COMMENTS

THE COST OF AMORTIZING NON-CONFORMING USES

As stated by recent decisions a landowner does not have the privilege of continuing a prior use of land not in conformance with a later zoning ordinance for more than a short period of time after the ordinance is enacted.[1] This diminution of the privileges of the landowner, stylized the "amortization of non-conforming uses,"[2] is most often attacked as a "taking" without due process of law;[3] an attack which can best be understood when this treatment of the landowner is compared with other more traditional restrictions on his privileges.

A landowner is subject to the power of the state to require transfer of his total aggregate of rights, privileges, powers, etc. in the land to the state.[4] But this power of the state and liability of the landowner is subject to the conditions that the transfer be for a public use,[5] and that the state is under a duty to pay compensation if it chooses to exercise its power.[6] With the erosion of the public use concept[7] the great practical distinction which characterizes eminent domain is its historic requirement of compensation.

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[1] Los Angeles v. Gage, 127 Cal.App.2d 442, 274 P.2d 34 (1954); Spurgeon v. Board of Commissioners, 181 Kan. 1008, 317 P.2d 798 (1957); Grant v. Baltimore, 212 Md.301, 129 A.2d 363 (1956); Harbison v. Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42 (1958).

[2] There is, of course, no true amortization in the generally accepted sense of a present allocation in advance of maturity of a future payment. The term has been criticized as the use of a respectable word as a "catch phrase" to cover bad reasoning. See Harbison v. Buffalo, 4 N.Y.2d 553, 574, 152 N.E.2d 42, 53 (1958) (dissenting opinion).

[3] See Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953); James v. Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955); Allen v. Corpus Christi, 247 S.W.2d 130 (Tex.Civ.App., 1952), aff'd 152 Tex. 137, 254 S.W.2d 759 (1953).

[4] Kohl v. United States, 91 U.S. 367, 371 (1875); Inspiration Consolidated Copper Co. v. New Keystone Co., 16 Ariz. 257, 144 Pac. 277 (1914); Bloodgood v. Mohawk & H.R.R. Co., 18 Wend. (N.Y.) 9, 56–59 (1837); Tuckahoe Canal Co. v. Tuckahoe & J.R.R. Co., 11 Leigh (Va.) 42, 75 (1840).

[5] See Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 B.U. L. Rev. 615 (1940).

[6] E.g., U.S. Const. Amend. 5; Ill. Const. Art. II, § 13.

[7] See The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L. J. 599 (1949). An interesting picture of the decline of the public use requirement in one jurisdiction can be seen from the following cases, in which the indicated purpose of each taking was held to constitute a public use: Zurn v. Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945) (slum clearance though subsequent development private); Cremer v. Peoria Housing Authority, 399 Ill. 579, 78 N.E.2d 276 (1948) (building of housing during housing shortage); Chicago Land Clearance Commission v. White, 411 Ill. 310, 104 N.E.2d 236 (1952) (slum clearance though

Zoning, on the other hand, is an exercise of the police power, which may operate without compensation.[8] Yet the denial of a privilege of use may in some cases put a far greater burden on a landowner, especially if that use has been commercial, than the required transfer of all rights, privileges, etc., would put on another landowner were there no compensation; yet discontinuance of the prior use requires no compensation.

Thus the non-conforming user is made to bear a greater cost than many land owners would bear if their land were taken by eminent domain even without compensation. The non-conforming user is given but one safeguard not available to those subject to an exercise of the power of eminent domain: he is entitled to an advance warning of a certain period before the use can be made to cease. It is the purpose of this comment to examine the rationale underlying this treatment of non-conforming uses.[9]

I

The dilemma in which the courts find themselves when faced with a non-conforming use is understandable. The continuance of the use operates, in many cases, to diminish the public welfare value of uniform zoning.[10] At the same time the mere existence of such uses gives an added justification to the pleas of those seeking variances from the zoning ordinance. Though the court have not been completely unwilling to require immediate discontinuance of incompatible land uses,[11] yet the feeling has been expressed that it would be unwise to allow the operation of zoning to force numerous and substantial im-

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there could be later private commercial development); People ex rel. Gutknecht v. Chicago, 414 Ill. 600, 111 N.E.2d 626 (1953) (taking blighted vacant land to build housing); People ex rel. Gutknecht v. Chicago, 3 Ill.2d 539, 121 N.E.2d 791 (1954) (taking of non-slum "rapidly deteriorating" land even though might be later private development); People ex rel. Adamowski v. Chicago, 14 Ill.2d 74, 150 N.E.2d 792 (1958) (taking of blighted vacant land for later private commercial development).

[8] "The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain. . . ." Mugler v. Kansas, 123 U.S. 623, 669 (1887).

[9] The question of whether amortization can be a practical method for achieving the goals of zoning is outside the scope of this comment. For a discussion of the effectiveness of amortization and its interrelation with other zoning techniques and some of their abuses, see Amortization of Property Uses Not Conforming to Zoning Regulations, 9 U. of Chi. L. Rev. 477 (1942). When the issue of the validity of amortization comes before the courts, however, it is isolated to whether there has been a constitutional exercise of the police power. This comment only looks at the theory which is used to justify amortization in the context in which the courts view it.

[10] Los Angeles v. Gage, 127 Cal.App. 442, 454, 274 P.2d 34, 40–41 (1954), relying on Bartholomew, The Zoning of Illinois Municipalities, 17 Ill. Munic. Rev. 221, 232 (1951).

[11] Compare Jones v. Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930), in which the court would not allow an existing sanitarium in residential district to be immediately discontinued under a zoning ordinance, with Everett v. Paschall, 61 Wash. 47, 111 Pac. 879 (1910), in which

provements to be removed immediately;[12] that the reliance placed by those who make improvements should not so easily be displaced. This dilemma was not seen during the early stages of zoning. The early exponents of zoning expected that non-conforming uses would wither away.[13] This expectation has not been realized and the need for positive action to deal with the matter has long since become apparent.

The possibility of reliance upon the power of eminent domain, with its requirement of compensation, was thought to be administratively burdensome as well as too expensive to be practical.[14] Numerous alternative measures have been tried: restrictions of expansion,[15] rules of abandonment,[16] and prevention of rebuilding in case of destruction.[17] None of these apparently aided in dealing with the most serious problem, i.e., uses which continue as they existed at the time of the zoning ordinance.

Thus far the most successful method of dealing with the non-conforming use has been to require its "amortization." Under this procedure, a date is fixed at the time of the enactment of the zoning ordinance beyond which non-conforming uses cannot be continued. Courts which had viewed an immediate compulsory cessation of non-conforming uses as an unconstitutional deprivation of property saw in the waiting period new possibilities for rationalizing a discontinuance of such uses. Thus, in *Los Angeles v. Gage*,[18] the "amortization" of a

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an existing sanitarium was immediately discontinued by injunctive action because it constituted a nuisance.

Incompatible land uses have also been immediately discontinued by legislative action by calling them "public nuisances." See Reinman v. Little Rock, 237 U.S. 171 (1915) (livery stable); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brick-kiln). The theory of public nuisance and non-conforming uses is the same: the police power operates upon an incompatible land use because of its detriment to the public health, welfare, and safety. See also Livingston Rock & Gravel Co. v. Los Angeles, 43 Cal.2d 121, 272 P.2d 4 (1954), discussed in text at notes 26–31 infra, in which an existing use was immediately discontinued on the basis of the verbal form of a zoning ordinance.

[12] Jones v. Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930); Standard Oil v. Bowling Green, 244 Ky. 362, 50 S.W.2d 960 (1932); American v. Kotras, 194 Md. 591, 71 A.2d 865 (1950); Des Jardin v. Town of Greenfield, 262 Wis. 43, 53 N.W.2d 784 (1952).

[13] Bassett, Zoning 108 (1940). Los Angeles v. Gage, 127 Cal.App.2d 442, 454, 274 P.2d 34, 40–41 (1954); Grant v. Baltimore, 212 Md. 301, 307, 129 A.2d 363, 367 (1956). See also, Elimination of Nonconforming Uses, 35 Va. L. Rev. 348, 353 (1949); The Elimination of Non-Conforming Uses, (1951) Wis. L. Rev. 685. It has been thought that original statements about not disturbing existing uses were merely a strategic maneuver to aid zoning. Harbison v. Buffalo, 4 N.Y.2d 553, 570, 152 N.E.2d 42, 51 (1958). This is also an interpretation from Bassett, supra.

[14] Bassett, op. cit. supra note 13, at 26–27.

[15] E.g., Billerica v. Quinn, 320 Mass. 687, 71 N.E.2d 235 (1947); Taft v. Zoning Board of Review, 75 R.I. 117, 64 A.2d 200 (1949).

[16] Branch v. Powers, 210 Ark. 836, 197 S.W.2d 928 (1946); Auditorium, Inc. v. Wilmington, 47 Del. 373, 91 A.2d 528 (1952).

[17] E.g., Price v. Ackmann, 345 Ill.App. 1, 102 N.E.2d 194 (1951).

[18] 127 Cal.App.2d 442, 460, 274 P.2d 34, 44 (1954).

non-conforming use was upheld on reasoning which has subsequently become almost generally accepted:

The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss. Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance. . . . Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. As a method of eliminating existing nonconforming uses it allows the owner of the nonconforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer. The loss he suffers, if any, is spread out over a period of years,[19] and he enjoys a monopolistic position[20] by virtue of the zoning ordinance as long as he remains. If the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public. Non-conforming uses will eventually be eliminated.

The judicial antecedents of the *Gage* doctrine do not show a concern with the effect of amortization. Though certain authorities were cited in the *Gage* case as instances of judicial approval of amortization plans, the approval expressed in those cases was more dogmatic than rational. In none of these cases had the courts actually recognized the amortization plan as relevant to their decision. In the two Louisiana cases cited, a grocery store[21] and a drug store[22] were forced to discontinue as non-conforming uses within a year of the passage of the zoning ordinance, but not on the theory that the waiting period made the discontinuance constitutional but rather on the doubtful grounds that the non-conforming uses were nuisances.[23] Another of the cases involved the upholding of a ten year amortization period for a gasoline station.[24] But the language of the opinion in

[19] Phrased less rhetorically, the reduction in burden to the owner is the income from the use for the period of its amortization discounted to its present value; which is theoretically the market price of a business yielding that income. If the court's language indicates that the standard is reduction of burden on the enterprise as such, then it seems that the previous life of the enterprise should be taken into account. Immediate discontinuance of an enterprise which had been in use ten years would be less of a burden than a five year amortization of a similar business one year old. But this possibility has not been investigated by the courts. (Author's footnote.)

[20] There is, of course, no true monopoly. There may be a convenience of location to customers of the use. Whether, or when, this results in a willingness to pay higher prices or bring in a larger volume of business has not been factually investigated. But saying that the continued success of a non-conforming use is because of an advantage conferred by zoning carries with it the implication, which may be intended, that in forcing the discontinuance of the use after a certain time there may be something of a quid pro quo. (Author's footnote.)

[21] State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), cert. denied 280 U.S. 556 (1929).

[22] State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929).

[23] The decisions have been heatedly criticized. See Fratcher, Zoning Ordinances Prohibiting Repair of Existing Structures, 35 Mich. L. Rev. 642, 644 (1937); O'Reilly, The Non-Conforming Use and Due Process of Law, 23 Geo. L. J. 218, 226–27 (1935).

[24] Standard Oil Co. v. Tallahssee, 183 F.2d 410 (C.A.5th, 1950).

that case did not mention the amortization period as a factor at all, and would seem to sanction an immediate cessation of the non-conforming use.[25]

A similar result occurred in a case[26] decided by the California Supreme Court three months prior to *Los Angeles v. Gage*.[27] The zoning ordinance provided for a twenty year amortization period for non-conforming uses, but also allowed for an immediate discontinuance if such could be done "without impairing the constitutional rights of any person."[28] The standard for immediate discontinuance was that the non-conforming use be "so exercised as to be detrimental to the public health or safety, or so as to be a nuisance."[29] Apparently assuming without discussion that the twenty year amortization period was valid, the court also sustained the revocation of the twenty year period as constitutional and thus sanctioned the immediate discontinuance of a non-conforming use. The use was found by the lower court to be "detrimental to public health, and . . . a nuisance."[30] It could then be immediately discontinued because the ordinance provided for discontinuance only if no constitutional rights were impaired, therefore, "in the light of such . . . language it would be a contradiction in terms to hold that the regulations are nevertheless unconstitutional."[31] There was no strong reliance on this case by the court in *Gage*, though it at least could have been cited for the proposition that the protection of non-conforming uses was not what it used to be.

There were also cases antecedent to the *Gage* case which struck down amortization provisions. But these cases did not deal directly with the propriety of the waiting period, nor did they contain any indication of the precise ground upon which the waiting period was unconstitutional. A one year amortization period for gravel pit operators was held invalid[32] because, "non-conforming

[25] "We find no merit in appellant's contention that enforcement of this ordinance would entail any unjust discrimination, or would be tantamount to depriving it of its property without due process merely because the site was acquired and improved at considerable expense before the zoning ordinance was enacted. The general rule here applicable is that considerations of financial loss or of so-called 'vested rights' in private property are insufficient to outweigh the necessity for legitimate exercise of the police power of a municipality." Standard Oil Co. v. Tallahassee, 183 F.2d 410, 413 (C.A.5th, 1950).

[26] Livingston Rock and Gravel Co. v. Los Angeles, 43 Cal.2d 121, 272 P.2d 4 (1954).

[27] 127 Cal.App.2d 442, 274 P.2d 34 (1954).

[28] Livingston Rock and Gravel Co. v. Los Angeles, 43 Cal.2d 121, 124, 272 P.2d 4, 7 (1954).

[29] Ibid.

[30] Id., at 125 and 7. The Supreme Court's decision did not mention the nuisance finding as significant and its language expressly covers the case when the use is not a nuisance. The dissent pointed out that, considering the area the use was in and its compliance as found by the planning commission with all "smog control and air pollution" measures, the use could hardly have been a nuisance. Id., at 131 and 10.

[31] Id., at 128 and 9. The circularity of the court's reasoning requires no extensive comment. The dissent pointed out that "[i]f public health and safety (police power), the basis for the zoning, cannot justify the destruction of existing uses, an administrative agency cannot be given such power." Id., at 130 and 10.

[32] Town of Somers v. Camarco, 126 N.Y.S.2d 154 (S.Ct., 1953), aff'd 308 N.Y. 537, 127 N.E.2d 327 (1955).

use[s] will be permitted to continue, notwithstanding the contrary provisions of an ordinance, where the enforcement of the Ordinance would render valueless substantial improvements or businesses and cause serious financial harm to the owner."[33] Except for this implicit disapproval, the effect of the amortization provision itself was not discussed by the court. Similarly a one and a half-year waiting period before an automobile salvage and wrecking yard[34] had to be discontinued could not save an ordinance from being unconstitutional; for "[t]o order a prior existing non-conforming business to move or go out of business is unreasonable and would be taking a person's property without due process of law and without compensation. . . ."[35]

The Ohio Supreme Court went out of its way to hold unconstitutional a unique amortization provision which called for the discontinuance of non-conforming uses after a "reasonable time"[36] to be determined by the city council. Rather than attack the doubtful provision of an uncertain waiting period, the court found that the ordinance denied "the owner of property the right to continue to conduct a lawful business thereon. . . ."[37] The court's language is also an implicit criticism of all amortization plans, but there was again no specific consideration of the waiting period plan as such.

It was thus against a background completely void of specific judicial statements on the effect of amortization provisions that the rationale of *Los Angeles v. Gage*[38] was laid down. Yet, the *Gage* decision marked the beginning of a series of approvals of amortization plans. The Maryland Court of Appeals has approved a five year amortization of prior non-conforming billboards;[39] and the Kansas Supreme Court has approved a two-year waiting period for non-conforming automobile wrecking yards.[40] But the amortization plan recently received its most significant success in a decision by the New York Court of Appeals,[41] which cancelled much of the effect of an earlier New York decision holding a required cessation of a non-conforming use invalid while ignoring a one-year period of amortization.[42] New York had also been most hesitant to interfere with non-conforming uses for historical reasons; the original zoning ordinance in the United States having received approval there only by an express declaration that prior uses would not be interfered with.[43] But in a bitter four

[33] Id., at 156.

[34] Allen v. Corpus Christi, 247 S.W.2d 130 (Tex.Civ.App., 1952), aff'd 152 Tex. 137, 254 S.W.2d 759 (1953).

[35] Id., at 131.

[36] Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 637 (1953).

[37] Id., at 387 and 700.

[38] 127 Cal.App.2d 442, 274 P.2d 34 (1954).

[39] Grant v. Baltimore, 212 Md. 301, 129 A.2d 363 (1956).

[40] Spurgeon v. Board of Commissioners, 181 Kan. 1008, 317 P.2d 798 (1957).

[41] Harbison v. Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42 (1958).

[42] Town of Somers v. Camarco, 126 N.Y.S.2d 154 (S.Ct., 1953), aff'd 308 N.Y. 537, 127 N.E.2d 327 (1955).

[43] Bassett, op. cit. supra note 13, at 108.

to three decision, an amortization plan for a cooperage business was upheld.[44] With scrupulous regard for the theory of amortization the court remanded for findings of fact as to the useful life of the business and the hardship on the owner.[45] It can be anticipated that this decision from a highly respected and previously hesitant court will have great influence.

But this most recent practical advance of amortization did not advance its rationale. The reasons given in *Los Angeles v. Gage* remain as the standard justification for amortizing non-conforming uses. This justification may not be as sound as its repetition would imply. Aside from the normal difficulties always attendant to the application of a standard of purely financial burden,[46] there are additional reasons for questioning the present theory behind the amortization plans.

The underlying assumption of the doctrine is that it is the burden on the owner which prevents the immediate discontinuance of non-conforming uses. The owner of a non-conforming use has a vested right, and vested rights cannot be disturbed by the operation of the police power.[47] The burden on the individual would far outweigh the benefit to society. But if the burden on the individual could be reduced, then the public benefit might outweigh that burden, and the conflict between the requirements of the police power and the burden on the individual would be resolved.[48]

The cornerstone of the whole process is that a reduction of burden on the individual is a relevant consideration in determining constitutionality. The validity of such an assumption is highly questionable in view of the fact that where zoning restricts the future use of vacant land, the burden placed upon the owner of that land by the consequent drop in its value is almost always considered irrelevant.[49] The justification for such a disparate treatment of these

[44] Van Voorhis, J., dissenting, felt that the decision was "the beginning of the end of the constitutional protection of property rights in this state in pre-existing non-conforming uses. . . ." 4. N.Y.2d 553, 564, 152 N.E.2d 42, 48 (1958). See also id., at 569–70 and 50–51.

[45] Id., at 563–64 and 47.

[46] The difficulties arise because any one financial burden can be exactly compared with any other financial burden. Logically then, if burden x reduced to burden y is sufficiently small to allow a particular state action, burden y by itself should not stand in the way of that action. This would allow any use to be immediately discontinued when the burden imposed was equal to that born by a use which had been amortized. See Harbison v. Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42 (1958), where provisions of an ordinance allowed for immediate discontinuance of any non-conforming use on which the loss imposed is $500 or less.

Such a result follows unless each individual's capacity to sustain a loss were considered, in which case similar uses by people with varying degrees of wealth would be treated dissimilarly. But if a "vested right" is to be removed because the burden on the owner is small, then the concept of "vested rights" is admittedly gone; for how will the most resolute of distinction finders segregate an expensive non-vested right, e.g., heavy investment in land, from a vested inexpensive right subject to immediate curtailment.

[47] See cases cited note 12 supra.

[48] Los Angeles v. Gage, 127 Cal.App.2d 442, 274 P.2d 34 (1954). See text at note 18 supra.

[49] See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Plaintiff's land dropped in market value from $10,500 to $2,500 an acre because of a comprehensive zoning ordinance. Accord: Zahn v. Board of Public Works, 274 U.S. 325 (1927).

substantially similar burdens is not at all apparent.[50] There may be valid reasons for treating users and owners of vacant land differently, but these reasons would not seem to rest upon any difference in the burden borne by each. Clearly the loss suffered by one who invests in valuable commercial land planning to build on it is the same loss suffered by one who invests in a commercial building only to find the use for which it was built made illegal. Both have made an investment of money; both find that investment has fallen in value; and they have incurred a financial loss. Any attempted distinction between the two in terms of the burden they bear would seem to be futile.

But if the burden on the owner of an existing use cannot be distinguished from the burden on the owner of vacant land, then the reduction of the burden which would be caused by the immediate discontinuance of a non-conforming use would likewise seem to be immaterial. A loss must first itself be relevant before its reduction can be of significance.

This would seem to invite the conclusion that, if the burden rationale is to be followed, non-conforming uses would be discontinued without notice, just as owners of vacant land are affected by zoning ordinances without notice. If, on the other hand, non-conforming uses are to be protected by amortization, a more consistent rationale, and one which actually justifies such protection, should be found.

II

The courts' difficulties in dealing with the non-conforming uses seem to stem from the hypnotic effect of two words, the definitions of which are thought to classify and settle all problems of governmental interference with property. "Vested" rights cannot be interfered with by governmental regulation;[51] property cannot be "taken" without compensation.[52] The problem is then dealt with by determining whether a taking of vested rights is involved. Or at least so it seems.

But it can be seen that the shibboleths "vested" and "taken" are but masks for deeper issues. Beneath the repetition of conclusion asserted by cant rests the whole problem of when particular governmental actions are to be allowed, and who is to bear their cost.

[50] See Jones v. Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930). An ordinance which required the immediate discontinuance of plaintiff's sanitarium was held unconstitutional. The court, which thought the Euclid case to be "drastic" and "extreme" attempted to make a distinction: "But we think that there is a decided difference between an ordinance which operates to limit the future use of property, no matter how great the impairment of its value, and one which requires the discontinuance of an existing use. In the first situation, we see merely the familiar example of an intangible and speculative future value being reduced as a result of the necessities of city planning; in the second we see the destruction of a going business." Id., at 319 and 321.

A good try but somewhat circular. Investment in a going business involves speculation as much as an investment in land. City planning is a factor in speculation about land values only because a prior determination has been made that it should be; going businesses would soon include speculation about zoing ordinances if they were to be held applicable to non-conforming uses. But this hardly answers why zoning should or should not affect existing uses.

[51] See note 12 supra.

[52] See note 6 supra.

A "taking" involves a transfer of all a person's rights, privileges, immunities, etc. in regard to an area of land. A regulation involves interference with only some of those rights, etc. Thus a distinction can be made. But unfortunately economics does not follow analytical jurisprudence. It has already been pointed out that the regulation of a privilege of use of land may involve a greater loss to the user than the owner of a small residential property would sustain even if his land were taken without compensation. When the problem is looked at in this way it becomes clear that the difference between a taking and a regulation by zoning is conceptual only. Nor can there be refuge behind the public use requirements of eminent domain as a truly distinctive factor. Much, if not all, zoning would satisfy the increasingly liberal public use limitation,[53] the requiem for which has long since been said.[54]

The same process of artificial distinction is followed in asking whether or not zoning interferes with a vested right. A vested right is whatever the courts wish to protect without saying why. Whether or not a vested right exists is most frequently in issue when land has only been partly developed or only a permit to build has been obtained and partial expense been made.

The courts have chosen to divide the problem: first asking whether a non-conforming use exists[55] so as to make the right vested and then applying their ideas concerning non-conforming uses.[56] But given the courts' conclusions on how non-conforming uses are to be treated, a decision on whether or not the use exists is simply another way of asking whether the cost of the particular zoning ordinance is to be borne by the individual claiming the non-conforming use.

The central question is who is to bear the cost or how is it to be distributed. Every governmental action changes the status quo and realigns interests. The public, or a significant part of it, gains a desired end; but the change in the status quo means that some one, or some group, will initially have its interests suffer. The cases seem to indicate that in a growing number of instances the cost will have to be borne by the individual landowner. This is already the law as regards vacant land. And there are indications that a similar result will more often occur in non-conforming uses considering the growing popularity of amortization plans with short waiting periods and the increasing realization that the burden on the non-conforming user would be similar to that of the owner of vacant land.[57]

[53] Practically admitted by the language of the opinions holding a discontinuance of the non-conforming use invalid because it is a taking without compensation while not mentioning the public use limitation. See cases cited note 12 supra.

[54] See The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L. J. 599 (1949), and other authorities cited note 7 supra.

[55] For a comprehensive discussion of the courts' standards dealing with the issues of where a non-conforming use "exists," see Nonconforming Uses: A Rationale and an Approach, 102 U. of Pa. L. Rev. 91, 94–97 (1953).

[56] E.g., City of Everett v. Capitol Motor Transp. Co., 330 Mass. 417, 114 N.E.2d 547 (1953); Smith v. Juilleret, 161 Ohio St. 424, 119 N.E.2d 661 (1954).

[57] E.g., People v. Miller, 304 N.Y. 105, 108, 106 N.E.2d 34, 35 (1952): "The decisions are sometimes put on the ground that the owner has secured a 'vested right' in the particular use

It may be worth noting that it is not everywhere assumed that in the argument between the individual and the government, those who wish to shift the cost back on the government must carry the burden, with all the presumptions against them. In Great Britain, for example, under all planning acts there is compensation to an owner of land for any forced change of a previous use because of the operation of the planning law.[58] Moreover, the owner of vacant land also receives some compensation for any drop in value of his land because planning decisions preclude a more profitable use.[59] It may be ironic that in Great Britain, where planning is part of the national life, the loss is somewhat shifted back to the state out of concern for the burden on the individual; while in the United States, where planning is often attacked as interference with private rights, the brunt of the loss is put on the individual in the interests of the state.

This is not to say that the British method or experience is preferable to that in the United States. It is only to highlight that the underlying problem of the treatment of non-conforming uses is that of deciding who is to bear the cost of the zoning ordinance. In the light of American case law, those who wish to protect the non-conforming use are confronted with the necessity of justifying a treatment for such use which is more favorable than that accorded to vacant land.

What can be seen from the cases is that the courts believe that certain types of investments should be protected while others need not be; or phrased another way, that certain types of investment are thought to be more beneficial to

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—which is but another way of saying that the property interest affected by the particular ordinance is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision. . . . Every zoning regulation, because it affects property already owned by individuals at the time of its enactment, effects some curtailment of vested rights, either by restricting prospective uses or by prohibiting the continuation of existing uses."

The court then said a discontinuance of existing uses usually did not occur because this imposed a greater burden than zoning for prospective uses. But the court did not mention Euclid v. Amber Realty Co., 272 U.S. 365 (1926). The non-conforming user of land who also owns the land cannot complain of the drop in value of the land under the Euclid decision. His loss because of discontinuance of the use must be narrowed to his investment in the use as such apart from the land. Yet that use has been returning income for the number of years it has existed. If the use has any element of mobility it may be "moved" to a different location and continue to produce income. The investor in vacant land, on the other hand, has received no yearly income from his investment. Thus, given an equal investment in land and in a use, after a given period of time the burden caused by immediate discontinuance of the use will be less than that caused by the owner of vacant land. The longer the period of time the use has been in existence the larger the initial investment in it can be and still have the discontinuance cause less of a burden than on the owner of vacant land with a lower initial investment. And this is not to mention the element of mobility in existing uses which may allow a continuing return from the use in a different location. It may be difficult to sustain, *ipso facto*, that the user will bear a greater burden by discontinuance than the landowner.

[58] Town and Country Planning Act, 10 & 11 Geo. VI, c. 51, § 27 (1947). See Hamilton, Solicitor's Guide to Development and Planning 62, 100 (2d ed., 1955).

[59] For an explanation of the purpose of the British compensation method, see Haar, Land Planning in a Free Society 94–106 (1951).

society than others. Thus either to preserve or encourage[60] similar types of investment those which are beneficial should be protected.

The investment which has greater value to society is the one which develops resources or creates trade. Society is not interested so much in the price of undeveloped land; someone will always own it no matter what its price. What society is interested in is the development of land, which does not take place automatically, but only by the choice of individuals who feel that they will make a profit from that development.

This taking into account of the value of particular activities is not uncommon to zoning. Churches have been allowed in residential areas contrary to zoning ordinances on the ostensible ground that they could cause no harm to the public health, welfare or safety.[61] But there are telling passages in the opinions describing the value of having churches in the immediate community.[62] Zoning ordinances also have made provisions for public transportation[63] in residential areas, certainly not because these are a lesser threat to the public safety than apartment houses.[64] If uses can be protected because of the value in their operation they can certainly also be protected because of the value they represent. Developed uses would thus be protected because of the interests they represent, the value brought to the community by continued land development.

But along with value represented, the non-conforming use can be detrimental

[60] See Nonconforming Uses: A Rationale and an Approach, 102 U. of Pa. L. Rev. 91, 103 (1953).

[61] E.g., Keeling. v. Board of Zoning Appeals, 117 Ind.App. 314, 69 N.E.2d 613 (1946); Israel Organization v. Dworkin, 105 Ohio App. 89, 133 N.E.2d 174 (1956).

[62] "When, under the facts in this case, the welfare and safety of the people in the neighborhood is placed in the scales of justice on one side, and the right to freedom of worship and assembly is placed on the other, the balance weighs heavily on the side guaranteeing the right to peaceful assembly and to worship God. . . ."

". . . It would seem reasonable to assume that if regulation is necessary in the interest of the safety, convenience and welfare of the general public, that should be regulated which has a direct effect upon such general welfare. This can be, and is, done generally by traffic police, signs and other reasonable regulations imposed alike upon all persons using the streets in the vicinity of churches, without undue interference with the right of worship and free assembly." Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, 233 Ind. 83, 92, 117 N.E.2d 115, 120 (1954), cited in Israel Organization v. Dworkin, 105 Ohio App. 89, 102, 133 N.E.2d 174, 181–82 (1956).

[63] The zoning ordinance upheld by the Supreme Court in the Euclid case included in the use district with single family dwellings ". . . water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way. . . ." Euclid v. Amber Realty Co. 272 U.S. 365, 380 (1927). This was the zoning ordinance for which a variance had to be obtained by court order to allow churches in the same use district. Israel Organization v. Dworkin, 105 Ohio App. 89, 93–94, 133 N.E.2d 174, 177 (1956).

[64] The Euclid zoning ordinance allowed apartment houses in the second use district after the one discussed in the preceding footnote. The majority opinion, written by Mr. Justice Sutherland, went out of its way to justify this classification. See Euclid v. Amber Realty Co., 272 U.S. 365, 394 (1926).

to the public welfare.[65] When this is true, the use should be discontinued. But, in order to avoid discouragement of the beneficial activity which engendered the use, i.e., the commercial development of property, the user should not be forced to bear the entire cost of discontinuance. A great part of that cost must be allocated to other interests.

The cost could be distributed through the general tax structure on all taxpayers and the user compensated by direct payment of a sufficient sum. But the procedural and administrative difficulties always connected with direct payment as well as the added burden on the municipal budget may preclude a profitable use of this method. There is a far easier way to both compensate the user and allocate the cost of that compensation.

A continuance of a non-conforming use is a cost and its discontinuance a benefit to the public at large because of harm to the general welfare. Allowing the use to continue is thus another way of allocating the cost to the public. But the discontinuance of the use can also be viewed as more directly benefiting the adjoining landowners.[66] It is not unusual to allocate the cost of improved conditions to those most directly benefited; assessments are often made on adjoining landowners for public improvements peculiarly benefiting them.[67]

Amortization is then justified as a method of compensating the non-conforming user; for it provides him with the privilege of receiving a return from his enterprise without relocation, a privilege which he would not have were the use to be discontinued immediately. That method of compensation is now solely justified as a reduction of the burden on the user which would be caused by immediate discontinuance. But it has been shown that this justification is inconsistent with treatment of other losses caused by zoning; an inconsistency which is present because the reduction of the burden doctrine is unable to rationally discriminate between the non-conforming user and the owner of vacant land. This inability to discriminate may already have brought about an erosion in the protection given the non-conforming user; for the argument can be sensed which may soon be pressed—that the two should be treated alike because the burden on both is the same.[68]

But a waiting period before discontinuance justified as compensation for the user so as not to harm the value he represents is not inconsistent with the treatment of owners of vacant land; and thus the danger is reduced that the non-conforming use will not have the protection it should receive.

[65] See note 10 supra.

[66] E.g., surrounding property owners may bring an action to enforce a zoning ordinance because of the resultant benefit to them from its enforcement, Kellog v. Joint Council of Women's Auxiliaries W. Ass'n, 265 S.W.2d 374, 376–77 (Mo., 1954).

[67] E.g., Lasky v. Hilty, 91 Ohio App. 136, 146–47, 107 N.E.2d 899, 904–5 (1951); In re Public Service Electric & Gas Co., 18 N.J.Super. 357, 87 A.2d 344 (1952).

[68] See note 57 supra.