AMORTIZATION OF PROPERTY USES NOT CONFORMING TO ZONING REGULATIONS*

Until very recently zoning ordinances have made no provision for any systematic and comprehensive elimination of the non-conforming use. This omis-

* [Much of the information in this note was secured through extensive correspondence with zoning officials and zoning committee members throughout the United States. Specific reference to this unpublished material is omitted.—Ed.]

† The "non-conforming use" is defined in almost all zoning ordinances as a building or land occupied by a "use which does not comply with the regulations of the use district in which it is situated." Chicago Munic. Code (Hodes, 1939) § 194A–2(n).
sion may have resulted from an early fear that the elimination of existing non-conforming uses would not meet with either judicial or public approval. Perhaps it resulted from a belief that zoning properly had nothing to do with the correction of past mistakes in urban growth but should be restricted to stabilization of present conditions and control of future developments. In any event, existing non-conforming uses were left untouched, except by provisions prohibiting their repair after serious damage by fire, their renewal after a certain period of discontinuance, or their enlargement beyond the present building or premises. Even in the rare instances in which these provisions became opera-

2 When New York City adopted a comprehensive zoning ordinance in 1916, many lawyers were certain that any attempt to introduce zoning under the slogan of “public health, safety, morals and welfare” would meet with unconditional opposition by the courts. Bassett, Zoning 26-27 (1940). The constitutionality of the regulation of future uses was uncertain until the United States Supreme Court upheld a similar ordinance in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), reversing 397 Fed. 397 (D.C. Ohio 1924). The Illinois court, one of the first to consider the question, upheld a zoning ordinance on rehearing, reversing its prior ruling. Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925).

3 “During the preparatory work for the zoning of Greater New York fears were constantly expressed by property owners that existing nonconforming buildings would be ousted. The demand was general that this should not be done. . . . Consideration for investments made in accordance with the earlier laws has been one of the strong supports of zoning in that city.” Bassett, op. cit. supra note 2, at 113.

4 Bassett, Zoning, 9 Nat'l Munic. Rev. 315, 328 (1920); Chamberlain and Pierson, Zoning Laws and Ordinances, 10 A.B.A.J. 185 (1924); Baker, Legal Aspects of Zoning 145 et seq. (1927).

5 The usual clause in zoning ordinances pertaining to non-conforming uses states: “The lawful use of a building or premises existing at the time of the adoption of this ordinance may be continued, although such use does not conform with the provisions hereof, and such use may be extended throughout the building.” Waukegan, Ill., Zoning Ord. (1924) § 2(a); Chicago Munic. Code (Hodes, 1939) § 194A-14(a-b). Some state enabling acts expressly prohibit municipalities from eliminating non-conforming uses. Ill. Rev. Stat. (1941) c. 24, § 73-I; Baker, op. cit. supra note 4, at 158 n. 229; note 36 infra; cf. Crane, Jr., Progress in the Science of Zoning, 155 Annals Am. Acad. Pol. & Soc. Sci., pt. 2, at 194, 196 (1931).

6 “Nothing in this ordinance shall prevent the restoration of a building or an advertising sign destroyed by fire, explosion, act of God, or act of the public enemy, not in excess of 50 per cent of the value of the building, or prevent the continuance of the use of such building or part thereof as such use existed at the time of such destruction.” Chicago Munic. Code (Hodes, 1939) § 194A-25. Similar provisions are to be found in most ordinances, although many contain no limiting percentage. Bloomington, Ill., Zoning Ord. (1941) § 6; Hinsdale, Ill., Zoning Ord. (1935) § 9; see O'Reilly, The Non-Conforming Use and Due Process of Law, 23 Georgetown L. J. 218, 229 et seq. (1933).

7 “Whenever a non-conforming use of a building has been discontinued or changed to a higher classification or to a conforming use, such use shall not thereafter be changed to a use of a lower classification.” Glen Ellyn, Ill., Zoning Ord. (1939) § 7. A few more recent ordinances state definite time limits for the “discontinuance” period, usually six months or one year. Naperville, Ill., Zoning Ord. (1940) § 4.2; O'Reilly, op. cit. supra note 6, at 244; Bassett, op. cit. supra note 2, at 111.

8 Note 5 supra.
tive, they were often not enforced. Rather, the hope seems to have been that existing non-conforming uses would be of little consequence and that, through some natural process of "discouragement," they would eventually disappear.

There is little indication, however, that non-conforming uses ever do disappear. The favorable, sometimes monopolistic, position accorded them, together with municipal requirements that all buildings meet certain standards of fitness, militates against their elimination. And while there is little statistical data available, it is generally believed that the original non-conforming uses have not decreased during the past ten or fifteen years. On the contrary, the opinion prevalent among those familiar with the situation is that the number of non-conforming uses has been increasing rapidly. The records of the boards of zoning appeals indicate that these bodies have devoted the major portion of their activity to considering petitions for the granting of new non-conforming uses, and that most of the petitions have been granted.

Many factors have contributed to this increase. In some instances the original plan may not have anticipated future developments; while this problem could better be taken care of by amendments to the zoning map, it is often "corrected" by the granting of use variances. Again, indifferent or even unsympathetic administration of the zoning ordinances has played its part. And this field has, of course, been particularly susceptible to political pressures.

Professional planners and city officials now recognize, however, that the fundamental problem facing zoning is the inability to eliminate the non-conforming use. Even the most skillfully drawn zoning map, when superimposed

9 The only instance of enforcement found was in one Chicago suburb where the owners of an abandoned coal yard and gasoline station were not permitted to erect another non-conforming use on the premises.

10 See Young, City Planning and Restrictions on the Use of Property, 9 Minn. L. Rev. 593, 628 (1925).

11 An estimate of the number of non-conforming uses which have sprung up since the adoption of zoning ordinances is rendered almost impossible by the general failure to prepare records of existing non-conforming uses at the time the ordinances were passed. Only by a very careful survey of village or city building permits and other records could an accurate estimate be made.

12 This is based upon an investigation made by a staff member in Waukegan, Oak Park, Evanston, Rockford, and Chicago, Ill.

13 Address of J. L. Crane, Jr., Problems of Zoning: What Power Has the Zoning Board of Appeals, before Chicago Regional Planning Ass'n, Feb. 6, 1930, at 10, 11-12; Pomeroy, Losing the Effectiveness of Zoning through Leakage, 7 Planning and Civic Comment, No. 3, at 8, 12-14 (1947); Address of Hugh Young, Chief Engineer, Chicago Planning Com'n, before Nat'l Society of Civil Engineers, New York City, Jan. 27, 1937 (advocating elimination of the variance-granting power in the new Chicago ordinance).

14 See discussion of use variances, part III infra.

15 Note 78 infra.

16 "After twenty years of experience, it appears that the removal of non-conforming uses is a very slow process and they have the opposite tendency to become monopolies. Furthermore,
upon a city which has grown haphazardly for twenty-five or fifty years, cannot
avoid creating numerous non-conforming stores and other commercial uses.
Other property owners in the neighborhood cite these exceptions to justify
granting permits for similar "out-of-place" establishments. Boards of appeals,
unable to give any assurance that existing non-conforming uses will be elimi-
nated, often yield to the argument—particularly during periods of depression
when restrictions upon the most immediately profitable use of property become
most burdensome. Indeed, if boards of appeals fail to grant a variance, courts
sometimes require one because of the existence of other non-conforming uses.\textsuperscript{7}

Although eminent domain is the most obvious method for solving the prob-
lem, the cost of compensating owners and the difficulty of measuring the value
of partial losses render that device impracticable.\textsuperscript{18} Immediate elimination with-
out compensation is, of course, too drastic.\textsuperscript{19} "Amortization"—a plan whereby
the owner of a non-conforming use is given a number of years during which to
prepare for the elimination of the use—offers greater possibilities. Cleveland\textsuperscript{20}
and New Orleans\textsuperscript{21} have adopted provisions of this type, and the Massachusetts
legislature has recently authorized Boston to put such a plan into effect.\textsuperscript{22} New
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York, Chicago, and St. Louis are considering the insertion of amortization provisions in their zoning ordinances.

The proposals vary greatly. Some pertain only to particular uses such as bill boards, garages, gasoline stations, and junk yards. Still others attempt to eliminate many more non-conforming uses. Nor are the lengths of the amortization periods uniform. Under some proposals a two-year period is all-

23 New York City, Zoning Resolution § 21–A (June 28, 1940): “Restrictions on Location of Garages, Storage or Parking of Motor Vehicles, Gasoline Service Stations. Where certificates of occupancy have been issued and where all other requirements of law, rule and regulation have been complied with, the existing use of such premises may be continued unless such use shall have been determined, after a public hearing by the Board of Standards and Appeals, to be a hazard to life, health, or the general welfare. Any public agency, department head or public institution may petition the Board of Standards and Appeals to terminate such existing use, stating the reasons therefor. In considering the termination of an existing use, the Board shall give due consideration to the general welfare and to the investment involved. The Board may continue to terminate the said use, subject to such conditions as it may prescribe.”

24 The Zoning Committee of the City Council of Chicago, in cooperation with the Chicago Plan Commission, has prepared the following draft of an amendment to the Zoning Ordinance: “§ 14. Amortization of Non-Conforming Uses. 

(a) In an ‘A’ Residence, ‘B’ Residence, Apartment or Group-House District, all non-conforming advertising signs and billboards shall be discontinued within one year after passage of this ordinance.

(b) In an ‘A’ Residence, ‘B’ Residence, Apartment or Group-House District, all non-conforming uses where no structural alterations are required, except as otherwise provided, shall be discontinued and made conforming within two years after the passage of this ordinance.”

If these provisions are inserted in the Chicago ordinance without an amendment of the present Illinois enabling act, the court would seem to have no choice but to declare the provision unauthorized. Ill. Rev. Stat. (1941) c. 24, § 73–1; note 37 infra.

25 The following clause has been proposed by the City Plan Commission of St. Louis, Mo.: “All non-conforming commercial or industrial buildings located within the ‘A’ Single-Family Dwelling District shall be removed or converted, and the building thereafter devoted to a use permitted in the district in which such building is located, on or before April 1, 1950; provided, however, that non-conforming commercial or industrial buildings located within the ‘A’ Single-Family Dwelling District for which a building permit was issued after April 1, 1920, shall be removed or converted, and the building thereafter devoted to a use permitted in the district in which such building is located, within forty (40) years from the date of the issuance of a building permit therefor but in all cases on or before April 1, 1970.”

26 A 1941 amendment of the Arlington County, Va., zoning ordinance provides, at § 18(15): “All signs not conforming to this Ordinance shall be removed within ninety (90) days after its passage and publication.” In compliance with this provision, over 68 billboard and 3,200 miscellaneous signs have been removed.

27 Note 23 supra. Although the New York City Planning Commission recognized that other non-conforming uses might deserve attention, it was felt that the uses chosen warranted special attention. Resolutions of New York City Planning Com'n, Majority Report (June 28, 1940).

28 Note 20 supra.

29 Neither the New Orleans nor the Boston provisions contain any limitations upon the type of non-conforming commercial uses which are to be eliminated. Notes 21 and 22 supra.
owed; others allow ten or twenty years. Although most of the provisions are silent as to the administrative techniques by which the amortization provisions are to be applied, the boards of zoning appeals will probably be given varying degrees of discretion by which individual hardships may be mitigated within the larger, less flexible framework of the definite elimination period.

Although proposed amortization ordinances have been defeated in some cities because of strong opposition by owners of non-conforming uses, the fact that a number of the largest cities of the United States have adopted, or are considering, amortization schemes indicates that the need for control of existing non-conforming uses is well recognized.

II

The failure of most communities to include amortization provisions in their zoning ordinances is explainable, not merely on the ground that the importance of eliminating all non-conforming uses has only recently become apparent, but also because of doubt as to the legality of an ordinance which requires the cessation of existing uses even though a period of amortization is provided.

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20 Note 24 supra.
22 The New York proposal, note 23 supra, appears to be the only instance where the administrative authority is carefully spelled out. The usual clause says nothing about how the two-, five-, ten-, or twenty-year amortization period is to be administered.
23 Pomeroy, op. cit. supra note 31. Amortization periods established for various buildings based upon tax evaluation figures might prove feasible.
24 A proposal for the 1938 revision of the Washington, D.C., ordinance would have allowed the zoning commission to set a "reasonable period" for the amortization of non-conforming uses. The revision of the Des Moines, Iowa, zoning ordinance proposed in 1940 provided, at art. 16, § 1, that all non-conforming uses be terminated within one year from the approval of the ordinance. A strong protest against the introduction of § 21a, note 23 supra, was made by a minority of the New York Planning Commission. Resolutions of the New York City Planning Com'n, Minority Report (June 28, 1940).
25 The realization that the termination of non-conforming uses is necessary for the proper functioning of a zoning plan is fairly recent, note 16 supra, although authorities early feared the spread of non-conforming uses. Munro, A Danger Spot in the Zoning Movement, 155 Annals Am. Acad. Pol. & Soc. Sci., pt. 2, at 202, 205; Zoning Ordinances—Amendment, 25 Ill. L. Rev. 817, 821 (1931); Freund, Some Inadequately Discussed Problems of the Law of City Planning and Zoning, 24 Ill. L. Rev. 135, 146 (1929); Hammersley, Dangers in Amending Zoning Ordinances, 19 Nat'l Munic. Rev. 7 (1928). But the California court indicated that it, at least, did not recognize this need when it said that the "necessities of city planning" require the restriction of future uses, but that these planning "necessities" do not require the elimination of present uses. Jones v. Los Angeles, 211 Cal. 304, 319, 295 Pac. 14, 21 (1930), note 55 infra. The depression, however, has greatly accentuated the problem. Walker, op. cit. supra note 18, at 48.
26 Noel, Retroactive Zoning and Nuisances, 41 Col. L. Rev. 457, 467 et seq. (1941); O'Reilly, op. cit. supra note 6, at 223 et seq.; Fratcher, Constitutional Law—Zoning Ordinances Pro-
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This doubt is based on two grounds: 1) that such regulation is ultra vires; 2) that it is unconstitutional. The first objection depends upon the scope of state enabling acts, a number of which may well prevent municipalities from requiring the amortization of uses. The constitutional objection is, however, much more fundamental, and is based on the constitutional guarantee against deprivation of property without due process of law.

This constitutional objection was advanced against zoning itself in the first instance but was rejected by the United States Supreme Court when, in Euclid v. Ambler Realty Co., it upheld an ordinance regulating future uses as a valid exercise of the police power of the state. The Court there recognized that the enforcement of such ordinances might result in great monetary loss to property owners. The realty company dealing in land in the hope of selling at commercial prices only to find the property suddenly zoned for residential use is in a real sense made to suffer. Likewise, a brick company which has purchased vacant land because of its valuable clay deposits only to find the property zoned for residential buildings is certainly faced with a set-back. Nonetheless, the loss must be borne without compensation when there is a reasonable relationship between the purpose of the zoning regulations and the public welfare.

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37 E.g., the Illinois enabling act provides: "The powers conferred by this article shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted." Ill. Rev. Stat. (1941) c. 24, § 73-1; see Durkin Lumber Co. v. Fitzsimmons, 106 N.J.L. 183, 190, 147 Atl. 555, 558 (1929).

Officials of Winnetka, Wilmette, and Evanston, Ill., declined to insert in their ordinances provisions similar to those recommended for St. Louis, Mo., note 25 supra. In view of the Illinois statute they appear justified in their confidence that the Illinois court would be opposed to such provisions.

38 U.S. Const. amend. 14; state constitutions have similar provisions.

39 272 U.S. 365 (1926). For a full collection of cases on the subject see Bassett, op. cit. supra note 2, at 54 et seq.

40 The New York court had shortly before indicated an even broader ground to support zoning restrictions when it said: "The power is not limited to regulations designed to promote public health, public morals, or public safety, or to the suppression of what is offensive, disorderly, or unsanitary, but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity." Wulfsohn v. Burden, 241 N.Y. 288, 298, 150 N.E. 120, 122 (1925).

41 The record showed that the realty company's land was worth about $10,000 an acre for industrial purposes while its value for the zoned residential use was about $2,500. Euclid v. Ambler Realty Co., 272 U.S. 365, 384-85 (1926).

Where the danger or discomfort to the public from a particular use is easily cognizable, its immediate elimination has been held constitutional. The owners of brick kilns43 and livery stables44 who have carried on business for years in a particular locality can be forced to remove such businesses from the locality, although no compensation is offered for the damage sustained by the owners.

In cases in which the continuance of certain activity is not so clearly detrimental to the general public, however, the courts have been more reluctant to uphold requirements that such activity be discontinued. Indeed, the opinions of the courts have been highly flavored with statements indicating that a regulation requiring the elimination of existing uses would be unconstitutional.45 But such statements have appeared only in cases in which the ordinance, often not a part of a general zoning plan,46 required the immediate elimination of the use,47 or dealt only with future uses.48 Furthermore, these cases are outdated, since they were decided at a time when even the lay writers in the zoning field did not recognize the need for the elimination of all non-conforming uses.49

43 Hadacheck v. Sebastian, 239 U.S. 394 (1915) (where the property was reduced in value from $800,000 to $60,000); cf. Miller v. Schoene, 276 U.S. 272 (1928); Manos v. Seattle, 173 Wash. 662, 24 P. (2d) 91 (1933); Oklahoma City v. Dolese, 48 F. (2d) 734 (C.C.A. 10th 1931).
45 The Illinois court so indicated when it said: “The building zone ordinance of the city of Aurora, pursuant to the requirements of the Enabling Act, . . . permits lawful uses of buildings at the time of the passage of the ordinance, although not in conformity with its provisions, to continue thereafter. This exemption is made so that the ordinance shall not have a retroactive operation. It would be manifestly unjust to deprive the owner of property of the use to which it was lawfully devoted when the ordinance became effective.” Aurora v. Burns, 319 Ill. 84, 96, 149 N.E. 784, 788-89 (1925). Of similar effect was the California court’s answer to the inquiry, “does the broad view of the police power which justifies the taking away of the right to engage in such businesses in certain territory, also justify the destruction of existing businesses? We do not think that it does.” Jones v. Los Angeles, 211 Cal. 304, 309-10, 295 Pac. 14, 17 (1930), discussed in note 55 infra.
46 In Jones v. Los Angeles, 211 Cal. 304, 309-6, 295 Pac. 14, 15 (1930), the court stressed the fact that the ordinance intending to eliminate asylums and rest homes in residential districts was not connected with an integrated zoning plan but was “directed toward one type of business.”


49 Chamberlain and Pierson, op. cit. supra note 4, at 185; Bettman, op. cit. supra note 16, at 853; Young, op. cit. supra note 10, at 628; Retroactive Zoning Ordinances, 39 Yale L.J. 735,
Since "the inalienable rights of the individual are not what they used to be," the courts may be willing to repudiate these dicta.

Of even greater importance is the fact that in none of the cases in which the dicta were announced was the court concerned with an amortization scheme. Indeed, a one-year amortization provision applied to a particular drug and grocery store has already been upheld by the Louisiana court in the famous Dema Realty Cases. Though commentators, supporting the opposite view, have declared that the Dema decisions sound like "Cossack interpretations of Muscovite ukases" or have distinguished them on the ground that they involved amortization periods, the most serious criticism which can be made of these decisions involves the reasoning of the court. One can hardly say, as does the court, that a non-conforming use in violation of a zoning ordinance is for that reason a public nuisance which must be abated.

The distinction between ordinances restricting future uses and those requiring the termination of present uses is merely one of degree, and constitutionality depends upon the relative importance to be given to the public gain and to the private loss. The advantage of amortization as a method of eliminating exist-

737 (1930); Byrne, The Constitutionality of a General Zoning Ordinance, 11 Marquette L. Rev. 189, 214 (1927). The California court quoted from these authors at length in support of its view that elimination of present uses was not necessary to a zoning plan. Jones v. Los Angeles, 211 Cal. 304, 311, 295 Pac. 14, 17-18 (1930).


52 Fratcher, op. cit. supra note 36, at 644.

53 Noel, op. cit. supra note 36, at 646.


55 Evanston Best & Co., Inc. v. Goodman, 369 Ill. 207, 211, 16 N.E. (2d) 131, 133 (1938). The California court has attempted to set up the distinction between ordinary zoning ordinances and ordinances providing for the elimination of non-conforming uses by indicating that "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." Jones v. Los Angeles, 211 Cal. 304, 319, 295 Pac. 14, 21 (1930). The court admitted, referring to the Euclid case, page 483 supra, that there may be a loss to the property owner from the usual zoning restrictions, but declared that, since the loss is in terms of "speculative future value," the creation of such a loss is justified because it is "familiar." The court apparently failed to recognize that the losses in "speculative future value" are "familiar" only because during the past two decades we have become accustomed to these necessary losses whenever a comprehensive zoning ordinance is adopted. As yet we have had no opportunity to become "familiar" with "the destruction of a going business." This facile distinction between "going business" and "intangible and speculative future value" is too easy a dismissal of the issue.
ing non-conforming uses is that it would allow the owner of the non-conforming use, by affording him an opportunity to make new plans, at least partially to offset any loss which he might suffer. It might, furthermore, give the owner an additional advantage which, apart from the ordinance, he would not enjoy. The proprietor of the small store in a district reserved for residential use, for instance, need no longer fear the entry of new stores into the neighborhood, insofar as he has acquired a monopoly under the ordinance for the amortization period. If that period is computed skillfully, the loss to the owner will be small when compared with the benefit to the public.

An amortization plan, if administered to reduce the owner’s loss to a minimum, would not, because of the period of adjustment and the monopoly accorded to the owner, be more drastic than the situation requires. The beneficial effect on the community of the eventual elimination of all non-conforming uses by such a plan more than offsets individual losses and should render the plan constitutional.

III

It has thus far been assumed that the amortization of non-conforming uses would be effective in furthering the purposes of zoning. The experience in Illinois

Another method by which this might be accomplished is the exercise of the power of eminent domain. This power is limited to the “public use,” yet it has been held justifiable to compensate owners of uncompleted buildings for loss occasioned by a limitation of the height of buildings. Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77 (1899); Dodd, Cases on Constitutional Law 698-99, 774-75 (2d ed., shorter selection 1937); cf. cases cited in Bassett, op. cit. supra note 4, at 337. Even though careful zoning in some municipalities might reduce the number of non-conforming uses to a minimum, the cost of compensating all owners of such uses would render a use of the power of eminent domain unfeasible. Bassett, op. cit. supra note 2, at 26-27; note 18 supra.

Resolutions of New York City Planning Com’n, Majority Report (June 28, 1949); note 16 supra. This would depend, of course, upon the extent to which there would be no further increase in the number of non-conforming uses in that particular area, see the discussion accompanying notes 12 and 13 supra.

Amortization provisions commonly fix definite periods for the elimination of non-conforming uses. Notes 20-25 supra. The better practice would be to establish maximum and minimum periods and to allow the zoning boards to vary the time period within these limits so that the owner’s loss would be minimized. This loss will reach its lowest point when the non-conforming building will have depreciated to a point where the difference between the cost of building a new conforming structure and the cost of maintaining the old non-conforming structure in compliance with the building standards is lowest.

In a great many instances there will be no need for the removal of any building. Thus the hundreds of beauty, tailor, delicatessen, and barber shops located on the ground floors of apartment buildings would entail a loss measured only by the difference between the rent obtained for commercial use and that obtained for residential use. Much the same result would exist in the case of homes which have been devoted to commercial pursuits during the depression. And this loss might be mitigated by the increase in residential values due to elimination of the non-conforming commercial uses.
nois, however, casts considerable doubt upon this assumption. While such a provision is indispensable if zoning is to be effective, it is questionable whether its adoption alone would be sufficient to eliminate non-conforming uses without considerable improvement in other aspects of zoning. Although lack of power to eliminate non-conforming uses has considerably intensified zoning problems, that power alone would not remove other difficulties. Among these difficulties are flaws in planning and administration which have caused the Illinois Supreme Court to lose confidence in zoning to such an extent that, in thirteen of the fifteen zoning cases which have been considered by the court in the last ten years, it has decided the regulations were arbitrary. In each of these cases a property owner desired to devote his property to a use that was prohibited by the zoning ordinance. Particularly significant to those who advocate the elimination of non-conforming uses is the fact that the Illinois court has, it appears, permitted not only the continuation of commercial uses in residential areas, but also the introduction of commercial uses into residential areas. The research in preparation for this section of the note has been limited to Illinois. Within that state a survey has been made of i) four Chicago suburbs of 8,000 to 15,000 population which are noted for their better-than-average municipal government (Glencoe, Winnetka, Wilmette, and Highland Park); 2) five cities of 35,000 to 80,000 population (Rockford, Waukegan, Aurora, Oak Park, and Evanston); and 3) Chicago.


62 In most of the cases property owners wished to obtain building permits for commercial use of property zoned for residential purposes; in a few cases home owners wished to remodel their houses for two-family occupancy.

63 The Illinois court has not been consistent in establishing criteria to determine the reasonableness of zoning restrictions. In some of the cases cited in note 61 supra, it was said that the fact that the petitioner knew of zoning restrictions when he purchased is a factor to be weighed against him, while in other cases the court has said that he should always stand in the shoes of his grantor. The court has sometimes stated that the profit to be derived from commercial use of land should not be considered, while in other instances this seems to have been the sole consideration. Again, the court has often said it would not interfere where the reasonableness of the restriction was debatable, yet it has held a restriction to be clearly "arbitrary and unreasonable" where a board and a lower court had found the restriction reasonable. See dissenting opinion, Taylor v. Glencoe, 372 Ill. 507, 515-16, 25 N.E. (2d) 62, 66 (1939).
conditions which have influenced the court to lose confidence in the regulation of future uses must be corrected before the court can reasonably be expected to uphold the more stringent device of gradual elimination of existing non-conforming uses.

The generalization is often made that most of the flaws in zoning result from the failure of those who draft the regulations and are charged with their administration to view it as part of a comprehensive plan for all the needs of the municipality, including transportation, public utilities, and parks. Indeed, the enthusiastic reception of zoning has been attributed to "a shift of emphasis as to the purpose of zoning, from one of effectuating the planned development of a community to one of attempting to protect property values by preventing harmful intrusions into residential neighborhoods and of seeking to lend an aura of special value to areas zoned for commercial and industrial use." Another source of defects in zoning administration is the yielding by zoning officials to pressures, group and individual.

Perhaps the most startling of the flaws in administration has been the general practice of overzoning a city for commercial and industrial uses while greatly underzoning for residential uses. Chicago is one of the worst examples. There, in 1923, 48.64 square miles were zoned for manufacturing use, but, in 1936, only 26.57 square miles were being so used. In 1923, 28.64 square miles were zoned for commercial use, but, in 1936, only 12.54 square miles were used commercially. At the same time about 26 square miles were occupied by residences, but the vast majority of these residences were unprotected by any zoning regulations from the inroads of indiscriminate commercial and manufacturing use. The practice of zoning a disproportionately large area for commercial use is

64 Local Planning Administration c. 9 (Institute for Training in Municipal Administration 1940); Proceedings of the Nat'l Zoning Conference, Chicago, Dec., 1937, at 7-9 (Washington Nat'l Resources Com'n 1938); Mass. Fed. of Planning Bds., Bull. 33 (1936). While zoning has spread very rapidly in Illinois and other states, very few communities have adopted any plan for the development of all the municipal services. In 1941 less than half the Illinois communities which had adopted zoning ordinances had active planning commissions.

65 Zoning was quickly accepted by the more "civic-minded" groups. "The romance comes from the support of such bodies of men as bankers, insurance companies, investment interests of all kinds, real estate men, civic workers and sound statesmen." Mass. Fed. of Planning Bds., Bull. 14 (1924).

66 Walker, op. cit. supra note 18, at 23.

67 Note 78 infra.

68 It would be no exaggeration to say that almost every city was overzoned for commercial use during the early spread of zoning in the 'twenties. Skokie, Ill., a suburb of Chicago formerly known as Niles Center, was "boomed" during the 'twenties when there were hopes of expansion westward from the city. Certainly one of the causes of overzoning was over-optimism as to the growth of the urban areas. Only this could account for such gross overzoning as is illustrated by the following chart, released by the Chicago Regional Planning Association in 1930:
not, however, confined to large cities.\textsuperscript{69} The common practice of zoning for commercial use all the lots along major streets results in so designating about 25 per cent of the total developed area, where business usually requires no more than 5 per cent.\textsuperscript{70}

The dangers from this overzoning are apparent. Not only are large sections of the residential area unprotected from the intrusion of industry, but also

One city planner has suggested that the city be visualized as a hotel: "The preliminary zoning plan set aside 52\% of the floor area for show rooms, restaurants, ballrooms, and machinery, with only 3\% for single rooms and 15\% for deluxe suites. . . ." Young, loc. cit. supra note 13, at 11. Some cities have attempted to remedy the situation. Address of L. V. Sheridan, Problems of Zoning: How Much Property Should Be Zoned for Business, before Chicago Regional Planning Ass'n, Feb. 6, 1930, at 1, 3-4.

See chart accompanying note 68 supra for overzoning figures on several Illinois municipalities.

Local Planning Administration 387 (Institution for Training in Municipal Administration 1940); Bartholomew and Associates, op. cit. supra note 16, at 19-21. Bloomington, Ill., for example, has zoned "commercial" practically the entire frontage of its principal street while only a small fraction is in actual commercial use.
the areas available for commercial use are so large and so widely scattered that costs of municipal services tend to become unnecessarily high. Many sections of the zones in which commercial uses are permitted are allowed to disintegrate pending the expected industrial boom. Blight sets in, the districts become slums, and decentralization of the community becomes a distressing problem. Moreover, the lack of a program well adapted to the needs of the community makes the regulations difficult to administer. The morale of the zoning officials cannot be maintained if zoning maps reflect various group and individual pressures upon the city council. And courts become critical of the reasonableness of the zoning regulations.

A second practice which has contributed to the skepticism of the Illinois court toward use restrictions is "spot zoning"—amendment of the zoning map to lower the restrictions on one small piece of property while the surrounding neighborhood remains subject to the previous restrictions. In a few cases these amendments may be necessary because of errors in the original zoning map, and, therefore, provision for amendments to municipal zoning ordinances has been made. But the fact that these amendments are so numerous and that they typically affect a few small lots indicates that public benefit is not


18 Young, loc. cit. supra note 13, at 15.


21 The Illinois Supreme Court gave early warning of this: "An arbitrary creation of districts, without regard to existing conditions or future growth and development, is not a proper exercise of the police power and is not sustainable." Aurora v. Burns, 319 Ill. 84, 95, 149 N.E. 784, 788 (1925).

22 Bassett, op. cit. supra note 2, at 145; Local Planning Administration 324 (Institute for Training in Municipal Administration 1940); cf. Highbee v. Chicago, Burlington and Quincy R. Co., 235 Wis. 91, 98, 292 N.W. 320, 322–23 (1940), where the court refused to accept a suggestion that "spot zoning" be defined as a method "by which a small area situated in a larger zone is purportedly devoted to a use inconsistent with the use to which the larger area is restricted."

A study of the zoning plat maps of Rockford, Waukegan, Evanston, and Oak Park, Ill., indicates that practically every change has resulted in a lowering of the use restrictions. In one section of Rockford, which was zoned "B" Residential and included twenty-eight square blocks, there were over fifteen amendments in the past ten years; no single amendment changed more than two lots and each was for a lower restriction. In Chicago the great majority of amendments have also lowered the use restrictions. Zoning and Zoning Administration in Chicago 9 (Metropolitan Housing Council 1938).

24 The state enabling act provides for amendments to the zoning ordinance by the city council after a "... hearing before some commission or committee. ..." Ill. Rev. Stat. (1941) c. 24, § 73–8.
the primary consideration. They tend to break down the whole zoning map in much the same manner as does original overzoning. They are also largely responsible for the prevalent feeling that improper political pressures affect the administration of zoning. The courts, recognizing the motives behind these amendments, have in a few cases struck them down. But restraint by the courts alone cannot be expected to be an effective deterrent, since, for the most part, the gas station, beauty shop, or two-family dwelling for which an amendment is sought will not sufficiently affect the value of adjoining property to warrant the cost of litigation.

A third defect of zoning in Illinois is the power of boards of appeals to grant "use variances." The practice in most states and the original practice in Illinois was to delegate to the boards of zoning appeals authority to grant variances to the regulations in cases of "particular difficulty and unnecessary hardship." Although in Welton v. Hamilton the Illinois Supreme Court held this delegation of legislative authority unconstitutional when unprotected by any standard or rule, many cities and villages have allowed their boards of appeals to

77 Freund, op. cit. supra note 35, at 146; Zoning Ordinances—Amendment, 25 Ill. L. Rev. 817, 821 (1931); Hammersley, op. cit. supra note 35; Munro, op. cit. supra note 35, at 205.

78 The belief that, once the "right contacts" are made, an amendment to the zoning ordinance is a simple matter appears to prevail among land owners in Chicago. "... [Many] of these amendments... have been passed to give special privileges to individuals who were in a position to benefit from zoning changes." Zoning and Zoning Administration in Chicago 8 (Metropolitan Housing Council 1938). But the factor which contributes most to the belief that politics plays an important role in Chicago zoning is acquiescence of zoning officials in the flagrant violations of the use regulations. Note 94 infra. The Board of Zoning Appeals of Chicago, during the years 1936–38, collected evidence of two hundred sixty-four violations of the ordinance. Most of these involved beauty parlors, grocery stores, or tailor shops in residential areas; few, if any, have been eliminated. See Chicago Daily News, p. 1, col. 3 (Oct. 17, 1941). One reason for this failure is that most zoning violation cases in Chicago are continued time and time again until the prosecution is finally dropped. Young, loc. cit. supra note 13, at 3.


81 Zoning Ordinances—Amendment, 25 Ill. L. Rev. 817, 821 (1931).

82 Ill. Rev. Stat. (Smith-Hurd, 1931) c. 24, § 68. For a discussion of various state statutes, see Bassett, op. cit. supra note 2, at 123.

83 344 Ill. 82, 176 N.E. 333 (1937), noted in 26 Ill. L. Rev. 575 (1932). Other provisions relative to the power of the board, such as the power to interpret the ordinance on appeal from findings of the building commissioner and the power to recommend amendments to the council, were not questioned. Welton v. Hamilton, 344 Ill. 82, 95, 176 N.E. 333, 338 (1931).
continue this exercise of discretion much as they did before the judicial ruling.\textsuperscript{54} A few cities have relied on amendments and have sought to avoid the objections of the court by inserting in their ordinances very rigid standards which must be followed by boards of appeals in granting variances.\textsuperscript{85}

After the decision in \textit{Welton v. Hamilton}, the Illinois legislature amended the zoning act. The amendment continued the authority of the boards of zoning appeals to grant variances but modified the requirements of its exercise by inserting "particular hardship" in the place of "unnecessary hardship" and by requiring a "finding of fact" with each variance granted by the board.\textsuperscript{86} The amendment has, however, proved of little assistance in formulating rules of procedure.\textsuperscript{87} It is virtually impossible to determine what amounts to the "finding of fact" required in the enabling act and this "finding" has assumed various forms. Thus some boards do not even insert in their decisions a statement that there is a "particular hardship."\textsuperscript{88} Others state that there are "similar non-

\textsuperscript{54} The following letter was sent on May 19, 1931, to all zoning officials by the Chicago Regional Planning Commission after the decision in \textit{Welton v. Hamilton}: "... The Regional Planning Association ... advises Boards of Appeal to continue to exercise great care in their rulings and make perfectly sure that no variation or modification which may be made is other than a liberal interpretation of the terms of the ordinance itself. ... When in doubt, the appeals should be denied and appellant should petition for an amendment. ..." Zoning ordinances of Waukegan, Libertyville, Arlington Heights, Glen Ellyn, Elmhurst, and DeKalb, Ill., still contain provisions identical to those declared unconstitutional in \textit{Welton v. Hamilton}. In Waukegan, although the ordinance granting power to the board of appeals remains the same as it was in 1925, the board now makes informal recommendations to the council, which in turn grants variances by ordinance. Minutes, Waukegan Bd. of Zoning App., June 12, 1940. This practice has been encouraged by the enabling act. Ill. Rev. Stat. (1941) c. 24, § 73-4. In Rockford, LaGrange, and Hinsdale, Ill., the original ordinance gave the board merely the power to recommend variances to the council. This practice is an attempt to escape the rule of \textit{Welton v. Hamilton}, but it does little more than further complicate the process by which a variance is obtained, since only on rare occasions will the council deny the recommendation of the board. Note 99 infra. One city has recently ignored the decision in \textit{Welton v. Hamilton} and enacted an ordinance giving its board power to grant variances in cases of "practical difficulties and unnecessary hardship." Rochelle, Ill., Zoning Ord. (1939) § 8(5).

\textsuperscript{85} Peoria and Naperville, Ill., have revised or enacted ordinances in the past two years which vest power in their boards to grant variances but circumscribe this power with definite standards which must be met before a variance can be granted. Peoria, Ill., Zoning Ord. (1940) § 136-19; Naperville, Ill., Zoning Ord. (1940) §§ 6.6, 6.7. Cf. East St. Louis, Ill., Zoning Ord. (1938) § 18. At least one small Illinois town has removed the power to grant permits for non-conforming uses from the board of appeals but has given it power to grant variances to the yard, height, or area regulations within certain percentage limitations. Zion; Ill., Zoning Ord. (1939) § 16.


\textsuperscript{87} The enabling act suggests only a broad outline for procedure before the boards. Ill. Rev. Stat. (1941) c. 24, § 73-5. No ordinances were discovered which prescribe any rules of procedure; the boards of appeals themselves have usually adopted rules of procedure. See, for example, the pamphlet containing the Zion, Ill., Zoning Ord. 16 et seq. (1939).

\textsuperscript{88} Minutes, Rockford, Ill., Bd. of Zoning App. (May 27, 1941). See also Minutes, Waukegan, Ill., Bd. of Zoning App. (since 1935). These contain no findings of fact at all except that there have been no protests by property owners.
conforming uses in the block” and therefore grant variances. In only a few cases are the findings of fact sufficiently detailed to determine whether an owner was entitled to a position different from that of his neighbors. Thus, in general, the boards appear to be so confused that they do not know on what facts their decisions should be based. This confusion and lack of a standard practice are also found in the procedures employed by the boards for appeal from rulings of the enforcing officer, for notice of hearings, and for the hearing itself. Possibly because of the uncertainty as to the boards’ authority and the lack of definite rules to follow, there is a pronounced tendency of most boards in

89 “The zoning Board of Appeals . . . finds as a fact that there are apartment buildings and similar nonconforming uses in the block in which applicant’s property is located . . . and that the applicant should be granted relief on the grounds of particular hardship in the way of carrying out the strict letter of the Zoning Ordinance . . . .” Minutes, Oak Park, Ill., Bd. of Zoning App. (Jan. 12, 1940). It is suggested that if a hardship is said to exist because of similar non-conforming uses within the neighborhood, there is no property owner who may not honestly insist upon a “hardship” created by the zoning ordinance whenever he desires to make a little more money out of his property by creating a non-conforming use.

90 The Naperville, Ill., zoning ordinance requires a detailed statement of facts enumerating reasons why the applicant should be treated differently from other property owners; the main purpose of the change must not be the wish to obtain increased revenue from the property. Naperville, Ill., Zoning Ord. (1940) § 6.6. The minutes of the Cook County Board of Zoning Appeals are a good example of carefully documented records of justification for granting variances.

91 The enabling act delegates to the board of appeals the authority to set a period within which appeals may be taken from the action of the enforcing officer. Ill. Rev. Stat. (1941) c. 24, § 73-5.

92 The only requirement in the enabling act for notice of hearing is for publication “. . . in the official paper of, or in a paper of general circulation in the municipality.” Ill. Rev. Stat. (1941) c. 24, § 73-4. This requirement is of questionable significance. Phipps v. Chicago, 339 Ill. 315, 320, 171 N.E. 289, 291 (1930).

The decision as to which property owners shall be given personal notice is within the discretion of the boards of appeals. Neither the Chicago Zoning Ordinance nor the Rules of Procedure of the Chicago Board of Appeals contain any rule as to personal notice. The present practice is to mail notice to the addresses in the block in which the property is located, requesting the janitor of the particular building to forward the notice to the real owner. The Metropolitan Housing Council obtains a docket from the zoning board in advance and notifies community property owners’ associations, scattered throughout the city, of any hearings which would affect the interests of their members. In other Illinois towns, of which Evanston and Rockford are examples, an arbitrary radius of 300 or 400 feet is set, within which all property owners receive personal notice. In Waukegan, Ill., the petitioner is required to return to the board a form showing proof of service of personal notice upon “surrounding property owners.”

93 Part of the present confusion in Illinois can be attributed to the marked indifference towards the boards of zoning appeals. The Illinois court, for example, has referred to one board as a “minor administrative body” whose report was “entitled to no more weight than the conclusions of a witness resting upon facts not in evidence.” Behnke v. Bd. of Trustees, 366 Ill. 576, 519, 9 N.E. (2d) 232, 233 (1937). Many of the boards themselves reflect this indifference. Thus “some of the boards of appeal in the Chicago region have met rarely, and when functioning at all have been largely ineffective.” Crane, loc. cit. supra note 13, at 12. The Waukegan, Ill., board has met only six times in the last six years.
Illinois to be overly lenient in the granting of use variances from the zoning map.94

Even a cursory study of the minutes of the boards of appeals in Chicago and other Illinois cities makes the importance of curbing this over-leniency apparent. Meeting after meeting is devoted to consideration of applications for permission to bring a two-family house into a one-family district95 or to erect a small store in a residential district. The granting of such petitions has been condemned by zoning experts.96 The problem of over-leniency in granting these variances might be partially solved by raising the standards for granting use variances and phrasing the higher requirements in specific and easily understandable rules. But in the past the boards, too frequently consisting of men who have little time to devote to zoning and who are, after all, neighbors and property owners themselves,97 have been unwilling to be too severe with any person who felt pinched by the zoning regulations. Such unwillingness would probably continue despite the enactment of specific rules setting higher standards for granting use variances. This tendency towards leniency in the granting of use variances indicates the danger of discrimination present in any form of amortization plan as long as the boards continue to exercise the variance-granting power. Consequently, a vital complement to the introduction of an amortization plan is the abolition of the power of the boards of appeals to grant use variances.

94 References cited note 13 supra. One of the best indications of a growing opinion that boards of appeals have been overly lenient in granting use variances is the change of professional opinion as to the wisdom of the Welton v. Hamilton decision curtailing the authority of the boards. Almost universally condemned in 1932, Freund, Power of Zoning Boards of Appeals to Grant Variations, 20 Nat'l Munic. Rev. 537, 538 (1931); Municipal Corporations—Power of Board of Appeals to Vary Application of Zoning Ordinance, 31 Mich. L. Rev. 106, 108 (1932); 38 W. Va. L. Q. 359 (1932); cf. Zoning—Power of Board to Vary, 26 Ill. L. Rev. 575, 577 (1932), at a time when most other courts upheld the board's authority to grant variances, see cases cited in Bassett, op. cit. supra note 2, at 145-48, the decision is now termed a "sound and wise" one. Bartholomew, The Zoning of Illinois Municipalities, 17 Ill. Munic. Rev. 221, 232 (1938).

95 The two-family house has become one of the most critical problems in city planning. Many old, once wealthy areas contain large houses which can no longer be used for anything but two- or three-family dwellings. When these houses are within one-family residence districts, the pressure to grant variances is great. The fact that there is no outward change in the physical structure of the building, combined with the unwillingness of neighbors to report violations, allows the change from a one-family to a two-family house to be made with little risk of detection by the authorities, and makes enforcement of the restriction almost impossible.

96 Pomeroy, op. cit. supra note 13, at 14.

97 Realtors, lawyers, and contractors are most commonly on boards of appeals. The members of the boards are frequently neither expert city planners not qualified administrators. Walker, op. cit. supra note 18, at 150, table 3, presents an occupational grouping among city planning commissions. "The disproportionate number of realtors is due primarily to their avowed special interest in zoning and consequent pressure for representation from local realty boards." Ibid., at 151.
These three "flaws," in addition to the lack of power to amortize non-conforming uses, are at the root of zoning difficulties. Overzoning can be remedied only by re-zoning parts of the municipality so as to conform more nearly to the needs of the present, but with a conservative eye to the not-too-distant future.98 Provisions in the ordinance allowing for spot zoning are, unfortunately, necessary, but frequent amendments to the zoning map will not be required if the original map is skillfully drawn. The power to grant such amendments should, therefore, be greatly restricted,99 perhaps by requiring the approval of a commission of zoning experts before the local governing body can enact the amendment.100 The additional loophole created by allowing the boards of appeals to grant use variances is unnecessary and should be closed by abolishing this power of the boards.101 These changes in the present zoning laws are necessary to afford counsel a valid argument with which to allay the skepticism of the court, by assuring it that the municipality, while amortizing some non-conforming uses, will not allow others to be established.102

98 Note 103 infra. If decentralization has progressed to a great extent, even more drastic measures would be necessary. Mr. Bartholomew has advanced a three-point program whereby he would 1) limit the area of urbanization by government control, 2) limit the area of urbanization by economic control, and 3) rehabilitate blighted districts. Bartholomew, op. cit. supra note 71, at 10–11; see Hyder and Tobin, Proposals for Downtown Milwaukee 80 et seq. (Urban Land Institute 1940).

99 Note 103 infra. There is little reason to believe that the city council would be less lenient in granting amendments than the boards have been in granting variances. Zoning—Power of Board to Vary, 26 Ill. L. Rev. 575, 577 (1932); Freund, op. cit. supra note 94, at 538. There does appear to be one difference, at least in theory, between the purpose of an amendment and the purpose of granting a present variance which should make it more difficult to obtain an amendment than a use variance: while the former should be made only for the benefit of the entire community, the latter might be for the benefit of a particular individual. Compare Michigan-Lake Building Corp. v. Hamilton, 340 Ill. 284, 172 N.E. 710 (1930), with Morgan v. Chicago, 370 Ill. 347, 18 N.E. (2d) 872 (1938).

100 Pomeroy, op. cit. supra note 13, at 9.

101 The boards should not be deprived of the power to grant variances as to height, area, and yard restrictions, but only of the power to grant use variances. "Proper adjustments almost always relate to yard and area requirements, occasionally to height, and almost never to use." Pomeroy, op. cit. supra note 13, at 14. "It would be entirely impracticable to pass an ordinance or an amendment each time one of these minor cases arises" (referring to applications for height, area, and yard variances). Crane, loc. cit. supra note 13, at 12.

102 A study of the briefs and records of cases before the Illinois courts during the past ten years reveals that municipal attorneys have often failed to assume the burden of demonstrating the value of zoning as a legal tool in the rational development of the land-use in a community. Schmidt, The First Twenty Years of Zoning in Illinois, 19 Ill. Munic. Rev. 154, 156 (1940). Many case records contain mere verbal battles between real estate men as to land values. See Abstract of Record, Harmon v. Peoria, 373 Ill. 594, 27 N.E. (2d) 525 (1940); Abstract of Record, People ex rel. Kirby v. Rockford, 363 Ill. 531, 2 N.E. (2d) 842 (1936); Abstract of Record, People ex rel. Lind v. Rockford, 354 Ill. 377, 188 N.E. 446 (1933).

In contrast are cases in which testimony of zoning experts gives the court opportunity to evaluate the problem of the particular restriction in light of the needs of the entire com-
nation of these flaws is required before the benefits to be derived from an amortization of non-conforming uses can be realized. Only then can the zoning movement succeed.

103 Evanston, Ill., has, within the past two years, restored large areas to residential use, and Chicago is considering the adoption of a revised zoning ordinance which will increase the amount of land zoned for residential purposes about 800% while greatly reducing the area to be devoted to commercial pursuits. Chicago Daily News, p. 3, col. 5 (Nov. 4, 1941).

The power to grant amendments has been restricted in a few municipalities by requiring the approval of a zoning commission to the proposed amendments. Decatur, Ill., Zoning Ord. (1940) § 26; cf. Peoria, Ill., Zoning Ord. (1940) § 136-24; East St. Louis, Ill., Zoning Ord. (1938) § 23. The Naperville ordinance provides: "No lot, group of lots, or unsubdivided territory shall by amendment be reclassified and placed in a lower district unless such land is sufficient in size to constitute a Zoning District, or unless it adjoins other land already classified in the same lower district." Naperville, Ill., Zoning Ord. (1940) § 7.6. The Bloomington, Ill., Zoning Ord. (1941), contains no provision for amendment.