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Recommended Citation
Frederic C. Bower, Amortization: A Means of Eliminating the Noncomforting Use in Ohio, 19 Cas. W. Res. L. Rev. 1042 (1968)
Available at: http://scholarlycommons.law.case.edu/caselrev/vol19/iss4/15

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Amortization: A Means of Eliminating the Nonconforming Use in Ohio

RAPID INDUSTRIALIZATION swelled the early 20th century cities to a degree theretofore unknown. Home, commercial, and industrial construction increased to meet the needs of increasing population. Implicit in uncontrolled development were dangers to the health and property of the cities' inhabitants and, in response, zoning was developed to meet the challenge.¹

Zoning ordinances were passed to control future land use. Early planners contemplated the passage of ordinances to eliminate existing structures which did not conform to zoning schemes, but were faced with strong economic and political opposition.² With the constitutionality of zoning itself doubtful until Village of Euclid v. Ambler Realty Co.,³ initiators of the zoning movement were naturally reluctant to seek passage of acts to which severe objections could be raised. Hence, early legislation treated lightly or neg-

¹In the landmark decision of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court recognized that "[w]ith the great increase and concentration of population, problems have developed... which require, and will continue to require, additional restrictions in respect to the use and occupation of private lands in urban communities." Id. at 386-87. It went on to hold that comprehensive zoning was a constitutional exercise of the State's police power in that:

The segregation of industries commercial pursuits and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community. The establishment of such... zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires and the enforcement of traffic and sanitary regulations. The danger of fire... and risk of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted. Id. at 392.

In Ohio, the community's right to zone was established in Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925) wherein the court noted that:

Under the police power society may restrict the use of property without making compensation therefore, if the restriction be reasonably necessary for the preservation of the public health, morals or safety. This is so, because all property within the state is held subject to the implied condition that it will be so used as not to injure the equal right of others to the use and benefit of their own property. Id. at 637-38, 149 N.E. at 33.

For a review of the history of zoning in Ohio see McCarthy, The Legal Background of Zoning in Ohio, 23 Ohio B. Ass'n Rep. 563 (1950).


³272 U.S. 365 (1926).
lected entirely the nonconforming use. Legislators consoled themselves with the thought that, in time, the nonconforming use would atrophy and disappear. It has not.

Today, the nonconforming use is one of the most difficult problems faced by municipalities in their attempts at orderly, efficient administration of zoning regulations. Theoretically, zoning promotes the general welfare by physically separating various incompatible uses of the available land to ensure that it is used most advantageously. Uniformity is sought within each division and consequently, a deviation from this uniformity, in the form of a nonconforming use, is necessarily contrary to the public welfare.

In addition, nonconformities may reduce neighboring property values, as for example, where a nonconforming use bordering on nuisance makes an entire area undesirable for residential use. Finally, the nonconformity may demand municipal services not required by adjoining land uses and may simultaneously reduce the tax basis of other property, thus forcing the municipality to shoulder an increased financial burden.

In Ohio, attempts to terminate the nonconforming use have been conspicuously unsuccessful. Traditional methods of control

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4 A nonconforming use is generally defined as a building, structure, or use of land that is lawfully in existence on the effective date of a zoning ordinance or amendment prohibiting such use, but which, nevertheless continues unaffected by such ordinance or amendment thereto. E. Yokely, ZONING LAW AND PRACTICE § 148 (2d ed. 1953). The preexisting nonconforming use is to be distinguished from a nonconforming use which is created by a zoning board when such board grants a variance from the requirements of the local zoning law. A variance presents no problem as it depends upon the board for continued existence, see State ex. rel. 12501 Superior Corp. v. East Cleveland, 81 Ohio L. Abs. 177 (Ct. App. 1959), and the present discussion is confined to those nonconforming uses which antedate the zoning law.

5 Problems faced by early city planners are extensively discussed in Young, City Planning and Restrictions on the Use of Property, 9 MINN. L. REV. 593 (1925).

6 One observer has urgently remarked that: "Until some method is devised to permanently eliminate the nonconforming use from our cities and towns, effective city planning cannot be achieved." Hertz, Non-Conforming Uses: Problems and Methods of Elimination, 33 DICTA 93 (1956). See also Anderson, The Nonconforming Use — A Product of Euclidian Zoning, 10 SYRACUSE L. REV. 214 (1959); Note, Amortization of Property Users Not Conforming to Zoning Regulations, 9 U. CHI. L. REV. 477 (1942).


9 Id. at 4.

10 In response to a questionnaire prepared by this writer, city planners in Ohio municipalities of over 500,000 population responded that nonconforming uses continue to be a problem despite efforts to eliminate them and that "thousands" of nonconforming uses exist in some Ohio cities. Data on prevalence of nonconforming uses is provided in Note, supra note 6, at 479.
have succumbed to the resilience of the nonconformity while the legality of alternative processes remains clouded. Amortization, the most attractive of the alternatives, could ensure elimination of the nonconforming use, but is impeded by statutory limitation and constitutional problems of due process and retroactivity.

This Note briefly traces the means that have been employed in Ohio to terminate the nonconforming use of land and sets forth the inherent limitations of these attempts. The problems involved in gaining judicial approval for amortization are raised and answered. Judicially determinative factors in a "reasonable" amortization ordinance are examined, and finally, the type of provision which would both satisfy constitutional due process requirements and do least violence to traditional notions of property rights is surveyed.

I. OHIO ATTEMPTS TO ELIMINATE THE NONCONFORMING USE

A. The Nuisance Approach

It is well settled that if a nonconforming use constitutes a nuisance it may be enjoined. Hence, although commenced under a

11 A list of the means of terminating nonconforming uses that have been proposed can be found in Comment, The Elimination of Nonconforming Uses, 1951 Wis. L. Rev. 685.

12 Amortization is the compulsory termination of a nonconforming use at the expiration of a specified time. Katarincic, supra note 8, at 5. For a discussion of the mechanics of amortization see text accompanying notes 41-44 infra. See generally Fell, Amortization of Nonconforming Uses, 24 Md. L. Rev. 325 (1964); Graham, supra note 7; Note, Principle of Retroactivity and Amortization of the Non-Conforming Use — A Paradox in Property Law, 4 Vill. L. Rev. 416 (1959); Note, supra note 6.

13 See text accompanying notes 45-51 infra.

14 It is equally well settled that a municipality may legislatively declare that certain uses of land are public nuisances which may then be prohibited by ordinance. Hadacheck v. Sebastian, 239 U.S. 394 (1915). In the Hadacheck case, petitioner was convicted for operating a brickyard in violation of a zoning ordinance. There was evidence that the operation produced dust, fumes, gases, and smoke which interfered with the habitability of the surrounding neighborhood. The Supreme Court held that brick manufacturing was not a nuisance per se, but that a municipality could still regulate it under the police power. The Court broadly stated:

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. . . . A vested interest cannot be asserted against it because of conditions once obtaining. . . . To so hold . . . would fix a city forever in its primitive condition. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. Id. at 410.

The holding and quoted language suggest that zoning requiring immediate termination of preexisting nonconforming uses would be constitutionally valid where the use approaches nuisance status. Courts in jurisdictions other than Ohio have seized upon this rationale to justify such ordinances. E.g., State ex rel. Dema Realty Co. v. McDon-
municipal permit, a manufacturing use that produced noxious odors has been terminated. Likewise, a nonconforming railroad has been required to operate at a noise level tolerable to the residents of its district.

As a means of comprehensively eliminating the nonconformity, the common law doctrine of nuisance is, at best, ineffectual. The most obvious weakness of such an approach is that it cannot be argued with any degree of cogency that every nonconforming use constitutes a nuisance. Also, a city's successful suit enjoins but one offensive use in a nuisance action and is no guarantee that conformity with a city's zoning scheme will follow. The pressing problem faced by most cities is the nonconforming use which does not constitute a nuisance — this is the factual situation that appears most frequently.

However, some commentators believe that the potential of the nuisance doctrine has not been fully exploited. They argue that as contemporary research unveils a fuller understanding of nuisance factors in urban development and as city planners develop performance standards against which such factors can be measured, the nuisance doctrines will become effective in instances where other methods of elimination are not. Thus, the nuisance doctrine, inadequate of itself, may yet prove to be a valuable tool when used

ald, 168 La. 172, 121 So. 613, cert. denied, 280 U.S. 556 (1929). See also Standard Oil Co. v. Tallahasee, 183 F.2d 410 (5th Cir.), cert. denied, 340 U.S. 892 (1950), wherein the court upheld an ordinance that required "that all locations or cities [sic] within said parts of areas of the City now used for motor vehicle service stations shall be discontinued . . ." Id. at 412. The court rejected plaintiff's suit to enjoin enforcement of the ordinance stating that plaintiff had acquired its property with "full knowledge of the right of the City to modify its zoning ordinances so as to conform [with the] requirements of a rapidly growing municipality." Id. It was "well established law" in Florida that a municipality had the power to discontinue an existing property use. Id. at 413.

Application of the nuisance rationale to statutes requiring cessation of existing nonconforming uses raises problems. The doctrine of nuisance is already well established and an application of the concept to the nonconforming use merely adds confusion to both areas of the law. As a result, cases utilizing the concept of nuisance are those in which the use causes "a tangible and material interference with the property or personal well-being of others and [is] likely to constitute or to become a common law nuisance." Noel, Retroactive Zoning and Nuisances, 41 COLUM. L. REV. 457, 467 (1941). In addition, there is doubt concerning the validity of the nuisance rationale when the only purpose of the ordinance is to achieve district uniformity. Id. at 467-70.

15 State ex rel. Ohio Hair Prods. v. Rendigs, 98 Ohio St. 251, 120 N.E. 836 (1918).
17 B. POOLEY, PLANNING AND ZONING IN THE UNITED STATES 104 (1961).
18 Id.
in combination with other methods of eliminating the nonconforming use.

B. Control Approach

The approach generally taken by Ohio communities in their attempts to eliminate the nonconforming use has been labeled the "control approach." Accordingly, local ordinances recognize the nonconforming use and allow it to exist but limit it so as to hasten its demise. In theory, the limitations imposed upon the nonconformity so inhibit its continuation that it will, in the natural course of events, eliminate itself. Generally, the owner of a nonconforming use is prohibited from repairing, changing, or abandoning his nonconforming use without losing his right to maintain it.

(1) Repair. —Judicially approved local zoning ordinances commonly prohibit the owner of a nonconforming use from restoring it after it has been totally or partially destroyed. In general, the right to repair is denied if the cost of such repair exceeds 50 percent of the value of the structure. Such limitations are constitutional. Of course, if ordinances do not provide to the contrary, a nonconforming use may be rebuilt after it has been damaged.

(2) Change. —Another means of control appearing in most local zoning ordinances is a prohibition against change of a nonconforming use to another use restricted in the district. Such a change is not permitted even though the new use is quite similar...
to the preceding one.\textsuperscript{25}

A change of use where the new use is of a higher classification than the old (\textit{e.g.}, a change from business to residential use) is permitted by some ordinances.\textsuperscript{27} If the new nonconforming use is the same as that preceding, some ordinances authorize the change. Others require permission of the zoning board of appeals.\textsuperscript{28}

(3) \textit{Abandonment}. — Ordinances which prevent a nonconforming use from continuing once it has been abandoned have been upheld.\textsuperscript{29} Abandonment occurs when the property is used in a fashion inconsistent with the claim of a nonconforming use.\textsuperscript{30} Whether or not an intent to abandon must be shown in order to preclude reestablishment of the use is open to debate. In \textit{Francisco v. City of Columbus},\textsuperscript{31} appellee moved the majority of his equipment from the site of his nonconforming use to a new factory approximately 1 mile away. Construing a statute that defined abandonment in terms of "removal of equipment," the court stated that an intention to abandon need not be displayed and a fortiori, an intention to continue abandonment need not be shown. Otherwise, a zone could never be cleared of nonconformities, for if the owner could show a mental reservation to return he would be allowed to resume his nonconforming use.\textsuperscript{32} However, a later case held that a temporary cessation of a nonconforming use does not prevent resumption unless an intent to abandon is shown.\textsuperscript{33} Respondent's suspension of its nonconforming shale mining operation was due to obsolescence of its equipment, not its own volition. An active intent to abandon lacking, the lower court decree in favor of respondent was affirmed.

\textsuperscript{25}\textit{See}, \textit{e.g.}, \textit{Sussman v. City of Cleveland}, 111 Ohio App. 18, 162 N.E.2d 225 (1959), \textit{appeal dismissed}, 171 Ohio St. 164, 167 N.E.2d 927 (1960). The petitioner had been selling secondhand building materials on her property located in an area subsequently zoned for residential use. When she changed the use to the sale of auto parts, also a nonconforming use, her request for a variance was denied by the zoning board of appeals and the board's decision was upheld by the Cuyahoga County Court of Appeals.

\textsuperscript{27}\textit{E.g.}, ordinance \textit{cited in Steudel v. Troberg}, 76 Ohio App. 136, 63 N.E.2d 241 (1945).

\textsuperscript{29}\textit{E.g.}, ordinance \textit{cited in McVey v. Reichley}, 105 Ohio App. 319, 152 N.E.2d 321 (1957).

\textsuperscript{29}Francisco v. City of Columbus, 13 Ohio Op. 404 (Ct. App. 1937), \textit{appeal dismissed}, 134 Ohio St. 526, 18 N.E.2d 404 (1938).

\textsuperscript{30}\textit{See generally Annot., 18 A.L.R.2d 725} (1951).


\textsuperscript{32}\textit{Id. at 408}.

(4) Criticism of the Control Approach. — Although some variation of the control approach is probably utilized by every local governing body engaged in zoning, it has not been successful in eliminating the nonconforming use. As one Ohio planner has recently stated, “It is naive to believe that a nonconforming use will, if regulated, disappear some time in the future. They just hang on . . . .” It seems evident that the premise underlying the control approach is faulty; even when controlled, nonconforming uses do not eliminate themselves.

The lack of success of the control approach can be attributed to factors other than its basic premise. In many cases, strict provisions have not been employed, and in others administrative deficiencies have impeded enforcement of control provisions. In addition, the existence of one nonconforming use is often cited by other property owners as ground for permitting another variance. If the variance is granted, nonconforming uses spread like a malignancy, infecting the allegedly restricted district. Finally, the monopolistic position enjoyed by a nonconforming use is often of considerable economic advantage to its owner, thus encouraging and enabling him to carry on indefinitely. It is submitted that the lack of success of the control approach indicates that a more effective solution must be sought.

II. Amortization: A Viable Alternative — Problems in Its Adoption

Amortization has been enthusiastically hailed as the answer to the nonconforming use problem and the best means to achieve effective zoning administration. Amortization is the compulsory termination of a nonconforming use at the expiration of a specified period. It is said that forced cessation of the use does not violate the owner’s due process rights because he is given a reasonable period during which to recover or “amortize” his losses.

34 1 J. METZENBAUM, LAW OF ZONING 75 (2d ed. 1955).
35 Interview with John A. Wilkes, Chief City Planner of Cleveland, in Cleveland, Ohio, Feb. 19, 1968.
37 It has been maintained that zoning boards are less than provident in granting variances. Dukeminier & Stapleton, The Zoning Board of Adjustment: A Case Study in Misrule, 50 KY. L.J. 273, 324 (1962).
38 See Note, supra note 6.
39 Katarincic, supra note 8, at 5.
40 Other justifications for the termination of an existing use are that the owner of
To illustrate the mechanics of amortization, suppose a person legitimately owns and operates a warehouse in an area zoned for commercial use. Suppose further that the building is of frame construction and has an estimated remaining usable life of 20 years. The value of the business is $30,000. Subsequently the area is rezoned as a residential district. Now a nonconforming use, the warehouse is incompatible with the residential dwellings surrounding it. Trucks, noise, and lights interrupt the tranquility of the residential area while the warehouse building destroys the architectural congruity of the neighborhood.

Amortization would eliminate the problem by compelling termination of the use after a specified number of years. After an "amortization period" the owner would have to give up the nonconforming use of his land.

The way in which the amortization period is determined varies. Under some ordinances, the amortization period depends upon the estimated remaining life of the structure to be amortized. Thus, if the hypothetical warehouse were constructed of cinder block rather than wood, its owner would have a longer period to recover the losses stemming from compelled liquidation. Conversely, if the warehouse were merely a temporary structure, its estimated remaining life would be less than the hypothesized 20 years and the amortization period would correspondingly be shorter. Under other ordinances, a single period is provided at the end of which all nonconforming uses and structures must be terminated. Still others are based solely upon the monetary value of the nonconforming use. Thus, the hypothetical value of $30,000 would determine the period during which the nonconforming warehouse was allowed to continue to exist. A more valuable warehouse would command a longer amortization period while a shorter period would suffice for a less valuable business.

Regardless of the basis for determining the length of the amor-

the nonconformity is probably in a monopolistic position which should produce extraordinary gains and which will thus help offset any possible losses sustained from elimination, see City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 460, 274 P.2d 34, 44 (1954), and that the benefit to the public from elimination of the nonconforming use, not a structure, will be greater than the detriment suffered by the owner. See People v. Miller, 304 N.Y. 105, 108, 106 N.E.2d 34, 35 (1952).

41 A discussion of the zoning ordinances of the 25 largest cities in the United States is found in Katarincic, supra note 8, at 12-20.

42 See, e.g., Los Angeles, California ordinance, cited in Graham, supra note 7, at 450.

43 See, e.g., Topeka, Kansas ordinance, cited in Graham, supra note 7, at 450.

44 See, e.g., Fernandina, Florida ordinance, cited in Graham, supra note 7, at 450.
tization period, it is not to be doubted that amortization has advantages over methods currently employed in Ohio to combat the nonconforming use. Because it does not depend upon a separate body of law for its efficacy, amortization avoids the confusion and ineffectuality inherent in the nuisance approach. Unlike the control approach, amortization ensures termination of the nonconforming use by requiring cessation at the end of a specified period.

Considering its advantages over Ohio's current attempt to deal with the problem, one might expect a movement to adopt amortization. Blocking such a movement is a doubt concerning its legality under Ohio law. In Ohio, it is widely held that the owner of property which is used for a lawful purpose prior to the enactment of a restrictive ordinance acquires a vested right to continue the nonconforming use; the use must be tolerated to the extent that it did not conform at the time of passage of the ordinance. To hold otherwise, it is said, would be unfair to the property owner who, in reliance upon the previous zoning law, had made substantial outlays to improve his property. Similarly, fear of subsequent zoning changes would tend to discourage owners from improving their property. Hence, the rule is that ordinances calling for the termination of preexisting uses constitute the unconstitutional taking of property without due process of law.

The vested rights theory is manifested in State enabling legislation and provided the basis for the controversial and oft-cited

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45 In response to the question, "Why has not amortization been utilized as a means of terminating the nonconforming use?", the Ohio city planner generally replies that there is a legal question concerning its validity. Planners say they would welcome such a provision if its legality were assured or if council would insist upon it. Questionnaire, supra note 10.

46 See, e.g., City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953); Clifton Hills Realty Co. v. City of Cincinnati, 60 Ohio App. 443, 21 N.E.2d 993 (1938).


48 Such a provision has been labeled retroactive and unconstitutional, Gibson v. Oberlin, 171 Ohio St. 1, 167 N.E.2d 651 (1960), or invalid because confiscatory. Kessler v. Smith, 104 Ohio App. 213, 142 N.E.2d 231 (1957).

49 OHIO REV. CODE § 713.15 (Page Supp. 1966) purportedly limits the zoning power of a municipality with respect to the nonconforming use:

The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or amendment thereto, may be continued, although such use does not conform with the provisions of such ordinance or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of the land shall be in conformity with sections 713.01 to 713.15, inclusive, of the Revised Code. The legislative authority of a municipal corporation shall provide in any zoning ordinance for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning ordinance. Id. (emphasis added).
City of Akron v. Chapman decision which held that an amortization provision violated the nonconforming owner's constitutional right to due process. Any argument proposing amortization as a solution to the nonconforming use problem in Ohio must thus meet and overcome the arguments in the enabling statutes and the Chapman case.

A. The Enabling Legislation

According to section 713.15 of the Ohio Revised Code a use "existing and lawful at the time of enacting a zoning ordinance... may be continued, although such use does not conform with the provisions of such ordinance...." Initially, it would seem that the legislature has precluded local governing bodies from terminating the nonconforming use. However, if the word "may" is given a permissive rather than directory interpretation, municipalities would be able to require liquidation of the nonconforming use at their discretion. A permissive interpretation is justifiable because the legislature, had it intended to prevent municipalities from terminating the nonconforming use, would have used the word "shall" instead of "may." Such a conclusion is bolstered by Ohio case law as it is generally held that the word "may," when used in a statute, grants discretion, whereas the word "shall" is imperative.

Whether the demands of section 713.15 may be imposed upon charter municipalities is doubtful. A municipality's power to zone is derived from the Ohio Constitution. A municipality is free to adopt any measure which does not "conflict with general law." Section 713.14 provides that "Sections 713.06 to 713.12, inclusive, of the Revised Code do not repeal, reduce, or modify any power granted by law or charter to any municipal corporation or the legislative authority thereof, or to impair or restrict the power of any municipal corporation under Article XVIII of the Ohio Constitution...." OHIO REV. CODE § 713.14 (Page Supp. 1960) (emphasis added). It has been held that this section "yields unrestricted power to municipalities in respect to zoning if such powers are granted by the municipal charter." Bauman v. State ex rel. Underwood, 122 Ohio St. 269, 270, 171 N.E. 336 (1930). Since the "general law" authorizes unrestricted exercise of powers granted by a municipal charter, there can be no "conflict with general law," and an ordinance adopted according to charter provision would be valid. This view is developed in Young, Regulation and Removal of Nonconforming Uses, 12 W. RES. L. REV. 681, 683 (1961).

51 Id. at 389, 116 N.E.2d at 700.
53 It is possible that an ambiguity exists. Compare the way in which the statute is categorized in B. POOLBY, supra note 17, at 119, with that in Katarincic, supra note 8, at 8.
54 E.g., Dennison v. Dennison, 165 Ohio St. 146, 134 N.E.2d 574 (1956).
The above argument in favor of a municipality's power to terminate the nonconforming use assumes that section 713.15 is applicable as a restriction on a municipality's zoning powers, but syntactically circumvents the statute's effect. Circumvention of the statute may be unnecessary because its applicability to zoning ordinances is in fact open to serious question. Zoning is an exercise of a community's police power and article XVIII, section 3 of the Ohio Constitution provides that: "Municipalities shall have authority to . . . adopt and enforce . . . such local police . . . regulations as are not in conflict with" the general law. A general law within the meaning of this provision is a State police regulation which prescribes a mode of conduct for all of the citizens of the State, regardless of the municipality, township, or county wherein they reside. Hence, it is questionable whether section 713.15, which merely limits a municipal corporation's powers to adopt and enforce police regulations, is a "general law" within the purview of the constitutional conflicts section. If it is not a "general law," its implicit prohibition against amortization is invalid and municipalities are free to establish their own rules regarding the termination of nonconforming uses.

Whether or not section 713.15 is a "general law" within the meaning of article XVIII, section 3 of the Ohio Constitution has not yet been decided. However, by analogy, the recent case of Village of W. Jefferson v. Robinson is authority for the proposition that section 713.15 is not a "general law" and thus does not restrict the municipal zoning power. In that case, the Supreme Court of Ohio was called upon to construe two Ohio Revised Code sections which deal with a municipality's power to license transient dealers and solicitors. These sections are similar to section 713.15 in that they are laws limiting a municipality's police power.

Respondent, convicted for violating an ordinance prohibiting peddlers from soliciting sales orders in private residences without the occupant's invitation, argued that the ordinance was in conflict with the Ohio Revised Code. Speaking for the court, Chief Justice Taft noted that even if there were a conflict, the validity of

56 See Clifton Hills Realty Co. v. City of Cincinnati, 60 Ohio App. 443, 21 N.E.2d 993 (1938).
57 OHIO CONST. art. XVIII, § 3 (1912) (emphasis added).
58 Fitzgerald v. City of Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).
59 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).
60 OHIO REV. CODE § § 713.63-.64 (Page 1953).
61 1 Ohio St. 2d at 116, 205 N.E.2d at 385.
the ordinance depended upon whether the licensing statutes were the general law of Ohio. He concluded that the statutes before the court only limited the legislative power of municipal corporations and

the words "general laws" as set forth in section 3 of Article XVIII of the Ohio Constitution mean statutes setting forth police, sanitary or other similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.62

The ordinance, not in conflict with "general" law, was valid and judgment for respondent was reversed.63

Both section 713.15 and the analogous sections before the Robinson court were laws of general application limiting the police power of a local governing body. Thus, it would seem safe to predict that section 713.15 is not a "general law" within the meaning of section 3 of article XVIII and thus does not prohibit the use of amortization. This interpretation seems reasonable in light of the purpose of the constitutional conflicts provision: to guarantee uniform application of State police regulations, not to limit directly the police power of a municipality.64

B. The Ohio Case Law

Ohio judicial expression on amortization as a means of terminating the nonconforming use is meager. The case of City of Akron v. Chapman65 considered an ordinance which authorized city council to require cessation of a nonconforming use after the use had existed for a "reasonable" length of time. What was "reasonable" was to be determined by the city council rather than by judicial or administrative inquiry. The court held that such an ordinance was unconstitutional as a violation of respondent's due process rights.66

The Chapman decision should not be deemed to have settled the question of the constitutionality of amortization in Ohio. The facts of the case negate such a conclusion. Respondent had used his property as a junkyard since 1916 and upon passage of the disputed ordinance in 1922, the use became nonconforming. Twenty-

62 Id. at 118, 205 N.E.2d at 386 (emphasis added).
63 Id. at 120, 205 N.E.2d at 388.
64 See City of Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929).
65 160 Ohio St. 382, 116 N.E.2d 697 (1953).
66 Id. at 388, 116 N.E.2d at 700.
eight years later, in 1950, city council passed an ordinance aimed solely at respondent's property, directing that the use terminate within 1 year. There was no evidence that uses similar to respondent's were treated in like manner and thus it is not surprising that the fiat was struck down.

In addition, the rationale of the court is open to criticism. By requiring termination of respondent's prior nonconforming use, the ordinance was held to deprive him of property in violation of his constitutional rights of due process. According to the court, a property right is

not merely the ownership and possession of lands . . . but the unrestricted right to their use, enjoyment and disposal. Anything which destroys any of these elements . . . destroys the property itself. The substantial value of property lies in its use. If the right to use is denied, the value of the property is annihilated and ownership is rendered a barren right.

If this definition were intended to relate to all property rights, it would obviously be too broad as it would preclude all zoning. One must conclude that the court's exposition was meant to apply only to property rights in preexisting nonconforming uses. Because the rights involved in a nonconforming use are vested rights they cannot be retroactively regulated by the zoning power without depriving the owner of due process. However, every zoning regulation curtails vested rights by restricting prospective uses or severely limiting continuation of existing uses. Hence, if the general power to zone is admitted, it is conceptually incorrect to differentiate between ordinary property rights and rights to maintain a nonconforming use on the basis that the latter are vested.

The factor underlying the differentiation is economic rather than conceptual. Prohibiting the continuation of an existing use generally imposes a definite, measurable loss upon the individual property owner, whereas the economic loss stemming from a prospective restriction is generally less pronounced. Courts, like the Chapman court, have transformed this generality into a rigid rule of law; it is presumed that an existing property interest affected by the particular ordinance is too substantial, when weighed against

67 Id.
68 Id.
69 See Clifton Hills Realty Co. v. City of Cincinnati, 60 Ohio App. 443, 21 N.E. 2d 993 (1938).
the objectives to be achieved by enforcement, to justify termination of the use. The owner of an existing nonconforming use is thus given an unalterable vested right to continue it.

It is submitted that the presumption that the right to continue a preexisting use is a vested right should be made rebuttable. The investment in many nonconformities is not sufficiently substantial to justify their continuation at the expense of the benefits accruing to the community from an effective zoning plan. Whether a local governing body should have the right to terminate the preexisting nonconforming use should be determined by the reasonableness, or lack thereof, of its amortization provision rather than the time at which the individual improved his property.

III. A REASONABLE AMORTIZATION PLAN:
JUDICIALY DETERMINATIVE FACTORS

A judicial determination of the constitutionality of any zoning regulation is arrived at by weighing the private loss suffered by the property owner against the gain accruing to the public from the regulation.\(^7\) If the public interest outweighs the loss suffered by the individual, the regulation is said to be a reasonable exercise of the police power of the municipality and is allowed to stand. The factors which a court peruses when striking the balance between the public and private interests should provide the city planner with an idea of what the reasonable amortization plan should embody. As Ohio has not yet passed favorably upon amortization, a survey of court decisions in more progressive jurisdictions is helpful.

New York has experienced a judicial evolution leading to approval of amortization. In the case of *People v. Miller*\(^7\) the court stripped the nonconforming use of the sacrosanctity previously accorded it, stating that a zoning regulation requiring termination of prior nonconforming uses would be sustained if the resulting loss to the owners were relatively slight and insubstantial.\(^7\) The *Miller* decision set the stage for *Harbison v. City of Buffalo*,\(^7\) the landmark amortization decision in New York. The city of Buffalo attempted to eliminate Harbison's nonconforming cooperage business by amending its zoning ordinance to require petitioners to

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\(^7\) 304 N.Y. 105, 106 N.E.2d 34 (1952).

\(^7\) Id. at 108, 106 N.E.2d at 35.

discontinue their nonconforming use within 3 years. The court declared that "reasonable termination periods based upon the amortized life of the structure are not . . . unconstitutional" and "if a zoning ordinance provides a sufficient period of permitted nonconformity, it may further provide that at the end of such period the use must cease." The court then remanded the case to the trial court to determine the reasonableness of the ordinance in light of the following: the nature of the surrounding neighborhood; the value and condition of existing improvements; the proximity of a relocation site and the costs of relocation; and other costs arising from damages sustained by petitioners.

In California, the leading case dealing with amortization is City of Los Angeles v. Gage. The ordinance in dispute required nonconforming uses of land to be discontinued within a 5-year period. Likewise, discontinuance was required of nonconforming commercial and industrial uses of residence buildings in certain zones. In its consideration of the provision as applied to respondent's use, the court received evidence concerning the cost of relocation, the annual gross revenue of the business, and the disturbance which the use caused to its surroundings. The court recommended that the allowed period of nonconformity be commensurate with the investment involved and the nature of the use; and, in cases of nonconforming structures, on their "character, age and other relevant factors.

Any amortization plan to be adopted in Ohio should ideally encompass the factors considered in the preceding decisions. At a minimum, the scheme should consider unrecoverable costs, the estimated remaining life of the nonconformity, and the degree to which the nonconformity disrupts the municipality's zoning scheme. The constitutionality of an ordinance which incorporates these matters should be resolved in favor of the enacting municipality rather than the nonconforming uses eliminated thereunder.

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75 Id. at 561-62, 152 N.E.2d at 46-47, 176 N.Y.S.2d at 604-05.
76 Id. at 564, 152 N.E.2d at 47-48, 176 N.Y.S.2d at 606.
78 Id. at 459, 274 P.2d at 43.
79 It is the thesis of one writer that a determination of these three factors in relation to each individual nonconformity represents the ultimate in the protection of an individual property owner's rights to due process. Graham, Legislative Techniques for Amortization of the Non Conforming Use: A Suggested Formula, 12 WAYNE L. REV. 435, 451-52 (1966).
80 In order to fully protect the nonconforming owner's rights to due process, it has been suggested that the presumption of validity commonly accorded legislative enact-
IV. A PROPOSAL

The typical amortization ordinance categorizes nonconformities by use and structure. Nonconforming uses of land are distinguished from nonconforming buildings which could house a conforming use and those buildings which could not. Nonconforming buildings are broken down into subcategories based upon type of construction. The amortization period allotted a nonconforming use varies according to the category to which the use relates.

Such provisions have been criticized for their lack of flexibility. Nonconforming buildings of the same construction are given the same amortization period without regard to varying rates of depreciation. A more plastic provision would permit a thorough appraisal of the environment in which the building is located, the use to which it is put, and the quality of its construction. Moreover, strict categorization does not adequately reflect the economic hardship that may accompany amortization of a going concern. Individual hardship to the proprietor, and availability and viability of the business should be thoroughly considered before amortization. In addition, rigidly classified ordinances overlook the possibility that there may be nonconforming uses that are beneficial to the neighborhood. The neighborhood grocery represents a good example of such a use. It may be that the corner grocery is a convenience and hence beneficial to the vicinity. Flexibility is needed to provide for such situations.

The needed flexibility could be injected into the amortization process through a hearing at which amortization periods are determined by a competent, expert board, specifically trained to exercise

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1. A non-conforming use of land shall be terminated within five (5) years;
2. A non-conforming use in a conforming structure or building shall be terminated within eight (8) to (15) years;
3. Non-conforming buildings and structures shall be eliminated as follows:
   a. Buildings or structures of a value of less than $5,000.00
      (1) Under $2,000.00 — within five (5) years after passage of the ordinance.
      (2) Over $2,000.00, but under $5,000.00 within ten (10) years after adoption.
   b. All others, within twenty-five (25) to fifty (50) years depending upon the nature of the construction.

their discretion in such matters. Accompanying such provision should be an enumeration of factors which are relevant to the board's decision. A hearing would enable the owner of a nonconforming use to present his case to the board. Thus, consideration of all relevant factors would be furthered. In addition, the enumeration of factors would bar administrative discrimination and abuse of discretion by supplying criteria for judicial review.

The type of provision described above might read:

1. Hearing To Determine Amortization Period

   The Planning Board shall conduct a hearing to determine the amortization period of nonconforming uses to be subjected to amortization. Notice of the date, time, and place of such hearing will be given to the owner of the nonconforming use to be amortized and to interested parties.

2. Factors Considered in Calculating Amortization Period

   In determining the amortization period of a nonconforming use, the Planning Board shall consider the nature of the use and its effect upon its surroundings, the value and condition of existing improvements, the possibility and cost of relocation, information supplied by the owner of the nonconforming use and interested parties thereof, and any other relevant factors.

Several factors in the above provision require comment. Notice of amortization is given the owner of a nonconforming use. The typical amortization ordinance does not provide such notice. A reasonable amortization period allows an owner to plan for the ultimate cessation of his use and thereby allows him to recoup any losses arising from liquidation. If notice is not given, he has no opportunity to prepare for liquidation. Therefore, courts should

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83 A specially trained panel is advisable because the typical zoning board of appeals does not have the expertise necessary to administer complex amortization problems. A professional, by contrast, can assimilate the comprehensive plan of the city. In addition, he is generally insulated from the formal and informal pressure to which a board of adjustment is often subjected. Katarincic, supra note 8, at 37.

84 Before a hearing is conducted, the nonconforming use must, of course, be located and identified. Following the hearing, the termination date must be noted and subsequently enforced. It has been maintained that irresponsible administration of these tasks will be the pitfall for amortization in certain municipalities. See F. HORACK & V. NOLAN, LAND USE CONTROLS 162-63 (1955).

85 It is to be noted that within the provision there is no requirement that all nonconforming uses must be terminated. Thus the Board may, within its discretion, grant continued existence to those nonconformities which are not injurious to the comprehensive plan. Under the typical amortization provision there is no such discretion. See note 81 supra.

86 Amortization ordinances have been criticized for not providing notice. Comment, supra note 82, at 362.

87 For a discussion of the justifications of amortization, see text accompanying note 45 supra.
not consider the amortization period as commenced until notice thereof has been given. 88

The suggested provision requires the board to take account of the nature of the use and its effect upon its surroundings. The compatibility, or lack thereof, of a nonconformity in relation to its neighborhood should be estimated when fixing the amortization period. If a nonconforming use is incompatible with its surroundings, it is reasonable to restrict its continued existence. If, on the other hand, a nonconforming use is relatively consonant with its neighborhood, it should be allowed a longer period of amortization or even immunity from elimination.

The value of a use and cost of relocation are to be considered in determining the amortization period. Although calculation of the value of the use is problematical, a fair resolution may be obtained by using fair market and costs. Market value should be obtained from tax appraisals, 89 while private estimates supplied by the owner or interested parties can supplement the tax appraisal. The cost of relocation can be likewise obtained by public and private evaluation. 90

Though problems of valuation are difficult, much more difficult is the composite review of the enumerated factors and final determination of the amortization period. Administrative discretion is the keynote of the proposed ordinance. Local officials are granted discretion to fix the amortization period in each particular case based upon the facts of the individual case. Administrative discretion raises the possibility of abuse and arbitrariness. However, mitigating against such abuse is the presence of the owner of the nonconformity at the hearing and the possibility of judicial review. Without a grant of discretion, it is difficult to imagine an ordinance sufficiently broad to allow adjustments and changes to fit the circumstances of each particular case. Because it provides for a tailored amortization period, the proposed ordinance is more likely to satisfy constitutional requirements of due process than an

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88 If notice must be given in condemnation cases in which compensation is awarded, Walker v. City of Hutchinson, 352 U.S. 112 (1956), a fortiori, it should be given in amortization cases.

89 In some municipalities tax appraisals are intentionally kept below market. The tax rolls would be an unfair guide to market value in these instances. See Katarincic, supra note 81, at 42.

90 It should be noted, however, that gathering information concerning the value of a use and the cost of its location could be a burdensome administrative task. Means of relieving such a burden are suggested in Graham, supra note 79, at 454.
ordinance with fixed and unchanging periods.\textsuperscript{91}

V. CONCLUSION

The nonconforming use of land remains an obstacle to the attainment of effective zoning administration in Ohio. Amortization, a process which assures elimination of the problem, remains, for all practical purposes, an untested weapon in the city planner's arsenal. Reticence in deployment of the device stems from the "legal questions" surrounding its successful adaptation. This Note elucidates those issues and hopefully destroys any illusion as to their insurmountability. Strong legal arguments support the validity of an amortization plan that adheres to the requirements of due process as enunciated in more advanced jurisdictions. In this connection, Dean Roscoe Pound's exhortation that the law must remain stable while never standing still has particular relevance. A well-conceived, well-drafted amortization provision need not cause fear of the stamp of instability, or illegality, that movements away from the status quo often entail. The provision proposed in this Note furnishes a springboard of progressive thought for the community interested in eliminating the nonconforming use.

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