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Elimination of Non-Conforming Uses

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The English courts seem to have struck far better balance in settling the issue. No one denies the freedom of the press enjoyed in England nor does there appear to be any dissatisfaction with the form of justice dispensed by the English courts. In the United States "trial by newspaper" occurs far too frequently. Returning to the court its traditional power to cite for contempt "anything that interferes with the independence of the judicial mind" would be the proper remedy for this evil.

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Elimination of Non-Conforming Uses

The unconstitutionality of the retroactive zoning ordinances[1] has presented a great problem to city planners. Theirs is the task of writing ordinances so that uniformity within zones will ultimately be accomplished. In order to discover what methods may legally be employed to accomplish their ends, the planners must look to the courts, but only recently has some certainty been forthcoming.

One of greatest problems facing the planners today is the elimination or liquidation of non-conforming uses of property.[2] Because zoning ordinances which are retroactive in their nature are unconstitutional several indirect methods have been employed in order to provide for the ultimate elimination of these non-conforming uses. The most common of these methods has been a provision in both statutes and ordinances that no "structural alterations" may be made to a non-conforming use,[3] and some laws provide that a building or structure which is not in conformity may not be extended.[4] Most courts have recognized that these laws are specifically

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[1] Acher v. Baldwin, 18 Cal.2d 341, 108 P.2d 455 (1941); Jones v. Los Angeles, 295 Pac. 14 (Cal., 1931); O'Conner v. Moscow, 69 Idaho 37, 202 P.2d 401 (1949); Douglas v. Melrose Park, 389 Ill. 98, 58 N.E.2d 864 (1945); Adams v. Kalamazoo Ice & Fuel, 245 Mich. 261, 222 N.W. 86 (1928); Curtiss-Wright Corp. v. Garden City, 57 N.Y.S.2d 377 (Sup. Ct. 1945); Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953); Corpus Christi v. Allen, 254 S.W.2d 759 (Tex., 1953).

[2] The term "non-conforming use" is used generally to describe any building or use which is not in conformity with the plan prescribed in a zoning ordinance.

[3] ILL. ANN. STAT., c. 24 § 26 (1952); VA. CODE ANN. § 15-848 (1950); ZONING ORDININCE OF CORTLANDT, NEW YORK (1951) § 6; ZONING ORDINANCE OF CITY AND COUNTY OF DENVER (1923) § 5-7 (can not alter exceeding 50% of assessed value); ZONING ORDINANCE OF QUINCY, ILL. (1946) Art XII, § 1. Thayer v. Board of Appeals of Hartford, 114 Conn. 15, 157 Atl. 273 (1931) (Structural alteration only to extent of 40% of assessed value of building). Schneider v. Board of Appeal, 402 Ill. 536, 84 N.E.2d 428 (1949); Goodrich v. Selligman, 298 Ky. 863, 183 S.W.2d 625 (1944); Selligman v. Von Allmen, 297 Ky. 121, 179 S.W.2d 207 (1944); Cole v. Battle Creek, 198 Mich. 98, 298 N.W. 466 (1941); Paye v. Grosse Pointe, 279 Mich. 254, 271 N.W. 826 (1937).

[4] Cole v. Battle Creek, 298 Mich. 98, 298 N.W. 466 (1941); Adler v. Irvington,

aimed at the "gradual elimination" of non-conforming uses.[5] The theory behind them is that over a period of years the non-conforming uses will disappear through the necessity of enlargement and expansion which is forbidden by the laws, or the owners of the uses will find it uneconomic or otherwise unwise to remain in districts where their businesses are non-conforming.[6]

There are other methods employed by legislators and planners such as a prohibition against resuming a non-conforming use when it has been abandoned,[7] usually for a fixed or arbitrary time. Some ordinances prohibit reconstruction if a structure is destroyed by an Act of God or otherwise.[8] It is interesting to see the extent to which a planner must go to accomplish his ends. For instance, under the Zoning Ordinance of Cortlandt, New York, all non-conforming uses in certain districts must be completely enclosed by a continuous solid fence.[9] Two states have provided that eminent domain should be used to rid zones of non-conforming uses.[10] This has proved to be costly and cumbersome, and there is some doubt as to the constitutionality of this method.[11] A Florida court held that the

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20 N.J. Super. 240, 89 A.2d 704 (1952); Coleman v. Walla Walla, 266 P.2d 1034 (Wash., 1954) (Change from a boarding house to a fraternity house held an extension of a non-conforming use); State *ex. rel.* Miller v. Cain, 40 Wash.2d 216, 242 P.2d 505 (1952).

[6] San Diego County v. McClurkin, 37 Cal.2d 683, 234 P.2d 972 (1951); Rehfield v. San Francisco, 218 Cal. 83, 21 P.2d 419 (1933); Gunther v. Board of Zoning Appeals of New Haven, 136 Conn. 303, 71 A.2d 91 (1949); Dorman v. Baltimore, 187 Md. 678, 51 A.2d 658 (1947); Brown v. Gambrel, 358 Mo. 192, 213 S.W.2d 931 (1948); Speakman v. N. Plainfield, 8 N.J. 250, 84 A.2d 715 (1951).

[6] 354 Mo. 700, 709, 190 S.W.2d 900, 906 (1945).

[7] MINN. STAT. ANN. § 396.12 (West, 1946) (discontinuance for a period of two years, then must conform if use is resumed); VA. CODE ANN. § 15-848 (1950). ZONING ORDINANCE OF CHATTANOOGA, TENN. § 13 (1951) (discontinuance for one hundred days is an abandonment of the use); ZONING ORDINANCE OF PORTLAND, ORE. (1950) (one year vacancy); ZONING ORDINANCE OF CITY AND COUNTY OF DENVER (1923) §§ 5-2 and 5-5. (Abandonment for six months for use of land, one year for use of a building). Auditorium, Inc. v. Board of Adjustment, 91 A.2d 529 (Del. 1952); State v. Casper, 5 N.J. Super. 150, 68 A.2d 545 (1949); Franmor Realty Corp. v. LeBoef, 104 N.Y.S.2d 247 (Sup. Ct. 1951).

[8] KAN. GEN. STAT. ANN. § 12-709 (1949); ZONING ORDINANCE OF CORTLANDT, N. Y. (1951) § 9 (destruction of 50% of the property); ZONING ORDINANCE OF QUINCY, ILL. (1946) Art. XII, § 3. (75% destruction of the property).

[9] ZONING ORDINANCE OF CORTLANDT, N. Y. (1951) § 9.

[10] MINN. STAT. ANN. § 462.13 (West, 1946); MICH. STAT. ANN. § 5.2933 (1) (1936). Under the Michigan statute the City of Detroit has passed an ordinance, *vis.*, ZONING ORDINANCE OF DETROIT (1949) § 3.3 (H): "The Commission shall, from time to time, recommend to the common council the acquisition of such private property as does not conform in use or structure to the regulations and restrictions of the various districts defined in this ordinance; and the removal of such structure."

[11] Adams v. Housing Authority of Daytona Beach, 60 So.2d 663 (Fla., 1952) (In

acquisition of a non-conforming property cannot be done under the power of eminent domain, pointing out that such was not acquiring land for a public use and purpose.[12]

These divers laws which indirectly provide for the elimination of non-conforming uses have proved to be ineffective and impractical because of the difficulty of enforcement caused by their many vague terms and concepts. Therefore, at least two states[13] and several cities have attacked the problem directly by providing for direct liquidation of these non-conforming uses.[14] The provisions of these enactments vary to some degree but generally allow a reasonable time for the non-conforming user to "amortize" or "liquidate" his use, building, or structure. Some ordinances distinguish a non-conforming use of land from a non-conforming use of a building and distinguish also between buildings which are non-conforming as to use but conforming as to design and buildings which are non-conforming in design as well as use.[15] Some of these ordinances are as yet in the "proposed" stage, the planners still not being sure as to their constitutionality.[16]

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this case the court held that it was already established in Florida that such non-conforming uses could be eliminated under the police power).

[12] *Ibid.*

[13] COLO. STAT. ANN. c. 45A § 19 (Supp. 1950). UTAH CODE ANN. (1953) § 17-27-18. ". . . The Board of County Commissioners may in any zoning resolution provide for the termination of non-conforming uses, either by specifying the period or periods in which non-conforming uses shall be required to cease, or by providing a formula or formulae whereby the compulsory termination of a non-conforming use may be so fixed as to allow for the recovery or amortization of the investment in the non-conformance." The state of Kentucky had a similar statute, KEN. REV. STAT. ANN. (Baldwin, 1943) § 100.071, but this has since been repealed. KY. LAWS c. 104, § 3 (1948).

[14] ZONING ORDINANCE OF LOS ANGELES (1951) § 12.23. (Providing for the liquidation of non-conforming uses in "R" districts, i.e. residential, in periods of 40, 30 or 20 years according to the type of structure involved; law not to take effect for 20 years. ZONING ORDINANCE OF CORTLANDT, N. Y. (1951) § 9 (Builder's supply yards, contractor's yards, or lumber yards, must be liquidated, removed, or discontinued in three-year period in "R" districts. This ordinance may be explained better on the theory of nuisance than on zoning principles); ZONING ORDINANCE OF PORTLAND, OREGON (1950) § 6-2201 (6) (Similar to the Los Angeles Ordinance providing for liquidation of non-conforming uses in 60, 40 or 30 years according to the type of structure; this law is not to take effect until fifteen years after the ordinance was passed); ZONING ORDINANCE OF RICHMOND, CALIFORNIA (1949); ZONING ORDINANCE OF BOSTON (1924) § 9 (All non-conforming uses to be terminated by 1987 under the latest amendment, but there is a thirty-seven year minimum period for liquidation after a use becomes non-conforming.)

[15] ZONING ORDINANCE OF KANSAS CITY, MO. (1946) § 58-18. Non-conforming use of land must be liquidated in one year, designed for conformity but used in non-conformity; ten years are allowed for liquidation, and if neither designed nor used in conformity, it may exist for its "usable life." Signs and billboards must go in five years.

[16] Proposed Zoning Ordinance of Minneapolis Non-Conforming Uses. "Reasonable

Whether the adoption and enforcement of such ordinances constitutes taking property without due process or whether it is a proper exercise of the police power depends upon the reasonableness of the action taken by the state or municipality. When dealing with the "vague contours of due process" each situation must be judged upon its own facts.

A study of the evolution of the law on this subject would indicate that these ordinances may be justified as valid exercises of the police power if reasonable. The leading case on the constitutionality of zoning ordinances decided by the Supreme Court of the United States held that if the ordinance does not pass the bounds of reason and assume the character of legislative fiat, it will be held constitutional under the police power.[17] Although this case dealt with an ordinance which had a devaluating effect upon the property instead of a retroactive effect, a general guide for formulation of ordinances was presented, this being that " . . . such provisions must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" to be declared unconstitutional.[18]

It was a result of the liberal philosophy expressed in the *Ambler Realty* case that the *Dema Realty* cases were decided wherein the Louisiana Supreme Court held that a city may by way of a reasonable ordinance remove any business from a district.[19] These cases have been criticized primarily on the ground that only one year of grace was granted under the ordinance involved.[20] In 1951 a New York court cited their principle with favor,[21] and now both Florida[22] and California[23] have upheld ordi-

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periods of amortization." (Thirty years for wood frame buildings, forty years for wood and masonry, and fifty years for buildings of other construction. This is to be figured from the date of erection); Proposed Zoning Ordinance of New York City § 870-73 (Non-conforming uses of land in residential or residential retail districts are given three years to liquidate. In residential districts, signs and buildings under $500 valuation must liquidate in three years. Other buildings are given thirty years from time of their establishment with minimum of 10, 15 or 20 years from passing of the ordinance according to their classification); Proposed Zoning Ordinance for City and County of San Francisco, § 20F.

[17] Euclid v. Ambler Realty Co., 272 U.S. 365, 47 Sup. Ct. 114 (1926).

[18] *Id.* at 395, 47 Sup. Ct. at 121.

[19] State *ex rel* Dema Realty v. Jacoby, 168 La. 752, 123 So. 314 (1929); State *ex rel* Dema Realty v. McDonald, 168 La. 172, 121 So. 613 (1929), *cert. denied,* 280 U.S. 556, 50 Sup. Ct. 16 (1929).

[20] Jones v. Los Angeles, 211 Cal. 304, 295 Pac. 14 (1931); Comment, 39 YALE L. J. 735, 737 (1930).

[21] Franmor Realty Corp. v. LeBoef, 104 N.Y.S.2d 247 (Sup. Ct., 1951). Although the court cited the principle of the *Dema Realty* cases with favor, the court doubted the reasonableness of requiring a liquidation in one year.

[22] Standard Oil Co. v. Tallahassee, 183 F.2d 410 (5th Cir. 1950). This case was approved by the Florida Supreme Court in *Adams v. Housing Authority of Daytona Beach,* 60 So.2d 663 (Fla., 1952).

[23] Livingston Rock & Gravel Co. v. County of Los Angeles, 272 P.2d 4 (Cal. 1954); Los Angeles v. Gage, 274 P.2d 34 (Cal. App. 1954).

nances providing for the direct liquidation of non-conforming uses as a constitutional exercise of the police power.

Direct liquidation has had an interesting history in California where since 1931 the courts have held that retroactive zoning ordinances were unconstitutional.[24] Later, these cases were distinguished by the California Supreme Court which held, in obiter, that it was inapplicable where a reasonable time for liquidation is involved.[25] But in October, 1954, the District Court of Appeal of California dealt with the issue directly.[26] In this case it was unequivocally held that an ordinance requiring the discontinuance of non-conforming uses of land within a five year period was a constitutional exercise of the police power. The court pointed out that in essence there is no difference between requiring a discontinuance of a non-conforming use and prohibiting alteration and expansion of non-conforming structures. The objects are the same and the methods are more direct. The court mentioned the fact that the old indirect methods of eliminating non-conforming uses have been ineffective since these uses have in effect become monopolies and privileges. In speaking of the equity of the amortization scheme the court said:

> As a method of eliminating non-conforming uses it allows the owner of the non-conforming use, by affording him 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, and he enjoys a monopolistic position 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.[27]

There seems to be little room for doubt that the planners may make reasonable provision whereby a business use, or structure may be eliminated by allowing its owner a reasonable time in which to recover his investment and make new plans.

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[24] Jones v. Los Angeles, 211 Cal.304, 295 Pac. 14 (1931).

[25] Livingston Rock & Gravel Co. v. County of Los Angeles, 272 P.2d 4 (Cal. 1954).

[26] Los Angeles v. Gage, 274 P.2d 34 (Cal. App. 1954).

[27] *Id.* at 44.