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COMMENT

CONFORMING THE NONCONFORMING USE: PROPOSED LEGISLATIVE RELIEF FOR A ZONING DILEMMA

by David G. Drumm

As the growth of America's metropolitan areas continues to accelerate, it has become increasingly necessary to rely on governmental solutions to the problem of fashioning a livable metropolitan environment. A principal method used to achieve this goal has been the application of comprehensive zoning ordinances;[1] with their use, the growth of a city may be monitored and directed to provide efficient municipal services, to maximize land values and the tax base, and to allow for consideration of environmental and aesthetic factors. Comprehensive zoning may be constitutionally applied to restrict the future use of undeveloped lands in conformity with planning objectives.[2] Yet, as metropolitan development increasingly involves redevelopment of inner-city areas and areas previously developed as satellite communities beyond the city limits, the propriety of applying comprehensive zoning ordinances is less certain. To force abandonment of an existing use appears inequitable, especially when substantial improvements have been undertaken. Nevertheless, the continued presence of a use that is incompatible with the city's proposed development may seriously retard development of an area. These conflicting interests create the problem of the nonconforming use. Zoning ordinances traditionally have been solicitous of the nonconforming use, allowing its continuance but restricting its growth or alteration. More recently, zoning ordinances have also provided for the amortization of the nonconforming use by requiring its eventual elimination after a period of grace. Neither approach has proven to be a complete solution. The Model Land Development Code,[3] proposed in 1975 by the American Law Institute, attempts in article 4 to remedy various shortcomings of the restriction and amortization approaches. This Comment will assess the current approaches to the nonconforming use problem and then will analyze article 4 of the Code to ascertain to what extent that proposal offers an improved solution to the nonconforming use problem.

1. Comprehensive zoning is the division of an entire municipality into districts for the purpose of restricting land use by geographical area. 1 R. ANDERSON, AMERICAN LAW OF ZONING 21 (1968). The first comprehensive zoning plan was enacted by New York City in 1916. Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 834 (1924).

2. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

3. MODEL LAND DEVELOPMENT CODE (Proposed Official Draft 1975) [hereinafter referred to as the MLDC or the Code].

I. ZONING AND THE NONCONFORMING USE

A. *Basis of the Zoning Power*

Zoning ordinances are enacted pursuant to the police power[4] delegated by the state to municipalities or other units of local government through enabling acts.[5] A zoning ordinance will typically divide the territory to be zoned into districts and will permit only a specified class of uses within each district.[6] Ideally, the ordinance will produce strict segregation of land uses while minimizing the negative impact of a designated use on adjoining land values.[7]

The general zoning process was declared constitutional in *Village of Euclid v. Ambler Realty Co.*,[8] in which a landowner attacked a zoning ordinance that allegedly had reduced the value of his land from $10,000 to $2,500 per acre.[9] The ordinance, the landowner claimed, violated the fourteenth amendment of the United States Constitution in that it deprived him of his liberty and property without due process of law[10] and denied

4. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14, 16 (1930).

The United States Supreme Court has defined the police power broadly: "[The police] power is not confined . . . to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people." Bacon v. Walker, 204 U.S. 311, 318 (1907). *See* Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 127, 371 A.2d 461, 467, *appeal dismissed*, 434 U.S. 807 (1977), for a recent expression of the same theory.

5. All states have delegated some zoning authority to municipalities, R. ANDERSON, *supra* note 1, at 138. The delegation must be specific; a general grant of police power is insufficent to authorize zoning. Poulos v. Caparrelli, 25 Conn. Supp. 370, 205 A.2d 382 (Super. Ct. 1964); Ellison v. City of Fort Lauderdale, 183 So. 2d 193 (Fla. 1966).

6. R. ANDERSON, *supra* note 1, at 22.

7. Achieving such a result was the primary goal of the earliest zoners. *See* S. TOLL, ZONED AMERICAN 183 (1969); Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROB. 305, 307 (1955).

8. 272 U.S. 365 (1926).

9. *Id.* The property lay in the general path of the development of Cleveland's industrial district. *Cf.* Forbes v. Hubbard, 348 Ill. 166, 180 N.E. 767 (1932) (ordinance zoning land residential when land across street in another municipality was used for commercial purposes held unreasonable).

10. The fourteenth amendment of the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The fifth amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." *Id.* amend. V. For a discussion of the application of the due process clause to the substantive content of governmental actions, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 427-55 (1978).

Virtually all state constitutions also contain a due process clause. *See, e.g.*, CAL. CONST. art. 1, § 13, cl. 6; N.Y. CONST. art. 1, § 6; TEX. CONST. art. 1, § 19 (due course of the law of the land).

Courts have recognized that the right to make future use of land is a "property" interest for due process purposes. For example, in *Euclid*, 272 U.S. at 386, the presence of a property interest was assumed explicitly in order to reach the issue of whether due process was afforded in the invasion of the landowner's property rights. For additional discussion of the principle, see City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697, 700 (1953), in which the court defined property as "not merely the ownership and possession of lands or chattels but the unrestricted right of their use, enjoyment and disposal." *See also* Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921).

him equal protection under the law.[11] The Court upheld the ordinance, finding it to be a constitutional exercise of the local government's police power. The Court recognized the city's need of a flexible police power, capable of addressing changing circumstances and conditions.[12] Nevertheless, the particular exercise of the power must bear a rational relationship to the health, safety, morals, and general welfare of the community.[13] Applying these principles, the Court found the challenged zoning ordinance constitutional; it was a means reasonably designed to meet the ends of insuring the safety of children, economizing on municipal expenses, and facilitating fire extinguishment. The Court warned, however, that if the ordinance was applied arbitrarily and unreasonably, it would be unenforceable.[14]

Since *Euclid*, courts have expanded the scope of goals in pursuit of which the zoning power may be employed. Zoning ordinances have been upheld with purposes as diverse as maintenance of property values,[15] stabilization of land use,[16] orderly development,[17] neighborhood uniformity,[18] and historic preservation.[19]

B. *The Nonconforming Use*

A nonconforming use is defined as a use of land, building, or premises that lawfully existed prior to the enactment of a zoning ordinance and that is maintained after the effective date of such ordinance even though not in compliance with the use restrictions applicable to the area in which it is situated.[20] Thus, a nonconforming use has been clearly established when all necessary construction has been completed and the use has begun prior to the effective date of the zoning ordinance. The nonconforming use must

11. The fourteenth amendment of the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This clause guarantees that individuals similarly situated will be similarly treated by the government. *See* L. TRIBE, *supra* note 10, at 991-94.

12. 272 U.S. at 387.

13. *Id.* at 395. *See generally* Noel, *Retroactive Zoning and Nuisances*, 41 COLUM. L. REV. 457, 459 (1941). For examples of ordinances held unreasonable, see Sigretto v. Board of Adjustment, 134 N.J.L. 587, 50 A.2d 492 (1946) (unreasonable to zone land residential when unsuitable for such use); Tews v. Woolhiser, 352 Ill. 212, 185 N.E. 827 (1933) (unreasonable to create a residential enclave within a commercial district).

14. *Id.* at 395. Shortly after the *Euclid* decision, the Supreme Court struck down a zoning ordinance unreasonable on its facts. Nectow v. City of Cambridge, 277 U.S. 183 (1928) (adjacent land zoned for industrial and railroad purposes caused plaintiff's land, which had been zoned for residential purposes, to become of comparatively little value).

15. Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941); Dunlap v. City of Woodstock, 405 Ill. 410, 91 N.E.2d 434 (1950).

16. Lewis v. District of Columbia, 190 F.2d 25 (D.C. Cir. 1951).

17. Granberg v. Turnham, 166 Cal. App. 2d 390, 333 P.2d 423 (Dist. Ct. App. 1958); Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955); Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 141 A.2d 606 (1958).

18. Galanes v. Town of Brattleboro, 136 Vt. 235, 388 A.2d 406 (1978).

19. Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955).

20. 6 P. ROHAN, ZONING AND LAND USE CONTROLS § 41.01 (1978).

be more than occasional[21] but does not have to be continuous; seasonal use is sufficient.[22] A few jurisdictions require that the use be generally known in the neighborhood.[23] In addition, the use must be in existence on the enactment date of the ordinance,[24] and must have been legal prior to adoption of the ordinance.[25]

The character of other activities sufficient to establish a nonconforming use varies among courts. Generally, a landowner's mere contemplation or expectation of a future land use does not entitle the landowner to nonconforming use status.[26] In some jurisdictions the mere procurement of a building permit does not entitle the holder to nonconforming use status.[27] A few courts, however, have reasoned that mere issuance of the permit is sufficient to establish a nonconforming use on the theory that the municipality is without power to revoke its own lawfully issued permit.[28] When an owner commences improvements on his property in good faith and in reliance on an existing zoning classification, the intended land use is normally protected as a nonconforming use.[29] New York requires that both the expenditures and the improvements be substantial before the use will be protected.[30] Other jurisdictions have found entitlement to nonconform-

21. *See* Durning v. Summerfield, 314 Ky. 318, 235 S.W.2d 761 (1951) (occasional use as a carnival).

22. Civic Ass'n v. Horowitz, 318 Mich. 333, 28 N.W.2d 97 (1947) (seasonal use as a carnival); Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N.W. 86 (1928) (seasonal use as an ice house).

23. *See, e.g.*, Fairlawns Cemetery Ass'n v. Zoning Comm'n, 138 Conn. 434, 86 A.2d 74 (1952); Wunderlich v. Town of Webster, 117 N.H. 283, 371 A.2d 1177 (1977).

24. Fairlawns Cemetery Ass'n v. Zoning Comm'n, 381 Conn. 434, 86 A.2d 74 (1952); Whitpain Township v. Bodine, 372 Pa. 509, 94 A.2d 737 (1953).

25. Ralston Purina Co. v. Acrey, 220 Ga. 788, 142 S.E.2d 66 (1965) (burden of proof is on person seeking to establish legality of nonconforming use); Eggert v. Board of Appeals, 29 Ill. 2d 591, 195 N.E.2d 164 (1963) (building code violation); *In re* Besthoff v. Zoning Bd. of Appeals, 34 A.D.2d 782, 311 N.Y.S.2d 58, 59 (1970) (violation of prior zoning ordinance); Larson v. Howland, 108 N.Y.S.2d 231 (Sup. Ct. 1951) (violation of restrictive covenant).

Technical illegalities are sometimes waived by the courts. *See* City of Middlesboro Planning Comm'n v. Howard, 551 S.W.2d 556 (Ky. 1977) (violation of revenue producing measure); *In re* Yocum, 393 Pa. 148, 141 A.2d 601 (1958) (violation of restrictive covenant); Town of Scituate v. O'Rourke, 103 R.I. 499, 239 A.2d 176 (1968) (unlicensed junkyard); City of Franklin v. Gerovac, 55 Wis. 2d 51, 197 N.W.2d 772 (1972) (unenforced zoning ordinance).

26. *See, e.g.*, Sherman-Colonial Realty Corp. v. Goldsmith, 155 Conn. 175, 230 A.2d 568, 572 (1967); Wunderlich v. Town of Webster, 117 N.H. 283, 371 A.2d 1177 (1977); Cook v. Haynes, 63 A.D.2d 817, 406 N.Y.S.2d 173 (1978); Smith v. Juillerat, 161 Ohio St. 424, 119 N.E.2d 611 (1954).

27. *See, e.g.*, Ellentuck v. Klein, 570 F.2d 414 (2d Cir. 1978); Richmond Corp. v. Board of County Comm'rs, 254 Md. 244, 255 A.2d 398 (1969); Navin v. Town of Exeter, 115 N.H. 248, 339 A.2d 12 (1975); People *ex rel.* Ortenberg v. Bales, 224 A.D. 87, 229 N.Y.S. 550 (1928), *aff'd*, 250 N.Y. 598, 166 N.E. 339 (1929).

28. *See, e.g.*, Appeal of Klein, 395 Pa. 157, 149 A.2d 114 (1959); Wasilewski v. Biedrzycki, 180 Wis. 633, 192 N.W. 989 (1923).

At least one ordinance has expressly protected the holders of building permits from zoning amendments. *See* ZONING RULES AND REGULATIONS FOR THE CITY OF SYRACUSE § 5.4.2 (1959), *cited in* Anderson, *The Nonconforming Use—A Product of Euclidian Zoning*, 10 SYRACUSE L. REV. 214, 221 (1959).

29. *See* A. Ferland & Sons v. Zoning Bd. of Review, 105 R.I. 275, 251 A.2d 536, 537-38 (1969).

30. *See* Town of Lima v. Harper, 55 A.D.2d 405, 390 N.Y.S.2d 752 (1977) (expenditures

ing use status based on incidental or negligible expenditures.[31] Some courts require that the expenditures represent a certain percentage of the total project cost before a nonconforming use may be established.[32] The expenditures for a landowner's improvements on the property must have been made in good faith; expenditures made in order to establish a use prior to the effective date of an impending zoning change generally cannot establish a nonconforming use.[33]

Euclid did not discuss the constitutionality of a zoning ordinance that sought to eliminate uses antedating the ordinance.[34] Initially this issue was avoided by the proponents of zoning lest the cause of zoning in general be harmed.[35] Draftsmen of the early zoning ordinances simply exempted nonconforming uses.[36] In several states statutes extend state-wide protection to the nonconforming use.[37] The zoning advocates felt that such a concession would not greatly impair the effectiveness of zoning since they anticipated that the nonconforming uses would be eliminated naturally over the course of time.[38] To facilitate this process of natural atrophy the ordinances frequently included restrictions on the mainte-

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of $17,600 for paving and piping of mobile home park did not establish a nonconforming use for the entire park because they primarily benefited already developed lots); *In re* Lefrak Forest Hills Corp. v. Galvin, 40 A.D.2d 211, 218, 338 N.Y.S.2d 932, 938 (1972) ($1,450,000 in already incurred costs and $5,800,000 additional contractual obligation were substantial).

31. *Compare* People *ex rel.* Skokie Town House Builders, Inc. v. Village of Morton Grove, 16 Ill. 2d 183, 157 N.E.2d 33 (1959) (expenses incurred in drafting construction plans and obtaining permits sufficient to establish a nonconforming use) *and* Board of Supervisors v. Cities Serv. Oil Co., 213 Va. 359, 193 S.E.2d 1 (1972) (expenses incurred in preparing and filing a site plan sufficient to establish a nonconforming use) *with* Sherman-Colonial Realty Corp. v. Goldsmith, 155 Conn. 175, 230 A.2d 568 (1967) (owner required to show that engineering expenses could not be recouped) *and* Rockville Fuel & Feed Co. v. Gaithersburg, 266 Md. 117, 291 A.2d 672 (1972) (owner required to begin construction).

32. *See* Molin v. Mayor of Glassboro, 116 N.J. Super. 195, 281 A.2d 401 (Super. Ct. Ch. Div. 1971); Reichenbach v. Windward at Southampton, 80 Misc. 2d 1031, 364 N.Y.S.2d 283, *aff'd mem.*, 372 N.Y.S.2d 985 (1975).

33. *See, e.g.*, Graham Corp. v. Board of Zoning Appeals, 140 Conn. 1, 97 A.2d 564 (1953); City of Hollywood v. Hollywood Beach Hotel Co., 283 So. 2d 867 (Fla. App. 1973); Donadio v. Cunningham, 58 N.J. 309, 277 A.2d 375 (1971); Town of Hillsborough v. Smith, 276 N.C. 48, 170 S.E.2d 904 (1969).

34. *See* notes 8-14 *supra* and accompanying text.

35. The public feared that zoning would involve forced removal of existing business. Norton, *supra* note 7, at 308. Also, prior to *Euclid*, zoning advocates feared that attempted retroactive application would cause invalidation of zoning in general on constitutional grounds. Comment, *Retroactive Zoning Ordinances*, 39 YALE L.J. 735, 737 (1930).

36. *See* Bettman, *supra* note 1, at 853. A typical early clause provided: "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. § 29 (1924) *quoted in* Note, *Amortization of Property Uses Not Conforming to Zoning Regulations*, 9 U. CHI. L. REV. 477, 478 n.5 (1942). *See also* ordinances cited in Comment, *The Abatement of Pre-existing Nonconforming Uses under Zoning Laws: Amortization*, 57 NW. L. REV. 323, 323 n.1 (1962).

37. *See, e.g.*, ARIZ. REV. STAT. § 9-462.02 (1977); CONN. GEN. STAT. § 8-2 (1979); HAWAII REV. STAT. § 205-8 (1976); KAN. STAT. § 12-709 (1975); MASS. ANN. LAWS ch. 40A, § 6 (Michie/Law. Co-op Supp. 1978); MINN. STAT. ANN. § 366.18 (West 1976); UTAH CODE ANN. § 10-9-6 (1973).

38. Norton, *supra* note 7, at 307.

nance of nonconforming uses. Courts generally upheld such restrictions[39] and sanctioned the legislative intent to eliminate gradually all nonconforming uses.[40]

II. RESTRICTION OF THE NONCONFORMING USE

A. *Restrictions on Altering the Nonconforming Use*

The establishment of nonconforming use status does not create the unrestricted right to engage in all types of nonconforming use. Ordinances typically provide that the use must remain identical to or at least substantially similar to the initial use.[41] Some ordinances permit change of a nonconforming use to any use allowed under the same or a more restrictive zoning classification.[42] A commendable feature of this form of regulation is that gradual improvement in the character of the use is encouraged.[43]

B. *Restrictions on Expansion of the Nonconforming Use*

Most zoning ordinances contain provisions limiting the expansion of nonconforming uses.[44] These provisions are construed broadly, precluding activities such as erection of new buildings,[45] employment of a greater land area,[46] and expansion of an existing building.[47] The criteria a court will use to find that an expansion has occurred, however, are not always self-evident. A New York court, for example, ruled that a nightclub's

39. *See, e.g.*, Waslinger v. Miller, 154 Colo. 61, 388 P.2d 250 (1964) (prohibition of extension or enlargement); Auditorium, Inc. v. Board of Adjustment, 47 Del. 373, 91 A.2d 528 (1952) (prohibition of resumption of nonconforming use after abandonment); Phillips v. Village of Oriskany, 57 A.D.2d 110, 394 N.Y.S.2d 941 (1977) (prohibition of change in nonconforming use); Application and Appeal of Hastings, 252 N.C. 327, 113 S.E.2d 433 (1960).

40. Nonconforming uses "may be regulated, and even girded to the point that they wither and die." City of Columbus v. Union Cemetery Ass'n, 342 N.E.2d 298, 300-01 (Ohio 1976). *See also* Kelly Supply Co. v. Anchorage, 516 P.2d 1206, 1210 (Alaska 1973); Beerwort v. Zoning Bd. of Appeals, 144 Conn. 731, 137 A.2d 756 (1958); Peterson v. Burt, 42 Wis. 2d 284, 166 N.W.2d 207, 210 (1969).

41. 6 P. ROHAN, *supra* note 20, § 41.03[2][a]. An example of such an ordinance is presented in Everpure Ice Mfg. Co. v. Board of Appeals, 324 Mass. 433, 86 N.E.2d 906 (1949).

42. *See* Stern v. Zoning Bd. of Appeals, 140 Conn. 241, 99 A.2d 130 (1953); City of Hagerstown v. Wood, 257 Md. 558, 263 A.2d 532 (1970); Redford Moving & Storage Co. v. City of Detroit, 336 Mich. 702, 58 N.W.2d 812 (1953).

43. Anderson, *supra* note 28, at 225.

44. 6 P. ROHAN, *supra* note 20, § 41.03[3][a].

45. City of New Orleans v. Langenstein, 91 So. 2d 114 (La. App. 1956); Gerling v. Board of Zoning Appeals, 6 A.D.2d 247, 176 N.Y.S.2d 871 (1958). *But see* Great South Bay Marine Corp. v. Norton, 58 N.Y.S.2d 172 (Sup. Ct. 1945) (building allowed when reasonable and natural accessory to existing nonconforming use), *aff'd*, 292 A.D. 1069, 75 N.Y.S.2d 304 (1947); City of Spring Valley v. Hurst, 530 S.W.2d 599 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (new building allowed absent substantial evidence that nonconforming use would be extended).

46. Evans v. Little Rock, 221 Ark. 252, 253 S.W.2d 347 (1943); Minquadale Civic Ass'n v. Kline, 42 Del. Ch. 378, 212 A.2d 811 (1965); Schaeffer v. Zoning Hearing Bd., 32 Pa. Commw. Ct. 261, 378 A.2d 1054 (1977).

47. Heagan v. Borough of Allendale, 42 N.H. 472, 127 A.2d 181 (1956). *But see* Town of Seabrook v. D'Agata, 116 N.H. 412, 362 A.2d 182 (1976) (only expansion of nonconforming features is prohibited).

change in entertainment from a band to "dancing girls" was not an unlawful expansion whereas an altered schedule of operation was.[48] Courts often base their decisions on a distinction between extension and intensification of the use.[49] Generally, developments that do not involve spatial or temporal expansions or effect only a qualitative change in the scope of operation are permitted as intensifications. Thus, the operator of a nonconforming use is allowed to increase the volume of his business,[50] to make use of the entire tract held when the land use was established,[51] or to add incidental structures.[52] An owner of nonconforming property is also allowed to make ordinary repairs or otherwise maintain his premises,[53] and to modernize his operation.[54]

Pennsylvania applies a more liberal doctrine of "natural expansion"[55] that permits the construction of new buildings on existing land,[56] the subdivision of apartment buildings,[57] and the placement of new storage tanks.[58] The doctrine does not apply, however, to expansion onto land acquired after the enactment of the ordinance[59] or to expansion that would be detrimental to the public health, safety, or welfare.[60] Similarly, in other jurisdictions a right of expansion to a stated percentage of the original size may be granted by ordinance.[61] Even when the ordinance prohibits ex-

48. Incorporated Village of Williston Park v. 280 Hillside Ave. Restaurant Corp., 55 A.D.2d 927, 390 N.Y.S.2d 637 (1977).

49. *See* City of Central City v. Knowlton, 265 N.W.2d 749 (Iowa 1978); Nyburg v. Solmson, 205 Md. 150, 106 A.2d 483 (1954); Keller v. City of Bellingham, 20 Wash. App. 1, 578 P.2d 881 (1978).

50. *See* Truly v. Nielson, 121 So. 2d 754 (La. App. 1960); Frost v. Lucey, 231 A.2d 441 (Me. 1967); Ruhm v. C.P. Craska, Inc., 59 A.D.2d 1016, 399 N.Y.S.2d 749 (1977).

51. *See* Fairmeadows Mobile Village, Inc. v. Shaw, 30 Misc. 2d 143, 211 N.Y.S.2d 592 (1961) (expansion of trailer park permitted to develop more spaces than in use when ordinance passed). *Contra*, Blundell v. City of West Helena, 258 Ark. 123, 522 S.W.2d 661 (1975) (trailer park not permitted to expand beyond lots developed when ordinance passed).

52. *See* Great South Bay Marine Corp. v. Norton, 58 N.Y.S.2d 172 (Sup. Ct. 1945), *aff'd*, 272 A.D. 1069, 75 N.Y.S.2d 304 (1947).

53. *See* Fontana v. Atkinson, 212 Cal. App. 2d 499, 28 Cal. Rptr. 25 (1963); Sitgreaves v. Board of Adjustment, 136 N.J.L. 21, 54 A.2d 451, 455 (1947).

54. *See* Irby v. Panama Ice Co., 184 La. 1082, 168 So. 306 (1936) (change from steam to internal combustion engine); Town of Wayland v. Lee, 325 Mass. 637, 91 N.E.2d 835 (1950) (use of machinery to replace work done by hand); Protokowicz v. Lesofski, 69 N.J. Super. 436, 174 A.2d 385 (Super. Ct. Ch. Div. 1961) (use of larger trucks in trucking business).

55. The doctrine, based on the interpretation of due process as enunciated in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), first appeared in *In re* Gilfillan's Permit, 291 Pa. 358, 362, 140 A. 136, 138 (1927). The Pennsylvania Supreme Court stated:

> [A]s the property was then used for lawful purposes, the city was without power to . . . prevent the owner from making such necessary additions to the existing structure as were needed to provide for its natural expansion and the accommodation of increased trade, so long as such additions would not be detrimental to the public welfare, safety and health.

56. Eitnier v. Kreitz Corp., 404 Pa. 406, 410-11, 172 A.2d 320, 322-23 (1961).

57. Silver v. Zoning Bd. of Adjustment, 435 Pa. 99, 103-04, 255 A.2d 506, 508 (1969). *See also In re* Fried-El Corp. v. Hempfield Township, 34 Pa. Commw. Ct. 341, 383 A.2d 1286 (1978) (subdivision of townhomes).

58. Humphreys v. Stuart Realty Corp., 364 Pa. 616, 620-21, 73 A.2d 407, 409-10 (1950).

59. *Id.*; *In re* Gilfillan's Permit, 291 Pa. 358, 362, 140 A. 136, 138 (1927).

60. Gross v. Zoning Bd. of Adjustment, 424 Pa. 603, 227 A.2d 824 (1967); Township of Kelly v. Zoning Hearing Bd., 36 Pa. Commw. Ct. 509, 388 A.2d 347 (1978).

61. *See, e.g.*, Robert's Running Creek Mobile Home Park, Inc. v. Landolfi, 56 A.D.2d

pansion, courts have allowed expansion upon a showing of hardship[62] or a showing that the limitation is without a substantial relation to health, safety, morals, or general welfare.[63]

C. *Restrictions on Resumption of the Use After Abandonment or Discontinuance*

Zoning ordinances commonly provide for the termination of the right to resume an abandoned nonconforming use.[64] Abandonment consists of two elements: discontinuance, and intent to abandon.[65] Some courts have required a clear showing of intent,[66] while others have regarded the discontinuance itself as conclusive evidence of the intent to abandon.[67] A split in authority also exists as to whether intent is required when the ordinance is phrased in terms of discontinuance, as opposed to abandonment.[68]

When discontinuance is involuntary, most courts addressing the issue have considered causing an owner to forfeit his nonconforming use to be inequitable.[69] The exception to this general rule concerns the destruction

933, 392 N.Y.S.2d 704 (1977); *cf.* Beckish v. Planning & Zoning Comm'n, 162 Conn. 11, 291 A.2d 208 (1971) (allowing expansion to floor area of existing building). Similarly, in Pennsylvania the right of natural expansion may be limited to a given percentage of the original area. Philadelphia v. Angelone, 3 Pa. Commw. Ct. 119, 125, 280 A.2d 672, 675 (1971) (10% limit); *In re* Groff, 1 Pa. Commw. Ct. 439, 274 A.2d 574 (1971) (50% limit).

62. *See, e.g.*, Home Fuel Oil Co. v. Board of Adjustment, 5 N.J. Super. 63, 68 A.2d 412 (Super. Ct. App. Div. 1949); Crudeli v. Zoning Bd. of Review, 73 R.I. 301, 55 A.2d 284 (1947) (hardship to disallow building of a driveway providing access to a building lawfully under construction); *cf.* Snyder v. Zoning Hearing Bd., 20 Pa. Commw. Ct. 139, 341 A.2d 446 (1975) (applicant seeking variance for expansion of nonconforming use must show same hardship as any other applicant for variance).

63. *See* Hoffarth v. County of St. Clair, 51 Ill. App. 3d 763, 366 N.E.2d 365 (1977) (prohibition of the expansion of archery range in rural area unreasonable).

64. *See* Hill v. City of Manhattan Beach, 6 Cal. 3d 279, 491 P.2d 369, 98 Cal. Rptr. 785 (1971); City of Lima v. Hempker, 118 Ohio App. 321, 194 N.E.2d 585 (1962). A mere change in ownership is not an abandonment; instead, the new owner acquires the right to the nonconforming use. People v. Smith, 38 Ill. App. 3d 798, 349 N.E.2d 91 (1976); Builder's Supply & Lumber Co. v. Village of Hillside, 26 Ill. App. 2d 458, 168 N.E.2d 801 (1960); Watts v. City of Helena, 151 Mont. 138, 439 P.2d 767 (1968); Gibbons & Reed Co. v. North Salt Lake City, 19 Utah 2d 329, 431 P.2d 559, 564 (1967); *cf.* O'Conner v. City of Moscow, 69 Idaho 37, 202 P.2d 401 (1949) (termination of right to nonconforming use on change of ownership held unconstitutional).

65. A, T & G, Inc. v. Zoning Bd. of Review, 113 R.I. 458, 322 A.2d 294 (1974).

66. *See, e.g.*, People *ex rel.* Delgado v. Morris, 334 Ill. App. 557, 79 N.E.2d 839 (1948) (involuntary vacancy due to inability to secure tenants not an abandonment); Borough of Saddle River v. Bobinski, 108 N.J. Super. 6, 259 A.2d 727 (Super. Ct. Ch. Div. 1969) (nonuse for 27 years, but no abandonment).

67. *See, e.g.*, Branch v. Powers, 210 Ark. 836, 197 S.W.2d 928 (1946); Borough of West Mifflin v. Zoning Hearing Bd., 3 Pa. Commw. Ct. 485, 284 A.2d 320 (1971); *see also* State *ex rel.* Brizes v. De Pledge, 162 N.E.2d 234 (Ohio Ct. App. 1958).

68. Some courts have construed discontinuance as equivalent to abandonment, requiring the element of intent. *See* Dubitzky v. Liquor Control Comm'n, 160 Conn. 120, 273 A.2d 876 (1970); Smith v. Howard, 407 S.W.2d 139, 141 (Ky. 1966); State *ex rel.* Peterson v. Burt, 42 Wis. 2d 284, 166 N.W.2d 207 (1969) (one year discontinuance while placarded by building inspections department).

69. Krul v. Board of Adjustment, 122 N.J. Super. 18, 298 A.2d 308 (Super. Ct. Law Div. 1972), *aff'd*, 126 N.J. Super. 150, 313 A.2d 220 (Super. Ct. App. Div. 1973) (building destroyed by fire); Las Cruces v. Neff, 65 N.M. 414, 338 P.2d 731 (1959) (advertising sign

of a building by an act of God.[70] In this situation, since the owner's investment has been lost, the reason for continuing the nonconforming use no longer exists.[71] Ordinances frequently terminate the right of the owner to rebuild when more than a certain percentage of the building has been destroyed by an act of God.[72] Similarly, if the building housing the nonconforming use has been razed by its owners, some ordinances do not allow the structure to be rebuilt.[73]

III. ELIMINATION OF THE NONCONFORMING USE

Nonconforming uses have proven to be more durable than the original zoning advocates anticipated.[74] Rather than withering away, many such uses have thrived because the establishment of zoning has bestowed on them a monopolistic position by preventing the establishment of competing enterprises within the zoned area.[75] Their continued presence, however, has been detrimental; in several instances, nonconforming uses have reduced the effectiveness of zoning ordinances, depressed property values, and contributed to the growth of urban blight.[76] Moreover, a nonconforming use may serve as a justification for granting variances to other property owners in the vicinity, furthering the decline of the neighborhood.[77] Some authorities have even singled out the nonconforming use as the fundamental problem of the zoning system.[78]

The problems caused by the durability of nonconforming uses require that affirmative measures be taken if the number of nonconforming uses is to be significantly reduced. The emergence of widespread application of such measures prompts a close look at their constitutionality, centering on the proper relative weights to be given to the police power and the private property interest.

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damaged by unknown cause); Brous v. Town of Hempstead, 272 A.D. 31, 69 N.Y.S.2d 258 (1947) (cabanas destroyed by hurricane); 6 P. ROHAN, *supra* note 20, § 41.03[6], at 41-108.

70. *See, e.g.*, City of Minot v. Fisher, 212 N.W.2d 837 (N.D. 1973); Marchese v. Norristown Borough Zoning Bd. of Adjustment, 2 Pa. Commw. Ct. 84, 277 A.2d 176 (1971).

71. State *ex rel.* Covenant Harbor Bible Camp v. Steinke, 7 Wis. 2d 275, 96 N.W.2d 356, 361 (1959); 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 61-7 (4th ed. 1975).

72. *See* City of Countryside v. Oak Park Nat'l Bank, 78 Ill. App. 2d 313, 223 N.E.2d 293 (1966) (50% of replacement cost); State *ex rel.* Nealy v. Cole, 442 S.W.2d 128 (Mo. Ct. App. 1969).

73. *See* Weldon v. Zoning Bd., 250 N.W.2d 396 (Iowa 1977); Angus v. Miller, 363 N.E.2d 1349 (Mass. App. 1977).

74. City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34, 40 (1954); Anderson, *supra* note 28, at 215.

75. Grant v. Mayor of Baltimore, 212 Md. 301, 308, 129 A.2d 363, 365 (1957); Norton, *supra* note 7, at 308.

76. *See* Graham, *Legislative Techniques for the Amortization of the Nonconforming Use: A Suggested Formula*, 12 WAYNE L. REV. 435, 435 (1966); Comment, *Elimination of Nonconforming Uses: Alternatives and Adjuncts to Amortization*, 14 U.C.L.A. L. REV. 354, 355 (1966).

77. Note, *supra* note 36, at 479 n.16.

78. Grant v. Mayor of Baltimore, 212 Md. 301, 308, 129 A.2d 363, 365 (1957); Note, *supra* note 36, at 479.

A. *Constitutional Powers*

Several United States Supreme Court decisions[79] antedating the advent of comprehensive zoning established the broad proposition that a regulation based on the police power may constitutionally limit the value or use of private property without providing compensation to the landowner.[80] Only if the end sought to be obtained was not within the proper scope of the police power or if the means chosen were not reasonably related to the end would the Court invalidate the regulation.[81] Regulations that satisfied this test were upheld, despite the fact that they inflicted a severe loss on the affected landowners.[82] For example, in *Hadacheck v. Sebastian*[83] the owner of a brick kiln that had been established seven years before the city limits of Los Angeles had expanded to encompass the site of the kiln, sought to have an ordinance prohibiting the manufacture of brick in certain areas declared invalid. The United States Supreme Court held that there was sufficient evidence on which to base the conclusion that brick kilns represent a threat to health and safety.[84] In sweeping terms, the Court justified interference with private property interests in order to secure collective benefits:

> A vested interest cannot be asserted against [the police power of a state] because of conditions once obtaining. . . . To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.[85]

The first Supreme Court decision to recognize the property owner's right to protection against the operation of a regulatory statute reasonably related to a permissible public end was *Pennsylvania Coal Co. v. Mahon*.[86] A state statute prohibited the mining of coal deposits if such mining would cause the collapse of residential structures supported by the underlying

79. Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brick kiln abated as a nuisance); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (livery stable abated as a nuisance); Mugler v. Kansas, 123 U.S. 623 (1887) (operation of brewery made unlawful by prohibition statute).

80. " '[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision . . . ." Mugler v. Kansas, 123 U.S. 623, 668 (1887) (quoting Transportation Co. v. Chicago, 99 U.S. 635, 642 (1878)).

81. McGowan v. Maryland, 366 U.S. 420, 425 n.2 (1961); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937); Nebbia v. New York, 291 U.S. 502, 525 (1934); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Hadacheck v. Sebastian, 239 U.S. 394, 409-10 (1915).

82. *See* notes 79 & 80 *supra*.

83. 239 U.S. 394 (1915).

84. *Id.* at 409-10.

85. *Id.* at 410 (citation omitted).

86. 260 U.S. 393 (1922).

coal. Justice Holmes, writing for the majority, found the statute to be unconstitutional as an uncompensated taking of the mineral owner's property rights.[87] The Court reasoned that the ownership of coal includes the right to mine it and found that the prohibition of mining activities would have the same economic effect as an actual appropriation of the coal reserves,[88] which unquestionably would constitute a compensable taking. In the Court's view, the zoning statute was an attempt to accomplish the result of an exercise of eminent domain without the concurrent obligation to provide compensation.[89] Justice Holmes described the difference between the police power and the eminent domain power as one of degree, not of kind: "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[90] Two factors were emphasized in deciding that the regulation under scrutiny in *Pennsylvania Coal* was so restrictive as to constitute a taking. First, the diminution in the value of the owner's property was large, in that the property's primary value derived from the coal reserves.[91] Secondly, the public interest promoted by the statute was small. From these two considerations, subsequent courts[92] and commentators[93] have fashioned a balancing test whereby the value of the regulation to the public is weighed against the losses of the affected property owners in order to determine if the regulation's effect is so severe as to constitute a taking. If the social benefit realized by prohibiting a certain use is high, greater hardship to individual landowners is tolerated.[94] Conversely, if the social benefit is minimal, less hardship to indi-

87. The fifth amendment of the United States Constitution provides that property may not be taken for public use without "just compensation." U.S. CONST. amend. V. This clause is known as the eminent domain clause. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 554-55 (1977). Eminent domain is the implied power of the government to exert dominion over private property on account of public exigency or for the public good. *Id.* at 556-57. The eminent domain clause has been applied to the states through the due process clause of the fourteenth amendment. Griggs v. Allegheny County, 369 U.S. 84 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The constitution of every state except North Carolina also contains a clause requiring compensation for takings of private property. Twenty-six states also provide compensation for property "damaged." W. STOEBUCK, NONTRESSPASSORY TAKINGS IN EMINENT DOMAIN 5 (1977).

88. 260 U.S. at 414.

89. *Id.* at 416.

90. *Id.* at 415. *Pennsylvania Coal* could have been decided without a consideration of the taking issue. The surface owner's deed included an express provision waiving any claim against the coal company arising out of subsidence damage. 260 U.S. at 412. The coal company argued that the Pennsylvania statute unconstitutionally impaired the obligation of contract, *id.* at 394-95, but the Court bypassed this contention and reached the taking issue.

91. *Id.* at 414.

92. *See* City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34, 44 (1954); Evanston Best & Co. v. Goodman, 369 Ill. 207, 211, 16 N.E.2d 131, 133 (1938); City of Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602, 604 (1959). *See generally* 1 A. RATHKOPF, *supra* note 71, § 6.07 for a discussion of the factors considered by courts in applying the balancing test.

93. F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 139, 195-211 (1973); 1 A. RATHKOPF *supra* note 71, § 6.07.

94. In Livingston Rock & Gravel Co. v. Los Angeles County, 43 Cal. 2d 121, 272 P.2d 4 (1954), *rev'g* 260 P.2d 811 (Cal. Ct. App. 1953), the California Supreme Court upheld an ordinance that provided for revocation of an exemption for nonconforming uses upon a

vidual landowners is needed to characterize the loss as a taking.[95]

Although the principle that a regulation can become a taking provides the Court with a constitutional basis for protecting a landowner from burdensome police power regulations, this theory is deficient in that it blurs the distinction between police power and eminent domain. The generally accepted definition of a taking by eminent domain contemplates a mandatory transfer of a property interest to the government.[96] This definition is consistent with the Court's opinions prior to *Pennsylvania Coal*.[97] In *Pennsylvania Coal*, however, the government did not actually acquire a property interest; the challenged statute merely restricted the permissible use of property.[98] The characterization of the regulation as a taking thus produced definitional uncertainty. Further, had the statute been an actual exercise of the eminent domain power, upon a finding that the taking was for a public use, the Court should have upheld the taking but required that compensation be provided the affected landowner.[99] By voiding the statute entirely, the Court implicitly treated the statute as something other than a taking.

Justice Brandeis, dissenting in *Pennsylvania Coal*, noted the fundamental dissimilarity between the eminent domain and police powers and denied that a police power regulation could ever rise to the level of a taking. In the view of Justice Brandeis, a police power regulation could be invalidated only under the due process clause.[100] Brandeis further viewed the due process clause as containing only two requirements: that a governmental regulation be directed toward a permissible end of the police power

finding that the use was so detrimental to the public health or safety as to constitute a nuisance.

95. *See, e.g.*, People v. Kesbec, Inc., 281 N.Y. 785, 24 N.E.2d 476 (1939) (use of land as a parking lot did not entitle the owner to nonconforming use status because there was no significant hardship in requiring discontinuance); People v. Wolfe, 272 N.Y. 607, 5 N.E.2d 355 (1936). *See also* People v. Miller, 304 N.Y. 105, 108, 106 N.E.2d 34, 35 (1952), which held that the keeping of pigeons as a hobby was not entitled to nonconforming use protection. The court in *Miller* characterized the vested rights approach as "but another way of saying that the property interest affected by the particular ordinance is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision." *Id.*

96. Stoebuck, *supra* note 87, at 570. The transfer in many cases must be viewed at a high level of abstraction such as, for example, a transfer of an easement or a forced release of a restrictive covenant. Nevertheless, even abstract transfers are readily distinguishable from ordinary regulations, which effect no transfer at all. W. STOEBUCK, *supra* note 87, at 200.

97. *See* United States v. Lynah, 188 U.S. 445 (1903), and Pampelly v. Green Bay Co., 80 U.S. 166 (1871), in which government improvements completely and permanently flooding private property were held to constitute takings. These holdings were limited to situations in which the government had effected an actual physical ouster of the owner's possession in Bedford v. United States, 192 U.S. 217 (1904) and Mugler v. Kansas, 123 U.S. 623 (1887). *See also* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851); Callendar v. Marsh, 18 Mass. (1 Pick.) 418 (1823); Stuyvesant v. Mayor of New York, 7 Cow. 587, 605 (N.Y. 1827).

98. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

99. *See* Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1034-35 (1975).

100. 260 U.S. at 417-18.

and that the means be reasonably related to that end. As the statute met the requirements of due process in that it was a reasonable means of accomplishing a valid end, Brandeis would have upheld it.[101]

While the dissent in *Pennsylvania Coal* avoided confusion between police power regulations and eminent domain takings, its interpretation of the due process requirement was inadequate because the opinion would have provided little protection for landowners. Justice Brandeis apparently ignored an additional element of the due process analysis that requires that the means chosen be "not unduly oppressive upon individuals."[102] By focusing the analysis on this criterion, the concerns that caused Justice Holmes and Justice Brandeis to disagree can be reconciled. This consideration allows a court to balance a regulation's impact on an individual property owner against the weight of the public interest to be served. At the same time, it avoids characterizing a regulation as a taking.[103]

Compelling reasons favor the due process characterization of the bal-

101. *Id.* at 419-20.

102. Lawton v. Steele, 152 U.S. 133, 137 (1894). In Goldblatt v. Hempstead, 369 U.S. 590, 595 (1962), this language was held to be still valid. In *Goldblatt*, although the challenged ordinance's impact on the property owner was analyzed under a due process standard, the Court inferred that an ordinance could pass the reasonableness test and nevertheless be an unconstitutional taking. 369 U.S. at 594. Since the extent of the landowner's loss was considered as an element of the reasonableness test, however, the Court simply could have merged the *Pennsylvania Coal* standard into the due process test, rather than continue to regard the two tests as separate.

103. Careful scrutiny of the landowner's burden by the Supreme Court would be a departure from the Court's current position of minimal scrutiny when confronted with substantive due process issues. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); United States v. Carolene Prods. Co., 304 U.S. 144 (1938); West Coast Hotel v. Parrish, 300 U.S. 379 (1937). The use of more than minimal scrutiny in the area of property regulations could exist side by side with established constitutional doctrines of substantive due process. First, the balancing analysis does not inquire into the rationality of the regulation as a means to the desired end. The minimal rationality test would thus continue to be the exclusive standard for gauging the relationship between means and end, which is the context in which it was developed. Secondly, the minimal rationality test also would be properly utilized when the state has adopted an administrative procedure for balancing the public gain against the regulation's impact on individuals, as opposed to society at large.

This form of balancing is distinct from the type of analysis used by a legislature in considering the wisdom of a legislative proposal. The legislature determines whether the proposed legislation will produce a net social benefit. A regulation may produce a net social benefit and therefore be a wise policy choice despite the fact that it severely burdens some individuals. To determine if the burden is so severe as to warrant compensation, the circumstances of each individual must be considered on a case-by-case basis. A legislature deals with broad social policy, not individual cases. Therefore, an administrative procedure by which the burdens of individual property owners may be weighed against the public gain pursuant to a legislatively set formula would be the proper vehicle for resolution of the compensation question. *See* Costonis, *supra* note 99. Deference should be given to a state's implementation of the balancing approach. A reviewing court should look behind a state legislature's resolution of the balancing issue only when the state (a) has failed to provide a balancing formula, (b) has provided a formula that is on its face unduly restrictive of private property rights, or (c) has refused to apply its adopted formula to a given situation. Among the commentators who have advocated a legislatively fixed compensation formula are Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of 'Just Compensation' Law*, 80 HARV. L. REV. 1165 (1967); Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967); Van

ancing test. First, analysis of a property use regulation solely in due process terms preserves the distinction between eminent domain power and police power. Secondly, and most importantly, evaluating a regulation under the due process clause avoids the requirement under the taking clause that "just compensation" be given.[104] Just compensation has been defined as monetary compensation in an amount equal to the fair market value of the highest permissible use of the affected property.[105] The definition is inflexible and has the potential of making the cost of land use planning prohibitive.[106] Its removal, therefore, is salutary. Thirdly, the cumbersome procedural requirements attending an exercise of the eminent domain power are avoided.[107]

B. *The Nonconforming Use as a Vested Right*

Although state courts have confused the concepts of taking and due process,[108] they generally have adopted an approach balancing the public interest against individual property rights in judging the constitutionality of a zoning ordinance.[109] The balancing approach has proven to be flexible and utilitarian when applied to conflicts involving prospective zoning.[110] Courts have had conceptual difficulties, however, in applying the

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Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970).

Finally, the proposed due process balancing approach would not involve the courts in determinations that they do not make already. Presently, under the *Pennsylvania Coal* standard, courts weigh the public benefits of a regulation against the regulation's effect on an individual property owner and, if the regulation is overly restrictive, determine the regulation to be a taking. The due process balancing approach would involve the same balancing test; the only difference would be the characterization of the result. Under a due process analysis, a regulation that unduly burdens an individual property owner would be labelled an invalid police power regulation rather than a taking.

The Court has recently expressed a willingness to employ a more critical substantive due process analysis when certain personal liberty rights are involved. *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). Furthermore, should examination of a landowner's burden be limited by federal doctrines of substantive due process, the state courts would be free to employ a higher standard of substantive due process under the state constitution than that required under the federal constitution.

104. "Just compensation" is one of the four basic elements of eminent domain, Stoebuck, *supra* note 87, at 572, and is also the primary drawback to the use of the eminent domain power in land use planning. Grant v. Mayor of Baltimore, 212 Md. 301, 308, 129 A.2d 363, 365-66 (1957); Costonis, *supra* note 99, at 1022, 1038.

105. *See* Costonis, *supra* note 99, at 1042-45. Professor Costonis has proposed that the payment of compensation to injured landowners as a means of preserving constitutionality could be characterized more accurately as an exercise of the "accommodation power," intermediate to the police power and the eminent domain power. *Id.*

106. *See* Comment, *The Elimination of Nonconforming Uses*, 1951 WIS. L. REV. 685, 695-97.

107. For example, in many states the use of juries to determine compensation awards is mandatory. *See* Costonis, *supra* note 99, at 1038-39.

108. The decisions of state courts frequently confuse the two concepts. *See* Mansfield & Snett, Inc. v. Town of West Orange, 120 N.J.L. 145, 198 A. 225 (1938); W. STOEBUCK, *supra* note 87, at 169, 188, 202.

109. *See* notes 92-95 *supra* and accompanying text.

110. *See, e.g.*, Weitling v. County of Du Page, 26 Ill. 2d 196, 186 N.E.2d 291 (1962); Goldstein v. Zoning Bd. of Review, 227 A.2d 195, 197 (R.I. 1967); Brehmer v. City of Kerrville, 320 S.W.2d 193 (Tex. Civ. App.—San Antonio 1959, no writ).

balancing approach to a zoning ordinance that has required the elimination of preexisting uses. A few courts have characterized the right to continue an existing use as a vested right[111] and have refused categorically to uphold a zoning ordinance requiring the elimination of a nonconforming use without examining the extent of either the landowner's loss or the public need.[112] Apparently, these courts have assumed that eliminating an existing use imposes a burden on landowners that is qualitatively different from the burden imposed by preventing a prospective use. Such an assumption is not necessarily true. The pecuniary loss caused by the prospective zoning can be as great as that caused by retroactive zoning.[113] One could argue that existing uses should be afforded greater protection than future uses in order to avoid the waste that can be caused by the

111. *See, e.g.*, McCaslin v. City of Monterey Park, 163 Cal. App. 2d 339, 329 P.2d 522 (1958); Town of Somers v. Camarco, 126 N.Y.S.2d 154 (1953), *modified and aff'd*, 284 A.D. 979, 135 N.Y.S.2d 42 (1954), *aff'd*, 308 N.Y. 537, 127 N.E.2d 327 (1955); Fox Lane Corp. v. Mann, 243 N.Y. 550, 154 N.E. 600 (1926); Pelham View Apts. v. Switzer, 130 Misc. 545, 224 N.Y.S. 56 (1927). The limits of the "vested right" category are uncertain, prompting one observer to remark, "a vested right is whatever the courts wish to protect without saying why." Comment, *The Cost of Amortizing Non-conforming Uses*, 26 U. CHI. L. REV. 442, 450 (1959). Perhaps the better view is that the indefiniteness of the category serves a valuable function by allowing the courts to make social value judgments as to the desirability of various activities. *See* Note, *Amortization and Performance Standards in Zoning Regulation: Study of Existing Nonconforming Uses in an Indiana Community*, 30 IND. L.J. 521, 537 (1955). For an analysis of social policy factors supporting protection of nonconforming uses, see text accompanying notes 112-16 *infra*.

112. The clearest case so holding is Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930). An ordinance requiring the elimination of all nonconforming uses within one year had been previously upheld by a Louisiana court in the cases of State *ex rel.* Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929), and State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929). The *Jones* case is one of the few reported decisions to hold squarely that the application of zoning ordinances to existing land uses is unconstitutional. One of the few earlier cases to state a similar holding is Pelham View Apts., Inc. v. Switzer, 130 Misc. 545, 224 N.Y.S. 56 (1927) (city cannot revoke building permit on basis of subsequently enacted zoning ordinance when construction has begun). The validity of the *Jones* holding has been accepted in dicta by courts in several jurisdictions. *See, e.g.*, A.C. Blumenthal & Co. v. Cryer, 71 Cal. App. 668, 236 P. 216 (1925); City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925); Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N.W. 86 (1928); Cassell Realty Co. v. City of Omaha, 144 Neb. 772, 14 N.W.2d 600 (1944); Frank J. Durkin Lumber Co. v. Fitzsimmons, 106 N.J.L. 183, 147 A. 555 (1929); Des Jardin v. Town of Greenfield, 262 Wis. 43, 53 N.W.2d 784 (1952).

The primary reason that the issue is rarely presented for judicial review is that most nonconforming uses are protected by state statute or municipal ordinance. *See* notes 36-40 *supra* and accompanying text. Municipal regulations other than zoning ordinances have been more frequently voided for retroactivity. *See, e.g.*, Mt. Zion Baptist Church v. Melillo, 3 N.J. 61, 68 A.2d 741 (1949) (building ordinance cannot require reconstruction of existing building); People v. Stanton, 126 Misc. 215, 211 N.Y.S. 438 (1925) (set-back ordinance cannot act retroactively); Brown v. Grant, 2 S.W.2d 285 (Tex. Civ. App.—San Antonio 1928, no writ) (building code must relate to future). *Contra*, O'Donnell v. Barach, 1 Ill. App. 2d 157, 116 N.E.2d 912 (1953) (safety ordinance requiring handrails on stairways validly applied to existing buildings).

113. For example, the pecuniary loss that zoning caused the landowner in the *Euclid* case was substantial, and could easily exceed the loss involved in many situations requiring the termination of a nonconforming use. *See* note 9 *supra* and accompanying text. For other examples of extreme pecuniary loss inflicted by prospective zoning ordinances, see Neubauer v. Town of Surfside, 181 So. 2d 707 (Fla. Dist. Ct. App. 1966); Bolger v. Village of Mt. Prospect, 10 Ill. 2d 595, 141 N.E.2d 22 (1957); Bowman v. City of Southfield, 377 Mich. 237, 140 N.W.2d 504 (1966).

abandonment or destruction of physical improvements connected with the use[114] and to assure landowners that their established uses will be protected, thereby encouraging them to develop their land and not merely hold it for investment.[115] Many land uses, however, do not require physical structures and accordingly may be terminated without economic waste.[116] Moreover, although land development is desirable, and therefore the presence of existing development is a factor to be considered in applying a balancing test, existing development should not be an insurmountable barrier to the enforcement of zoning ordinances. The vested rights approach, therefore, should yield to a thorough application of the same balancing approach used to evaluate prospective zoning ordinances.

Several courts have failed to apply the balancing approach when the preexisting use that an ordinance seeks to eliminate is properly classified as a common law nuisance.[117] In these instances, the courts have held that nuisance uses may be immediately terminated without compensation to the owner, despite the presence of extreme economic hardship.[118] A thorough application of the balancing test would give weight to the extent of the public interest in the elimination of the nuisance, but would allow this interest to be outweighed in the proper case.

C. *Compensation and the Amortization Approach*

Recent state court decisions have evidenced a willingness to apply the balancing approach in upholding ordinances that order the elimination of

114. Note, *Nonconforming Uses: A Rationale and an Approach*, 102 U. PA. L. REV. 91, 103 (1953).

115. Tangible improvements on land are an addition to the physical wealth of the nation, and in many cases produce a stream of goods and services as well. Comment, *supra* note 111, at 450.

116. An example is an unimproved parking lot.

117. To constitute a common law public nuisance, a land use must injure the safety, health, or morals of the public or work some substantial annoyance, inconvenience, or injury to the public, 58 AM. JUR. 2D *Nuisances* § 7 (1971). Some commentators have noted a requirement that the interferences with neighboring property owners be material and tangible. *See* Noel, *supra* note 13, at 467; Norton, *supra* note 7, at 312; Comment, *supra* note 106, at 695.

118. Among the land uses that have been eliminated as nuisances without compensation are junkyards (Levine v. Board of Adjustment, 125 Conn. 478, 7 A.2d 222 (1939); Finkelstein v. City of Sapulpa, 106 Okla. 297, 234 P. 187 (1925)), hospitals (Shephard v. City of Seattle, 59 Wash. 363, 109 P. 1067 (1910)), funeral homes (State *ex rel.* Skillman v. City of Miami, 101 Fla. 585, 134 So. 541 (1931)), and cemeteries (Laurel Hill Cemetery v. City of San Francisco, 216 U.S. 358 (1910); People *ex rel.* Oak Hill Cemetery Ass'n v. Pratt, 129 N.Y. 68, 29 N.E. 7 (1891)). *Contra*, Rosehill Cemetery Co. v. City of Chicago, 366 Ill. 207, 8 N.E.2d 664 (1937). Immediate elimination of a brick kiln in Hadacheck v. Sebastion, 239 U.S. 394 (1915), discussed at text accompanying notes 83-85 *supra*, was also justified under a nuisance rationale. An extreme view of the nuisance definition is presented in Yeager v. Traylor, 306 Pa. 530, 160 A. 108 (1932) (public garage in a residential area is a nuisance per se). The perceived distinction between nuisance and nonnuisance nonconforming uses is discussed in Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930).

Land uses held not to constitute nuisances include gasoline storage tanks (Webb v. Alexander, 202 Ga. 443, 43 S.E.2d 668 (1947)), dance halls (Bielecki v. City of Port Arthur, 12 S.W.2d 976 (Tex. Comm'n App. 1929, judgmt adopted)), and a dilapidated building (Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810 (1923)).

nonconforming uses over a specified period of time. The leading decision is *City of Los Angeles v. Gage*,[119] in which an ordinance that required the removal of nonconforming uses in certain categories within five years[120] was declared constitutional. The court found that the five-year period afforded the owner a reasonable time in which to amortize[121] his investment. In addition, the court found that the monopoly position granted by the five-year exemption was compensation for the forced removal of the business. The court stated:

> The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss. . . . Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. . . . [I]t allows the owner of the nonconforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer. The loss he suffers, if any, is spread out over a period of years, 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.[122]

Courts in several states similarly have held amortization schemes to be constitutional when the period allowed was reasonable.[123] Others adhere to the vested rights theory and have found amortization to be unconstitutional.[124]

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119. 127 Cal. App. 2d 442, 274 P.2d 34 (1954). Although an earlier case, Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950), upheld an ordinance allowing a period of grace in which the owner could "amortize" his investment, the holding was not explicitly based on the amortization factor. *Id.* at 413.

120. The ordinance applied only to nonconforming uses "(1) where no buildings are employed in connection with such use; (2) where the only buildings employed are accessory or incidental to such use; (3) where such use is maintained in connection with a nonconforming building." 274 P.2d at 37.

121. The term "amortization" is used only by loose analogy and bears little relation to that term's technical meaning in either law or accounting. *Id.* at 44; Harbison v. City of Buffalo, 4 N.Y.2d 553, 556-57, 152 N.E.2d 42, 54, 176 N.Y.S.2d 598, 615-16 (1958) (Van Voorhis, Jr., dissenting).

Amortization provisions in zoning ordinances generally establish a certain period of time during which a land use may continue to exist. At the expiration of this period, the use must be terminated. The theory behind amortization is based on the principle that a property owner should be given a period of time during which he may recover at least part of his investment in property before he is forced to discontinue the use without compensation. 6 P. ROHAN, *supra* note 20, § 41.04[1].

122. 274 P.2d at 44.

123. *See, e.g.*, Grant v. Mayor and City Council, 212 Md. 301, 129 A.2d 363 (1957) (five-year amortization of billboards); Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598, 615-16 (1958) (three-year amortization of a junkyard); City of Univ. Park v. Benners, 485 S.W.2d 773 (Tex. 1972) (twenty-five-year amortization of unspecified commercial use).

124. *See, e.g.*, Hoffman v. Kinealy, 389 S.W.2d 745 (Mo. 1965); City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953); James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955). *See also* Stoner McCrary Sys. v. City of Des Moines, 247 Iowa 1313, 78 N.E.2d 843 (1956); Sun Oil Co. v. City of Upper Arlington, 55 Ohio App. 2d 27, 379 N.E.2d 266 (1977).

From a policy standpoint, the concept of reasonable amortization is preferable to the vested rights theory. Not only does amortization involve the application of the balancing approach to the nonconforming use problem, but the recognition that the amortization period may serve as compensation to validate an otherwise invalid ordinance provides needed flexibility. In some instances a land use regulation may be desirable from a public policy standpoint but nevertheless be adjudged unconstitutional under the balancing test because an unavoidably severe impact on one or a few individuals outweighs the public benefit.[125] The provision of compensation in this situation may serve to remedy the constitutional infirmity of such an ordinance by decreasing the burden imposed on the landowner.

Amortization, however, is only one form of compensation. Other forms may be more useful at times, such as when immediate termination of a use is required. Also, a reasonable amortization period could be so lengthy, as in the case of a substantial building, that the original purpose for requiring the elimination may have disappeared by the time the period has elapsed.[126] In the interim, the landowner realizes that his structure has a finite lifetime, and may therefore allow his building to deteriorate, thus contributing to neighborhood blight.[127] In this situation, the government body should be allowed to balance the due process scale by providing monetary compensation rather than allowing a reasonable amortization period.

Another drawback to the amortization method, at least as presently administered, is its inflexible application to broad categories of uses.[128] Within the categories, no allowance is made for mitigating factors such as location, appearance, condition, or age.[129] In addition, no efficient notice mechanism exists whereby an owner is provided the opportunity to present the merits of his case before an ordinance is enforced against his property.[130]

The greatest shortcoming of the amortization method as it presently exists does not derive from the method itself, but from customary zoning practices. Municipalities frequently zone much of their undeveloped land in highly restrictive "holding patterns," which temporarily allow only the highest form of use.[131] The parcels are later downzoned as the municipal

125. This result may occur because a utilitarian standard of social benefit disregards the manner in which the benefits and burdens are distributed among the affected individuals. A regulation may produce an overall social benefit by producing a small benefit for a great number of individuals while necessarily concentrating a very large burden on one or a few individuals. Although the enactment of such a regulation may be in the public interest and rationally related to a permissible end, the extent of the burden imposed on a few individuals may render the regulation unconstitutional.

126. *See* Norton, *supra* note 7, at 311.

127. *See* Comment, *supra* note 76, at 366.

128. *See* Graham, *supra* note 76, at 451.

129. *Id.*

130. Comment, *supra* note 76, at 362-63.

131. *See* D. MANDELKER, THE ZONING DILEMMA 61 (1971); Krasnowiecki, *The Basic System of Land Use Control: Legislative Preregulation v. Administrative Discretion*, in THE

officials receive and approve individual development proposals.[132] As a consequence of this practice, an official zoning designation is often meaningless.[133] A use may be nonconforming judged by the standard of current zoning but nevertheless may be entirely compatible with actual future development of the area. Evenhanded enforcement of all technical nonconforming uses, therefore, is purposeless. Many government officials respond by abandoning active enforcement efforts and relying solely on enforcement initiated by neighboring landowners.[134] Accordingly, the amortization method causes only a small decrease in the number of nonconforming uses.[135]

IV. THE MODEL LAND DEVELOPMENT CODE

The Model Land Development Code, promulgated by the American Law Institute in 1975, provides a framework for the comprehensive and flexible treatment of the nonconforming use. The completed Code is the product of more than a decade of investigation and evaluation of existing land use planning law.[136] The Code's purpose is to provide for rational consideration of planning goals, systematic treatment of enforcement and judicial review, and coherent implementation of planning techniques on a regional basis.[137] The Code is designed not as uniform legislation, but as a series of measures that may be adopted separately as legislatures deem appropriate.[138]

Article 4 of the Code addresses nonconforming uses. The commentary to article 4 emphasizes that the article is not merely a recodification of the existing law of nonconforming uses;[139] rather, it is an attempt to make judicial treatment of the area both more rational and more effective.[140] A section by section examination of the article affords a comparison with existing law, which is useful in assessing the potential consequences of the Code's enactment.

A. *Basic Authorization for the Elimination of Nonconforming Uses*

Section 4-101(1) provides that "a local government . . . may require the discontinuance of an existing land use."[141] This is the basic authorization

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NEW ZONING: LEGAL, ADMINISTRATIVE AND ECONOMIC CONCEPTS AND TECHNIQUES 3 (1970).

132. *See* D. MANDELKER, *supra* note 131, at 62.

133. MLDC, Commentary on Art. 4, at 175-77.

134. Comment, *supra* note 76, at 359.

135. The results of surveys to this effect are reported in MLDC, Commentary on Art. 4, at 173 (nationwide); Sussna, *Abatement of Nonconforming Uses and Structures*, 44 CONN. B.J. 589, 591 (1970) (New York City); Comment, *supra* note 76, at 354 (Los Angeles); Note, *supra* note 111, at 523-25 (Indiana).

136. The project was conceived in 1960 by Herbert F. Goodrich, then director of the American Law Institute.

137. Wechsler, *Foreword* to MLDC, at xi-xii.

138. *Id.* at ix-x.

139. MLDC, Commentary on Art. 4, at 177.

140. *See* Wechsler, *Foreword* to MLDC, at vii.

141. MLDC § 4-101 provides:

for the elimination of nonconforming uses, of which the remainder of article 4 represents a qualification. Interestingly, the Code abandons the term "nonconforming use."[142] Instead, it uses the term "discontinuance" as a word of art,[143] encompassing the cessation of a land use, "or other action necessary to restore land to its condition prior to all or any particular development."[144] This definition of discontinuance provides zoning officials with a power to eliminate existing land uses that is broader than any such power heretofore recognized by the courts; not only may activities be prohibited, but the destruction of buildings, removal of rubble, or the rectification of excavation or landscaping activities may be required.[145] The definition stops short, however, of authorizing state and local governments to require the replacement of one land use by another.

Section 4-101(2) protects against the elimination of an existing use merely because it does not conform with the standards for future development.[146] This section requires that the existing use must belong to a category of uses expressly designated to be discontinued in the same ordinance that identifies permissible categories of future land uses.[147]

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(1) A local government, in the manner provided in this Article, may require the discontinuance of an existing land use. The discontinuance to be required may include the total or partial demolition of a building or structure, the cessation of any activity that constitutes a land use under this Code, or other action necessary to restore land to its condition prior to all or any particular development.

(2) A local government wishing to discontinue existing land uses shall list the categories of existing land uses to be discontinued in the development ordinance adopted under Article 2. The ordinance shall state whether the categories are to be discontinued throughout the jurisdiction of the local government or only in specified districts or under specified conditions.

(3) Nothing in this Article limits the power of any local government to proceed against unlawful development under Article 10, or to adopt regulations under other enabling authority requiring cessation of a business, demolition or alteration of a structure, or other change in the use of land.

"Local government" is defined in § 1-201(9) as those entities granted the basic power to regulate land development under § 1-102(2). The latter section grants the enacting state discretion as to the classes of local government in which it wishes to vest this power. "Land use" is defined in § 1-201(8) as the "development existing on land." The definition of development appears in § 1-202(1) and includes "the making of any material change in the use or appearance of any structure of land." The broad concept of development used in the Code was first expressed in England's Town & Country Planning Act, 1971, § 22(1). MLDC, Note to § 1-202, at 21.

142. The official commentary states that "the confusion surrounding the meaning of this term has contributed to the unsatisfactory state of the present law in this area." MLDC, Commentary on Art. 4, at 181.

143. MLDC, Note on § 4-101, at 185.

144. MLDC § 4-101(1).

145. The Code's language that "any other action necessary to restore land to its condition prior to all or any particular development" is perhaps too broad. For example, under this wording if land were used for mining purposes, the owner could be compelled to fill in all excavations. The cost of such restoration could be vastly disproportionate to any anticipated benefit. *See* Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963).

146. MLDC § 4-101(2).

147. *Id.* § 4-101(2). The development ordinance is regulated by § 2-101, which requires it to specify four categories of uses: development allowed as a matter of right under a general development permit, development allowed by an exercise of discretion under a special

B. *The Planning Function*

Section 4-102 contains a significant limitation on the broad authority granted by section 4-101.[148] The major purpose of this section is to coordinate the function of eliminating nonconforming uses with the planning function stressed in article 3 of the Code.[149] The goal is to limit mandatory discontinuance of nonconforming uses to those situations in which a carefully considered land development plan necessitates the discontinuance.[150] The Code permits the forced discontinuance of nonconforming uses only when the use to be discontinued is inconsistent with (1) a neighborhood character that a local land development plan has determined to maintain for a substantial period of time;[151] (2) the charter of a special preservation district;[152] (3) a plan for a specially planned area,[153] or

development permit, development subject to the ordinance but not requiring a permit, and development exempted from the ordinance. The development ordinance is intended to combine the function of present zoning and subdivision ordinances. *Id.* Commentary on Art. 2, at 33.

148. MLDC § 4-102 provides:

> (1) The local government may require that a category of land uses be discontinued only if:
>
> (a) a State or Local Land Development Plan has established a policy of maintaining a particular neighborhood character for a substantial period of time, and the specified category of land use would be inconsistent with the character in that neighborhood;
>
> (b) a special preservation district has been designated under § 2-209 and the specified category of land use would be inconsistent with the character of the district;
>
> (c) a plan for a specially planned area has been adopted under § 2-211, and the specified category of land use is inconsistent with the plan;
>
> (d) development regulations for an Area of Critical State Concern have been adopted under § 7-203 or § 7-204, and the specified category of land use would be inconsistent with those regulations; or,
>
> (e) the category of land uses to be discontinued includes such land uses as are determined by the local governing body to be offensive to the public or to users of neighboring land, and to be performing no essential public function that cannot readily be performed at more appropriate sites in the region. Such determinations may be made, for example, with regard to signs, billboards, automobile graveyards and junkyards. No category of land use may be designated for discontinuance under this paragraph if a Land Development Plan or other official expression of government policy indicates that this category of land use will be compatible with the future development of the area.
>
> (2) No category of land use shall be designated for discontinuance in any area where similar new development could be undertaken upon the issuance of a general development permit.

149. Article 3 represents a compromise between a shifting theory of planning with no fixed goals and an "end-state" theory of planning in which preestablished goals are rigidly adhered to. Fox, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URB. LAW. 928, 935-36 (1974).

150. MLDC, Commentary on Art. 4, at 177.

151. *Id.* § 4-102(1)(a).

152. A special preservation district may be designated for any area of historical, archaeological, scientific, architectural, natural, or scenic significance, and a special discretionary permit may be required for all development therein. *Id.* § 2-209. The special permit allows the land use authorities to control development to a greater extent than under a general permit.

153. A specially planned area designation also allows development control via use of the

(4) regulations adopted for an area of critical state concern.[154] Generally, the policy determination must meet the detailed requirements of study and planning imposed by article 3.[155]

The net effect of the requirements of section 4-102 is to prohibit the elimination of nonconforming uses whose designation as such is based solely on a tentative zoning classification. Removal of an existing use is authorized only when the use conflicts with a regulation that is based on careful planning considerations. The extent to which the application of the Code approaches its theoretical model is, of course, dependent on the availability of accurate information and meaningful standards on which to base policy decisions.[156] To the extent that practice accords with theory, strict and even-handed enforcement of nonconforming use elimination will be made possible. Another likely effect of the Code will be careful consideration of policy issues at the legislative level, thereby reducing the potential for arbitrary classifications.

The sole instance in which the Code does not require long-range planning is in the removal of existing nuisances. The Code authorizes the removal of uses "offensive to the public or to users of neighboring land" that perform "no essential public function that cannot readily be performed at more appropriate sites in the region."[157] Examples given in the text of the Code include signs, billboards, automobile graveyards, and junkyards.[158] The official commentary suggests that such nuisances are best regulated

special permit. *Id.* § 2-211. The distinction is that this designation is not based on historical or scenic characteristics of the land itself, but on a special need for coordinated planning to promote policy goals.

154. An area of critical state concern must be related to a major public facility, an area regionally important for historical, natural, or environmental considerations, the site of a new community, or an area in which local authorities have failed to act. *Id.* § 7-201(3). In these cases, the state may initiate planning activities after the establishment of planning objectives. *Id.* § 7-201(1).

155. Specifically the plan must be based on studies of the demography, industry, housing, transportation, land use, economics, history, scenic significance, natural resources of the area, and the financial feasibility of the plan. *Id.* § 3-103. From consideration of these studies, the planners must determine the current problems of the area, project future trends, and identify policy objectives. *Id.* § 3-104. The planners must then analyze the social and economic impact of the objectives and their alternatives and prepare a short-term program designed to achieve these objectives, which may be adopted only after public hearing and examination by the state and any interested local government body. *Id.* § 3-105. The local government is required to appoint an agency to prepare periodic reports monitoring the progress of the short-term program. *Id.* § 3-107. Similar provisions are applicable to state land development plans, which may cover the entire state, or any region thereof. *See id.* art. 8. A state need not adopt an art. 8 plan to designate an area of critical state concern. MLDC § 7-201. The Code's reporters reasoned that the resolution of immediate problems would be hampered by such a restriction. MDLC, Note to § 7-201, at 297-98. An exemption from the art. 3 planning requirements is afforded to smaller communities with little or no development potential that wish to establish a special preservation district. MLDC, Note to § 2-209, at 67. These communities may substitute a written policy report for the more comprehensive art. 3 plan. *Id.* § 2-209 (bracketed portion).

156. The Code is vulnerable to criticism for its failure in many places to elucidate substantive rules to guide the discretionary judgments that the Code requires. *See* Fox, *supra* note 149, at 949.

157. MLDC § 4-102(1)(e).

158. *Id.*

outside the zoning context rather than by "regulations artificially based on the desire to promote homogeneous land use" and that when adequate nuisance remedies are in effect, the Code authorization is unnecessary.[159] Such a stance is consistent with and a manifestation of a Code policy not to interfere with nonzoning regulations that may require the elimination of existing land uses such as criminal statutes, building codes, or fire ordinances.[160]

C. *Enforcement*

The Code provides that nonconforming uses be eliminated by use of the same procedural apparatus as is provided in article 10 for the enforcement of zoning ordinances generally.[161] Enforcement authority is vested in a Land Development Agency, a body to be designated by the local government as its exclusive delegate in zoning administration.[162] Section 4-201(1) provides that the Land Development Agency *shall* issue enforcement notice against each nonconforming use designed for discontinuance in the development ordinance. Thus, once an ordinance requires the termination of uses in a given category, no discretion is allowed in the decision to enforce, a marked departure from current practice.[163]

The enforcement notice must be sent to the owner of record as well as any other person who has filed a request to receive such notices, and must clearly state the violation, the steps necessary to correct it, the date by which such steps must be completed, and the possible sanctions for noncompliance.[164] The recipient has two weeks from the date of mailing of the notice to respond, within which period he may make a demand for an administrative hearing[165] under hearing procedures that require notice,

159. *Id.*, Commentary on Art. 4, at 183. Even if nuisance abatement is effected through a separate procedure, the due process test properly would be the same as that applied to ordinary land uses. Thus, the noxiousness of a use should not be an automatic justification for abatement, as it is under the vested rights approach, but merely one factor to be weighed against the burden imposed on the landowner. *See* text following note 118 *supra*.

160. *See* MLDC § 4-101(3).

161. An earlier draft had provided for a separate procedure for discontinuing nonconforming uses. *See* MODEL LAND DEVELOPMENT CODE §§ 5-201 to -202 (Tentative Draft No. 4, 1972). MLDC § 4-201 now provides:

> (1) The Land Development Agency shall issue an enforcement notice under § 10-201 against each land use designated for discontinuance in the development ordinance.
>
> (2) The enforcement notice shall state, in addition to the matters listed in § 10-201, that application may be made to the Land Development Agency for a hearing under § 10-201(3)(e), and that at such hearing the Agency will consider the eligibility of the land use for an exemption or an extension of time under § 4-202.

162. The concept of the Land Development Agency, formulated in MLDC § 2-301, is an essential element of the Code. The local government is given wide discretion in choosing an agency to operate as the Land Development Agency, but formal administrative procedures and full disclosure are mandatory in any case to assure impartiality and rationality of decision-making. *See* MLDC, Note on § 2-301, at 82-83.

163. *See* Comment, *supra* note 76, at 359; text accompanying notes 133-34 *supra*.

164. MLDC § 10-201.

165. *Id.* § 10-201(3)(e).

testimony under oath, opportunity for cross-examination, and a decision based on a written record.[166] In addition, the recipient may seek judicial review.[167] If the adjudicatory hearing is not requested, section 4-202 requires the Land Development Agency to order discontinuance of the violation.[168]

If the landowner does request a hearing, however, he is entitled to demonstrate that he qualifies for an exemption, an extension of time, or some measure of compensation.[169] These remedies resemble the current remedies of summary abatement,[170] amortization,[171] and eminent domain.[172] The novelty of the Act, however, is its coordination of the various remedies in a common enforcement procedure, thus providing a full range of alternative remedies in each case and a full hearing in which the most efficient and equitable solution to the particular problem may be determined.

The first remedy, exemption from enforcement, may be granted the landowner in three situations. First, he may obtain a reconsideration of

166. *Id.* § 2-304. The requirements for a hearing imposed by the Code are adapted from the requirements of an adjudicatory hearing under the Federal Administrative Procedure Act, 5 U.S.C. § 1004 (1976). *See* MLDC, Note on § 2-304, at 92.

167. MLDC § 10-202(3).

168. *Id.* § 10-202(2).

169. *Id.* § 4-202 provides:

> (1) The Land Development Agency shall issue an enforcement order under § 10-202 requiring discontinuance within [one month] of a land use for which an enforcement notice has been issued, unless the Agency finds on the basis of the hearing thereon that the land use is entitled to an exemption or extension of time, or that an interest in the land should be acquired by the local government.
>
> (2) The Land Development Agency may exempt a land use from discontinuance if it finds that:
>
> (a) none of the grounds for discontinuing land uses required under § 4-102 are applicable to the specific land use in question; or
>
> (b) the hardship caused by the discontinuance would outweigh the public benefits thereof, provided that evaluation of the public benefits of discontinuance shall take into consideration benefits that may result from discontinuance of other similar land uses; or
>
> (c) a special development permit to allow continuance of the land use should be granted under Article 2, in which case the Agency shall treat the application for a hearing as an application for a special development permit.
>
> (3) The Land Development Agency may grant an extension of time in order to allow a reasonable time for discontinuance of land use. In determining a reasonable time the Agency shall take into consideration:
>
> (a) the probable extent of the economic usefulness of the land use;
>
> (b) the urgency of the public purpose requiring discontinuance; and
>
> (c) the cost of discontinuance to the owner.
>
> (4) If the Land Development Agency concludes that the extension of time necessary to provide a reasonable time for discontinuance of a land use would exceed three years, it shall notify the local governing body prior to issuance of the enforcement order so that the local governing body may elect to acquire an interest in the land under § 5-102 in order to assure the earlier discontinuance of the land use.

170. *See* note 118 *supra* and accompanying text.

171. *See* notes 121-24 *supra* and accompanying text.

172. *See* note 89 *supra* and accompanying text.

whether discontinuance of the particular use is in fact justified by the articulated planning purpose on which the ordinance is based.[173] Secondly, he is entitled to show individual hardship sufficient to outweigh the public benefit under the balancing test.[174] Thirdly, the landowner may qualify for a special permit to continue the nonconforming use.[175] In contrast to the absence of discretion in the initial decision to eliminate a use, a large amount of discretion is afforded the hearing examiner in the decision to grant an exemption. This divergence in the scope of discretion allowed may be justified in that the formalities and required public disclosure of the hearing procedure can shield the exercise of discretion from improper political pressures.[176]

When an exception from enforcement is not warranted, a second remedy may entitle a landowner to a reasonable time within which to discontinue a use. Under the Code, determination of the reasonable time is made after balancing the probable extent of the economic usefulness of the existing land use,[177] the cost of discontinuance to the owner,[178] and the urgency of the public purpose requiring discontinuance.[179] Unlike existing practice,[180] the test operates on a case-by-case basis, a method that allows for the consideration of mitigating factors such as location, condition, or aesthetics.

Finally, a third remedy in the form of compensation may be available if a reasonable period within which to discontinue a use will exceed three years. In such a situation, the Land Development Agency is required to notify the local government.[181] The local government then has the option to acquire an interest in the land in lieu of allowing the amortization period.[182] This option has the virtue of providing a means whereby those uses that are particularly meddlesome may be promptly eliminated, even when substantial structures are involved.[183] Acquisition of an interest in land, however, represents an exercise of the eminent domain power, and

173. MLDC § 4-202(2)(a).

174. *Id.* § 4-202(2)(b). The agency may allot special weight to the value of uniform enforcement, however. *See id.*, Note on § 4-202, at 191.

175. MLDC § 4-202(2)(c). This provision grants the nonconforming user the same right as any other landowner to qualify for a special development permit under any of the numerous provisions of § 2-201.

176. The Code places reliance on formal procedures and disclosure rather than on tenure and quorum requirements to promote depolitization of the decision-making process. *See* MLDC, Note on § 2-301, at 83.

177. MLDC § 4-202(3)(a).

178. *Id.* § 4-202(3)(c).

179. *Id.* § 4-202(3)(b). The three factors present an application of the due process balancing, with the first two factors relating to individual burdens and the third factor to the collective benefit. *See* notes 102-07 *supra* and accompanying text.

180. *See* notes 128-30 *supra* and accompanying text.

181. MLDC § 4-202(4).

182. *Id.* § 5-102 allows a governmental agency to acquire an interest in land as a means of securing the discontinuance of a nonconforming use.

183. Compare existing practice in which a substantial building must be granted an amortization period of such duration that the effectuation of planning goals is impossible. *See* text accompanying note 126 *supra*.

the landowner must be compensated.[184] The government need not purchase the fee simple interest, however; all it need purchase is the right to maintain certain uses or structures on the land.[185]

The Code's reference to purchase of a land interest is unfortunate in that it incorporates the conceptual error introduced by Justice Holmes in *Pennsylvania Coal*.[186] Land use restriction is not literally a taking in that no interest is transferred to the government.[187] Compensation of the landowner, therefore, need not take the form of a purchase. Instead, compensation can be granted in order to balance the due process scales when the burden on an individual is high.

In sum, article 4's enforcement procedures provide a flexible method by which to eliminate nonconforming uses. The justification of each enforcement application in light of its policy objective is required, as is the individual tailoring of the remedy for efficiency and fairness.

D. *Regulation of Existing Uses*

The Code contains no special provisions for restricting the alteration, expansion, or resumption after discontinuance of nonconforming uses.[188] Instead, the same measures that regulate these activities for ordinary uses govern nonconforming uses as well.[189] For example, the Code would classify a modification merely as a development that "will continue the type of use then existing on the parcel,"[190] but would deviate from the general development plan. Such development may be allowed under a special development permit "if compliance with the general development provisions would cause practical difficulties."[191] Since the mere presence of nonconforming use status is itself defined as a "practical difficulty,"[192] such a use may be modified if the modification differs from permitted development no more than necessary to overcome the practical difficulties and such use will not significantly interfere with the enjoyment of other land in the vicinity.[193]

The Code treatment of modification is salutary. Because section 4-101 authorizes the removal of any nonconforming use that significantly interferes with development, ordinances would no longer need to prohibit modification of nonconforming uses as an indirect means of eliminating those uses. Instead, a modification could be examined on its own merits.

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184. *See* note 99 *supra* and accompanying text. Although the constitutionality of eminent domain as a means of land control has been established, Berman v. Parker, 348 U.S. 26 (1954), its use has been criticized because of its cost and administrative complexity. Grant v. Mayor of Baltimore, 212 Md. 301, 308, 129 A.2d 363, 365-66 (1957). E. BASSET, ZONING 27 (1936), *quoted in* Comment, *supra* note 106, at 696.

185. *See* MLDC, Note on § 5-102, at 204.

186. *See* notes 96-99 *supra* and accompanying text.

187. *See* notes 96-98 *supra* and accompanying text.

188. Compare existing practice summarized at text accompanying notes 41-73 *supra*.

189. MLDC, Commentary on Art. 4, at 180-81.

190. *Id.* § 2-202(1).

191. *Id.*

192. *Id.* § 2-202(2)(b).

193. *Id.* § 2-202(1).

Assume that a landowner seeks to change one nonconforming use to another nonconforming use or to resume a nonconforming use after its discontinuance. Under the Code, such action would constitute development.[194] The development of a new nonconforming use, by definition, would not be allowed under a general development permit.[195] The landowner, however, could procure a special developmental permit. Such a permit would be granted only if disallowance would deprive the owner of all economic use of the property, the proposed development differs from the general development plan no more than is necessary to permit an economic use,[196] and the use and enjoyment of land in the vicinity is not harmed.[197] Thus, the Code continues a policy of not favoring the resumption of old or the establishment of new nonconforming uses.[198] This stance is justified insofar as it may be assumed that the development permitted under a general development permit was chosen rationally. The landowner in these situations is seeking to establish a new use and is properly placed in the same category as any other landowner attempting to establish a use in conflict with the zoning regulations.

V. CONCLUSION

The presence of a land use that is grossly incompatible with the future development strategy of a growing area can obstruct the orderly and rational growth of metropolitan areas. As the rate of metropolitan development intensifies, waiting for an incompatible use to dissipate by natural causes and by governmental restrictions on the use's growth, change, or discontinuance is increasingly unsatisfactory. Ordinances requiring the elimination of nonconforming uses, while more effective, are potentially unconstitutional. Predicting whether an ordinance will be unconstitutional, however, is difficult in light of the confusion as to the proper constitutional framework within which to analyze the problem of the nonconforming use. Early cases upheld regulations that impinged on a landowner's property rights without compensation if the regulations represented a reasonable use of the police power to accomplish a legitimate end. To avoid the harsh results of these decisions, *Pennsylvania Coal Co. v. Mahon* held that an unduly oppressive regulation could be an unconstitutional taking of property, thereby confusing the police power and the eminent domain power. The equitable result of *Pennsylvania Coal* could have been achieved without sacrificing definitional consistency by application of the due process clause to balance the social gain produced by a regulation against the landowner's loss. While state courts have recognized the general validity of a balancing approach, they have failed to apply it consistently in treating the nonconforming use. Instead, courts have either

194. *See id.* § 1-202.
195. This is a tautology since the use is made nonconforming by reference to the development ordinance and the ordinance cannot authorize what it forbids.
196. MLDC § 2-204(1).
197. *Id.* § 2-204(2).
198. *See* notes 41-43 & 64-73 *supra* and accompanying text.

categorically protected nonconforming uses from the operation of zoning ordinances or, if the use was also a nuisance, categorically eliminated it without compensation. The recent trend of upholding zoning ordinances requiring the amortization of nonconforming uses within a reasonable time, however, represents the application of a balancing approach in that the amortization period is considered to be compensation for the landowner's loss. Amortization, however, falls short of being a thorough application of the balancing test in that the amortization period is the only means of compensation considered and precludes immediate removal of a nonconforming use even in urgent circumstances. Furthermore, the prevalent use of "wait-and-see" zoning has rendered technical zoning violations substantially meaningless.

Article 4 of the Model Land Development Code attempts to remedy these problems. Under this proposal, a nonconforming use may be abated only if the acting local government has developed a comprehensive plan with which the use substantially conflicts, or the use is of a particularly obnoxious quality. Procedurally, the landowner is provided an adjudicatory hearing within which to develop the factual circumstances of his particular case and to select an appropriate remedy. The Code's procedural framework is readily adaptable to implementation of a full-scale balancing approach, although the Code itself continues the confusion between police power and eminent domain power. In aid of consistency, the nonconforming use is not further stigmatized by requiring it to conform with regulations regarding its extension, alteration, or discontinuance other than those that are made applicable to land uses in general.

Article 4 is an improvement over existing law in three respects: (1) it isolates those uses, the elimination of which may further a compelling public purpose; (2) it affords a common procedure under which the merits of a variety of corrective measures can be analyzed; and (3) it treats the nonconforming use in a manner more consistent with the treatment of other land uses. States that could benefit by these effects would do well to consider statutory enactment of this portion of the Model Land Development Code.