Summer 1955

Amortization and Performance Standards In Zoning Regulations: Study of Existing Nonconforming Uses in an Indiana Community

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Any doubts, then, that constitutional full faith and credit must be
given a foreign fair trade statute in a cause of action brought under that
law in the courts of a free trade forum are actually not significant since
the McGuire Act, due to its interstate commerce setting, has already done
that which is needed to require limitation on the activities of the mail
order vendors selling from free trade to fair trade states.

AMORTIZATION AND PERFORMANCE STANDARDS IN
ZONING REGULATIONS: STUDY OF EXISTING NON-
CONFORMING USES IN AN INDIANA COMMUNITY

Legislative and judicial protection of existing land uses which do not
conform to prescribed zoning restrictions have been a fundamental impedi-
ment to urban and rural planning. Early legislation reflects a failure
to consider the neighborhood grocery or auto repair shop in a residential
district a significant problem for zoning regulation. It was assumed
that nonconforming uses would live their natural lives and then dis-
appear. The eagerness of planning commissions to have zoning controls
popularly accepted made them apprehensive of creating public and

76. That the McGuire Act represents a federal policy favoring fair trade does not,
however, require a conclusion that therefore the Cole proposal as a creation of a federal
cause of action, would have been preferable to the present Section 3 of the Act. Enforce-
ment of the policy of the Act need not precipitate an increased burden on the federal
courts; review of the state courts by the Supreme Court should adequately provide the
guidance necessary to prevent judicial abandonment of the Congressional policy.

1. Writers regard nonconforming structures and uses as the primary problem of
zoning regulation. Oppermann, Non-Conforming Uses & the City Plan, 15 J. Land &
P.U. Econ. 94 (1939); O'Reilly, The Non-Conforming Use & Due Process of Law, 23
Geo. L.J. 218 (1934); Notes, 1 Buff. L. Rev. 286 (1952); 1951 Wis. L. Rev. 685.

2. Since zoning legislation was aimed at the regulation of prospective development,
existing land uses were not considered a barrier to present control. Therefore, planning
commissions were urged not to be deterred by the existence of nonconforming structures
and uses in the zoning districts. 1 Yokley, Zoning Law & Practice § 50 (2d ed. 1953).

3. The classic statement on this point follows: "Within a period of another
twenty years, a large number of such 'non-conforming' uses will have disappeared,
either through the necessity of enlargement and expansion which invariably is forbidden
or limited by ordinance, or by the owners realizing that it is unwise and uneconomic
to be located in a district which probably is not suited for the non-conforming purpose,
or by obsolescence, destruction by fire, or by the elements or similar inability to be used;
so that many of these non-conforming uses will fade out." Metzenbaum, The Law
of Zoning 288 (1930).

4. "During the preparatory work for the zoning of Greater New York fears were
constantly expressed by property owners that existing non-conforming buildings would
be ousted. The demand was general that this should not be done. . . Consideration
for investments made in accordance with the earlier laws has been one of the strong
supports for zoning in that city." Bassett, Zoning 113 (1936).
judicial hostility by advocating the destruction of going businesses. This restraint has resulted in the preservation of prior inconsistent uses in otherwise compatible zoning districts.

The prediction that nonconforming uses and structures would disappear has not become a reality. In fact, recent surveys show that de facto nonconformists have grown in number. This is a consequence of laxity in enforcement, the practice of granting variances, and the enactment of spot zoning amendments. The monopolistic position of nonconforming retail stores in relation to neighborhood businesses and the cost incident in

5. In the early 1900's, when New York City was investigating the possibility of zoning regulation, no comprehensive plan had been introduced in the United States. The limits of the police power were undefined. Bassett relates that many eminent attorneys were of the opinion that unless payment was made for the taking of private property zoning would be declared unconstitutional. Id. at 26-7.

6. A typical clause pertaining to existing nonconforming structures states: "The nonconforming use of a building or structure, lawfully existing at the time this ordinance became effective, may be continued." BLOOMINGTON, IND., ZONING ORD. § 104(B). A minority of states' enabling acts provided that existing structural uses would be preserved. See BAKER, LEGAL ASPECTS OF ZONING 158, n.229 (1927).


8. METROPOLITAN HOUSING & PLANNING COUNCIL, ZONING & ZONING ADMINISTRATION 16 (Chicago 1938); see also figures compiled from information obtained from the Chicago Zoning Board of Appeals, Note, 48 N.U. L. REV. 470 (1953).


10. The power to grant variances was included in zoning legislation to alleviate restrictions in cases where individual hardship would result. Note, 35 VA. L. REV. 348, 353 (1949). A variance excepts an individual parcel of land from the restrictions imposed on land use in the zone. One survey shows that between 1923 and 1953 there were 4,260 variances granted in Chicago, 2,640 of which were allowed since 1942. Note, 48 N.U. L. REV. 470, 481 (1953).

11. Spot zoning amendments, which change the zoning ordinance by rezoning a specific area, have been enacted in 2362 instances between 1923 and 1953 in Chicago. Id. at 475. Such practice caused one writer to state: "It is common knowledge that this committee action is a mere formality since a form of 'senatorial courtesy' prevails in the Council whereby the alderman whose ward is affected by the proposed amendment determines whether it shall be passed or defeated." Id. at 474.

12. Ordinances have allowed existing nonconforming businesses to continue but have prohibited the entrance of any new business. Thereby, nonconformists enjoy freedom from competition in the area and become entrenched because of their local monopoly. Note, 35 VA. L. REV. 348, 353 (1949).
altering structures and uses to conform to ordinance restrictions militates against voluntary compliance.\textsuperscript{13}

The detrimental effect of nonconforming uses and structures has caused widespread criticism of present legislation and judicial decisions.\textsuperscript{14} It is asserted that nonconforming uses depreciate neighborhood property values,\textsuperscript{15} cause unwholesome environment for homes,\textsuperscript{16} and overburden municipal services.\textsuperscript{17} To determine whether or not justification exists for such adverse comment a survey was conducted in an average Indiana city with a population of 30,000.\textsuperscript{18} One hundred and forty-eight non-conforming uses and structures, consisting of 98 neighborhood businesses, 39 multi-family dwellings, and 11 industries, were individually examined.\textsuperscript{19} In each, the type of use, condition of the building housing the use, general condition of the adjoining neighborhood, parking and loading facilities, traffic congestion, and junk and trash accumulations were noted.

\textsuperscript{13} Note, 9 U. Chi. L. Rev. 477, 479 (1942).
\textsuperscript{14} "There has been an increasing belief on the part of those interested in zoning that there must be a gradual elimination of non-conforming uses. It has been referred to as 'indispensable if zoning is to be effective,' as the 'logical next step,' and as 'absolutely essential to success in the overall aspects of redevelopment.'" Kneier, supra note 7, at 286. Other writers have specifically noted the disparaging effects of non-conforming uses and the desirability of their elimination. Address by Frank E. Horack, Jr., Am. Bar Ass'n, Aug. 17, 1954; Notes, 1 Buff. L. Rev. 286 (1952); 1951 Wis. L. Rev. 685; 39 Yale L.J. 735 (1930).
\textsuperscript{16} The presence of incompatible land uses within a restricted district invariably undermines the desirability of that area for its declared purpose. This weakens the resistance against the entrance of new conformists so that the neighborhood is soon swallowed up with nonconformity. Eventually neighborhood decay begins and the conservation function of zoning is defeated. Note, 48 N.U. L. Rev. 470, 471 (1953). See also Levine v. Board of Adjustment, 6 N.J. Misc. R. 548, 549, 142 Atl. 234, 235 (1928); accord State ex rel. Civello v. New Orleans, 154 La. 271, 97 So. 440 (1923).
\textsuperscript{17} Zoning is but one aspect of systematic government planning which envisages the provision of better and more economical municipal services. The location of conflicting land uses in a zone complicates the task of administration in making assessments, locating schools, providing police protection, preventing and fighting fires, developing street plans, regulating traffic, and providing sanitary services. Walker, Planning Function in Urban Government 59 (2d ed. 1950); Kneier, supra note 7, at 282. Accord, Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925).
\textsuperscript{18} The survey of land uses was conducted in Bloomington, Indiana. The city affords an opportunity to examine many of the problems which result from mixing land uses. In addition to the ordinary residential, commercial, and manufacturing uses Bloomington contains heavy and light industries and a state university.
\textsuperscript{19} The uses were classified on the three unit classification of the city ordinance. Neighborhood businesses include groceries, garages, filling stations, storage buildings, professional offices, shops, junk yards, restaurants, appliance sales rooms, and other commercial uses. Family dwellings include both single and multiple family residences, apartments, and lodging houses. Heavy and light industries are within the industrial group.
Over 50 percent of the nonconforming neighborhood businesses were closely abutted by substandard dwellings. In excess of 30 percent of the commercial structures were in a state of disrepair or were adjoined by utility or storage "shacks." Inadequate parking and loading facilities leading to traffic congestion, and unwarranted accumulations of junk and trash were also identifying markers of this use. Fifty-nine percent of the multi-family dwellings had traffic problems which could be traced to inadequate parking space. Approximately one half of the immediately adjoining neighborhoods contained substandard buildings. Although nonconforming industrial uses exhibited better physical conditions and fewer abutting substandard structures, 91 percent of the industries caused traffic congestion, and 55 percent of them contained unnecessarily large quantities of waste and junk.

From the survey it may be deduced that the presence of nonconforming uses and buildings produces breakdown and blight in residential districts. The tendency of adjoining owners to permit their property to fall into disrepair can be traced to several factors. Accumulations of unsightly trash and waste cause the general neighborhood appearance to decline. This is best demonstrated by the local automobile repair shop.

20. Neighborhoods containing homes which had fallen into disrepair or were in actual blight condition existed in close proximity to 52 of the 98 neighborhood businesses.
21. Of the 41 buildings considered to be dilapidated or badly in need of repair 31 were the actual business structures and 10 were adjoining storage shacks or utility rooms.
22. Sixty-one of the businesses had inadequate parking space and 48 lacked areas in which produce or materials could be unloaded without blocking the streets. In 23 instances these conditions resulted in bad traffic congestion.
23. These trash accumulations existed in 33 businesses. All are instances where receptacles were not provided or where storage was so inadequate that large piles stood on the lot.
24. Twenty-four dwellings had inadequate parking areas and in 22 cases traffic congestion resulted. This was largely a result of utilizing the curb space on both sides of narrow streets. Only 6 of the housing units provided off-street parking facilities for their tenants.
25. Eighteen of the 39 dwellings were closely adjoined by substandard residences.
26. Only one industrial structure was in a substandard condition. However, it was in the final stage of dilapidation and was used for the storage of lumber and other inflammable materials. This structure could be abated as an imminent fire hazard. None of the industries had storage shacks, and in only 4 instances substandard dwellings were in the immediate neighborhood.
27. Only one conforming industry did not have bad traffic congestion. This may be attributed to their location in downtown business areas. Seven of the industries had inadequate parking facilities for their employees.
28. Six industries did not have adequate waste and junk storage. Also, in 3 instances they were forced to pile produce in alleys partially obstructing passage.
29. Seventy-four of the 148 nonconforming uses had substandard structures in their adjoining neighborhoods.
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with its graveyard for wrecked cars. In addition, nonconforming structures themselves are often eye sores. In many instances they could be abated either as nuisances or imminent fire hazards. Incessant traffic congestion due to inadequate parking and loading facilities detracts from desirable living conditions with possible adverse affect on adjoining property values. Similarly, nonconforming uses and structures increase the cost of municipal services in the form of traffic regulation, fire and police protection, and sanitation.

Because of the limited operation of eminent domain and nuisance law, planning officials have sought indirect means to eliminate nonconforming uses. The traditional methods of regulation are to limit the construction of any new nonconforming uses, to prohibit the expansion

30. In 9 of the 11 nonconforming garages, filling stations, and auto repair shops there were accumulations of wrecked cars, scrap metal, and tires. All of these uses were located in residential areas.

31. Sixteen of the nonconforming uses and structures were considered nuisances or imminent fire hazards. A judgment of noxiousness was made only in instances where conditions were inexcusable and beyond repair. It is significant to note that 7 of these uses and structures were in blight areas.

32. See note 16 supra.

33. See note 17 supra.

34. Utilization of the power of eminent domain to eliminate nonconforming structures and uses has been limited by the requirement that the taking of property be for a public purpose. The requirement of a public purpose has been a subject of considerable disagreement. The modern trend is to say that the taking is “useful to the public,” while the old view was that the acquisition had to be for “use by the public.” See Walker, Planning Function in Urban Government, 96, 97 (1950). Nevertheless, archaic condemnation procedure and the high cost of reimbursing property owners militates against the use of this power. Bassett, Zoning 27 (1936); Note, U. of Pa. L. Rev. 91, 93 (1953). It has been suggested that eminent domain be reserved for situations where there is a compelling public need for the land. Slum clearance is a common instance of the exercise of this power. Note, 1951 Wis. L. Rev. 685, 697.

The British have organized a systematic body of law to cope with public regulation and ownership of undesirable land uses. See Note, 60 Harv. L. Rev. 800 (1947).

35. The Supreme Court has indicated that considerable weight will be given a legislative declaration that a particular use or structure is a nuisance per se. Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brick kiln); Reinman v. Little Rock, 237 U.S. 171 (1915) (livery stable). “It should be observed, however, that in almost all of the cases where legislation of this kind has been sustained, the enterprise prohibited has been one of a type causing a tangible kind of harm, such as an invasion of the atmosphere with soot, or odors, or noise—a kind of harm which is likely to result in common law liability.” Noel, Retroactive Zoning and Nuisances, 41 Col. L. Rev. 457, 464 (1941); Tucson v. Arizona Mortuary, 34 Ariz. 495, 272 Pac. 923 (1928) (mortuary); Levine v. New Britain, 125 Conn. 478, 7 A.2d 222 (1939) (junk yards); Knowles v. Central Allapattae Properties, 145 Fla. 123, 198 So. 819 (1940) (dog kennel); Rosehill Cemetery Co. v. Chicago, 366 Ill. 207, 8 N.E.2d 664 (1937) (grave yard).

36. To be exempt from zoning restrictions, the use must have been in existence on the effective date of the ordinance. An intended use is not enough. See Yokley, Zoning Law & Practice § 151 (1953); Note, U. of Pa. L. Rev. 91, 95 (1953).
of existing structures\textsuperscript{37} or the resumption of a use once it has been discontinued,\textsuperscript{38} and to forbid reconstruction where the building has been destroyed beyond a certain stipulated percentage of its value.\textsuperscript{39} Currently, two new methods of combatting the nonconforming use problem have been suggested—amortization and performance standards regulation.

Recent state enabling acts and city ordinances have provided for amortization of nonconforming uses and buildings.\textsuperscript{40} The general purpose of this legislation is to establish a period of grace,\textsuperscript{41} based upon the useful remaining life of nonconforming structures and a reasonable time for the nonconforming uses, at the termination of which the uses and buildings must conform to regulations or be discontinued. The amortization period is relatively short for uses which embrace no structure or where

\textsuperscript{37} "Any change in the premises which tends to give permanency to, or expands the non-conforming use would not be consistent with . . . " the basic purposes of zoning. Yokley, supra note 36 at 380. Some ordinances have permitted structural extensions which change the use to one of a higher classification or one which conforms to restrictions in the district. Dayton, Ohio, Zoning Ord. § 210 cited in Note, 35 Va. L. Rev. 348, 349 (1949). However, the courts have generally restricted extension or enlargement of existing nonconforming uses. DeFelice v. Zoning Board of Appeals, 130 Conn. 156, 32 A.2d 635 (1943); Mercer Lumber Co. v. Glencoe, 390 Ill. 138, 60 N.E.2d 913 (1945); Austin v. Older, 283 Mich. 667, 278 N.W. 727 (1938); Puretti v. Johnson, 132 N.J.L. 576, 41 A.2d 896 (1945). There is also authority denying an owner the right to change from one nonconforming use to another such use. Moore v. Lexington, 309 Ky. 671, 218 S.W.2d 7 (1949); Town of Lexington v. Bean, 272 Mass. 157, 172 N.E. 867 (1930); People v. Giorgi, 16 N.Y.S.2d 923 (County Ct. 1939); Shields v. Spokane School Dist., 31 Wash.2d 247, 196 P.2d 352 (1948).

\textsuperscript{38} Chicago, Ill., Zoning Ord. § 14 (h) (1923). The problem is what constitutes discontinuance or abandonment. The courts have generally ruled that an intentional act of abandonment on the part of the owner is required. A temporary non-use without the requisite intent is not enough. Fairbanks Morse & Co. v. Freeport, 125 N.E.2d 57 (Ill. 1955); People ex rel. Delgado v. Morris, 334 Ill. App. 557, 79 N.E.2d 839 (1948); Landay v. MacWilliams, 173 Md. 460, 196 Atl. 293 (1938); Appeal of Haller Baking Co., 295 Pa. 257, 145 Atl. 77 (1928). Perhaps, it would be advisable to place a definite time limit on what would amount to an abandonment.

\textsuperscript{39} Thus, ordinances prohibit reconstruction of a nonconforming use where it has been damaged by fire, windstorm, or other catastrophe. Restrictions which limit the amount of damage between 50 and 75% of the value of the building have been approved by the courts. See Baird v. Bradley, 109 Cal. 2d 364, 240 P.2d 1015 (1952); Palazzola v. Gulfport, 211 Miss. 737, 52 So.2d 611 (1951); Navin v. Early, 184 Misc. 545, 56 N.Y.S.2d 108 (1945). An Indiana decision ruled that a worn out refreshment stand could not be reconstructed. Fidelity Trust Co. v. Downing, 224 Ind. 457, 68 N.E.2d 789 (1946). Ordinary repairs for natural deterioration are excepted from these regulations. 1 Yokley, Zoning Law & Practice § 156 (1953).


\textsuperscript{41} Owners are given a number of years in which to prepare to eliminate their use or structure. The periods are not uniform in length. They range from 2 to 40 years. Note, 9 U. Chi. L. Rev. 477, 480-2 (1942).

\textsuperscript{42} "(a) The nonconforming use of land shall be discontinued within five (5) years from June 1, 1946, or within five (5) years from the date the use became non-conforming, in each of the following cases: (1) where no buildings are employed in connection with such use; (2) where such buildings employed are accessory or in-
the buildings themselves conform but the uses housed do not. For example, groceries housed in family dwellings, junk yards, and used car lots could be removed from a residential district without destroying any existing building. A typical ordinance in Los Angeles provides that such uses must be discontinued within five years. Where nonconforming buildings or uses housed in such structures are being removed, a variable term of twenty to forty years is allowed. Thus, a nonconforming use in a nonconforming building may continue until the structure is amortized. Ordinances usually provide an exception for the immediate removal of uses and buildings which become a nuisance or create an imminent danger to the public health, safety, or morals.

Amortization effectuates the ultimate goal of zoning which is to confine certain classes of uses and buildings to particular localities and to reduce uses and structures to conformity as soon as possible. If the period of amortization is sufficiently extensive, individual losses will be minimized since the owner will be afforded an opportunity to make plans to spread his loss over a period of time in which he is free from new competition in the neighborhood. The cost of government coerced compliance with zoning regulation may be a deductible business expense for income tax purposes. The term in which nonconforming structures must

 incidental to such use; (3) where such use is maintained in connection with a conforming building." Los Angeles Mun. Code (§ 12.23 B & C) (1946) as quoted in Los Angeles v. Gage, 274 P.2d 34, 37 (Cal. 1954).

43. "The nonconforming use of a conforming building or structure may be continued, except that in the [Residence] Zones any nonconforming commercial or industrial use of a residential building or residential accessory building shall be discontinued within five (5) years from June 1, 1946, or five (5) years from the date the use becomes nonconforming, whichever date is later." Ibid.

44. See notes 42 and 43 supra.


46. Ibid. But see State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929) where only one year was allowed to eliminate a nonconforming drug store.


48. Zoning is actually the "legal tool" by which comprehensive municipal planning is accomplished. Walker, Planning Function in Urban Government 57 (2d ed. 1950). Amortization offers another device to achieve this end by eliminating one of the most detrimental impediments. In addition, it provides an equitable median to balance the interests of private land owners and the public need. See Note, 35 Va. L. Rev. 348, 357 (1949).

49. See note 12 supra. "The proprietor of the small store in a district reserved for residential use, for instance, need no longer fear the entry of new stores into the neighborhood, insofar as he has acquired a monopoly under the ordinance for the amortization period." Note, 9 U. Chi. L. Rev. 477, 485-6 (1942). Also see Note, 102 U. of Pa. L. Rev. 91, 101 (1953).

50. A recent tax case indicates that where a property owner is forced to destroy a business structure because it does not conform to municipal fire restrictions he may deduct his loss. Chesbro v. Commissioner, 21 T.C. 123 (1953). Also, it was ruled a deductible loss where a building was torn down for business purposes. Dayton Co. v. Commissioner, 90 F.2d 767 (8th Cir. 1937).
conform or be discontinued is discretionary within the maximum and minimum limits of the ordinance. In determining the permissive period of continuance the zoning board may consider the type and construction of the building, the nature of the use, and its economic importance in the community.

Some current writers have suggested a complete departure from conventional zoning methods. Their system, known as "performance standards" regulation, would permit any land use in any district so long as the activity does not injuriously affect adjacent property, disturb the comprehensive plan, or unduly burden municipal services. The aim of such regulation is to compel the removal of the actual damaging effects of nonconforming uses. It would provide performance standards capable of measurement on scientific instruments. Units of measure such as the

51. "Brick, stone, or concrete buildings with structural members of steel are given a hundred years of life; brick, stone, or concrete buildings with structural members of metal, reinforced concrete, masonry, or timber are given seventy-five years; all other buildings are given fifty years." Note, 35 VA. L. REV. 348, 356 (1949), citing CHICAGO, ILL., ZONING ORD. § 20 (1944).

52. This consideration is an aspect of the "general welfare" of the community. Zoning officials would be inclined to allow the maximum length of time before coercing the removal of the major income-producing business in the community. There would be no compelling necessity which would justify extending the period within which a neighborhood sales room was forced to conform so long as the owner is afforded an opportunity to equitably spread his loss.

53. "The expression 'performance standards' is taken from building code terminology. Modern building codes are written more in terms of what materials and methods of construction will do—their performance under stated conditions—rather than in specific descriptions of materials and building methods. This change has been forced on building commissioners because of the greater number of new materials and designs that have been brought out in the past ten or twenty years." O'Harrow, Performance Standards in Industrial Zoning, PLANNING ADVISORY SERVICE BULL., AM. SOC. PLAN. OFF. 1 (1951). O'Harrow advocates the organization of a system of control based upon the ability of uses and structures to conform with performance regulations. He points out that present ordinances merely describe the undesirable conditions which are sought to be eliminated. For example, a common provision is to prohibit unwarranted emission of dust, odor, noise, or smoke. Performance standards would establish a measurement of permissive units of dust or noxious gases per cubic foot of air. Id. at 2.

54. Thus, each land use would be tested by its direct or indirect effect on adjacent land uses, on government services, and on community growth. Under such a standard, industry, business, and homes could be located on any site in any zone so long as the intended use met adequate performance standards." Horack, Performance Standards in Residential Zoning, 1952 PLANNING 153, 154.

55. The function of planning officials would be to devise standards which must be conformed with in order to establish a business or industry in a residential neighborhood. Regardless of the material of which a factory is constructed—brick, concrete, steel, or wood—the question would be whether it could withstand 2,000 degrees Fahrenheit for two hours so that it would not be a fire hazard to the surrounding property. If not, it should not be located in close proximity with family dwellings.

56. O'Harrow proposes to "substitute a quantitative measurement of an effect for the qualitative description of that effect . . ." to determine the right of an owner to locate within a particular zone. O'Harrow, supra note 53 at 4.
"decibel" or "some" for noise,\(^5\) density regulations for sewage and traffic,\(^5\) "analytic" schedules to determine fire risks,\(^5\) the umbrascope or Ringelman chart for smoke control,\(^6\) and maximum concentrations of noxious compounds to regulate odor and gases,\(^6\) are the measuring devices of the system. Different standards are established for various areas within a city but if the noise, smoke, odor, dust and dirt, noxious gases, glare and heat, fire hazard, industrial waste, traffic and transportation, aesthetic, and psychological effects produced by use do not violate the residential standards,\(^6\) even a heavy industry could be located in a residential area. When the use first fails to meet the standard requirements, the owner will be ordered either to abate such conditions or amortize his use.

Although performance standards have presently been developed

\(^{57}\) The "some" is a new unit of measurement for noise developed in recent years. The old unit, the "decibel," was used to measure the pressure created by sound waves. The "some" adds a new dimension for the loudness of noise. Objectionable industrial sounds originate from the factory in only 5% of the cases. Such noise is mainly a result of the movement of traffic and transportation. \(\text{Id. at 5}\). The most effective means of muffling actual factory noise is the "set back line." The prospects of controlling factory-produced noise are very good. \(\text{Ibid.}\)

\(^{58}\) Standards for the permissive release of industrial sewage waste have been organized. Density regulations would permit an industry to throw off sewage equivalent to the amount that would be discharged by so many people per acre. For example, in slaughterhouses a steer is equal to the waste produced by 2 1/2 hogs, and a hog is equal to the domestic waste of 2.43 persons. A slaughterhouse which processes 1,000 hogs a day, or 400 steers, dispenses the same sewage load as 2,430 persons. A particular zone could be restricted to uses which produce waste equivalent to 1,000 persons per acre. \(\text{Id. at 13, 14}\).

In the area of traffic control density regulations could adopt several units of measurement—employees per acre of ground, daily truck-loads, or carloads. There is also the possibility of channelling traffic toward particular streets or providing public conveyance. \(\text{Id. at 16, 17}\).

\(^{59}\) Most of the major cities have fire codes and ordinances. Fire insurance rates are computed on the basis of the hazard involved in the use. The "analytic" schedule classifies particular hazards numerically in percentage figures. These are determined from a combination of factors—building construction, the use housed in the building, the danger from adjoining hazardous businesses, and the current maintenance of the building. These ratings could be utilized to prescribe standards for the location of businesses in residential areas. \(\text{Id. at 11, 12}\).

\(^{60}\) Both of these devices measure the degree of smoke density. The extensive work carried on in smoke control in recent years has provided excellent standards which are being used in the major industrial cities. \(\text{Id. at 6, 7}\).

\(^{61}\) At present the most effective control of unpleasant odors is to prohibit the release of particularly noxious gases beyond so many ounces per cubic feet of air. Dangerous gases could be controlled in a similar manner by prescribing maximum concentrations of compounds which are injurious to plant and animal life. O'Harrow, suprano note 53, at 7, 9, 10.

\(^{62}\) O'Harrow suggests these 11 fields in which performance standards should be adopted for industrial zoning. \(\text{Id. at 4-20}\). They represent the objectionable traits of present industries. If an industry could conform with the performance standards prescribed for these areas of regulation, there should be little objection to its location in more restricted use districts.
only for industries, regulations could also be devised for commercial and residential uses. Standards for the latter two uses could require off-street parking and loading spaces proportionate to the volume of business or number of persons housed in order to curb traffic congestion. Traffic could be channelled through exits which take the pressure off congested streets. Many of the adjoining storage "shacks" could be abated. Requirement of containers for the accumulation of trash and waste would dispose of unsightly and unsanitary conditions. In this manner many of the objectionable traits of nonconforming uses could be removed, and owners who complied would not have to eliminate their buildings or uses.

With this brief outline of amortization and performance standards it becomes necessary to examine the practical effects of such regulation. The first and most fundamental question is whether zoning officials would enforce such laws. Under both systems wide discretionary powers are placed in the hands of planning commissions and boards of zoning appeals. Their abuse of the power to grant variances and make spot zoning amendments under present ordinances may indicate that they would also be reluctant to order the discontinuance of a use or the destruction of a building. This is largely a result of their susceptibility to local influence and pressure groups. The present indulgent attitude

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64. Density regulation was suggested as early as 1916 in laying out residential districts. It has also been used as the basis for prescribing minimum lot requirements. Basset, ZONING 28 (1936). See note 58 supra.
65. See note 59 supra.
66. In establishing the period of amortization for nonconforming structures the ordinance would prescribe a maximum and minimum term within which structures must conform or be removed. If official discretion is exercised in a reasonable manner, individual hardship will not result and objectionable buildings will be eliminated. Objective standards could be established in most instances based on the type of building construction. Subjective considerations should enter only in instances where the public necessity is not so compelling or where the economic importance of the business in the community is a major factor. The Chicago ordinance prescribes the period of amortization strictly on the basis of the useful life of the structure. See note 51 supra.

Even performance standards require the exercise of discretion by enforcing officers. One of the basic criticisms of present ordinances is their use of numerical restrictions to describe permissive uses. O'Harrow gives the example of a classification which says a laundry employing five persons is a business and may locate in a commercial zone, while a laundry employing six persons is an industry and may not reside in the district. O'Harrow, supra note 53, at 3. Administrative discretion under performance standards is exercised to determine the ability of structures and uses to conform to regulations under stated conditions. Id. at 1.

67. See notes 9, 10, and 11 supra.
68. Variances and zoning amendments have generated judicial accusations hinting that political pressure and personal influence exist at the administrative level. "[T]he amending ordinance is invalid because it is inconsistent with the original comprehensive zoning ordinance of 1923, and permits arbitrary, inharmonious, and preferred situations to be established and given special privileges, special freedom from maximum height and volume restrictions . . . without just cause. . . . We cannot resist saying that it is indeed strange that an ordinance making as radical changes in the height and
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is likely to change under the new proposals. Amortization and performance standards afford an opportunity to rechannel the discretionary function of zoning boards. Current ordinances provide only indirect means of elimination,\(^69\) coupled with the power to tolerate and even increase nonconforming uses.\(^70\) Under these new systems there is legislative recognition of the harmful effects of the nonconforming use and structure. Official powers are directed toward discontinuance which should have a noticeable effect on the flagrant practices of granting variances and spot amendments. The ordinance could direct the commission to classify each use and presently fix the permissive period for its continuance\(^71\) or the performance standard with which it must comply. At this point their discretion has been exercised and enforcement becomes ministerial. If zoning officials remain reluctant to order conformance or discontinuance, the ordinance could provide an alternative private remedy. One or more adjoining property owners could be granted the right to mandate the commission to perform its duties.\(^72\) Adjoining owners, being the ones who suffer from the presence of the use, will probably not be so hesitant to coerce compliance.

A weakness of present legislation is its propensity to produce a large number of vacant buildings. These vacancies result from regulations which prohibit resumption of a nonconforming use in a nonconforming building once the use has been abandoned.\(^73\) Ordinances which preclude reconstruction of a nonconforming building after it has been partially destroyed\(^74\) also cause vacant structures when the owners move out and


69. See notes 36, 37, 38, 39 supra on indirect means of regulating nonconforming uses and structures.
70. See notes 6, 10, 11 supra.
71. See note 51 supra.
72. Private litigants have been granted a cause of action where they can show that the continued operation of a nonconforming use or structure deprives them of the full enjoyment of their own conforming property. A suit to enjoin a nonconforming use has been accorded adjoining owners even though the nonconformance does not amount to a common law nuisance. State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929); State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929). The courts have generally granted the remedy of mandamus to compel the performance of a ministerial act. Ballou v. Kemp, 92 F.2d 556 (D.C. Cir. 1937); State ex rel. Miller v. Bender, 102 Ind. App. 185, 1 N.E.2d 662 (1936); City of New York v. Schoeck, 294 N.Y. 559, 63 N.E.2d 104 (1945); State ex rel. Ward v. Raleigh County Court, 76 S.E.2d 579 (W. Va. 1953).
73. See note 38 supra.
74. See note 39 supra.
fail to raze the structure. Under present laws no action can be taken until the vacant structures can be attacked as nuisances. An amortization plan would give zoning officials the power to order destruction of the non-conforming structures within a reasonable time.\textsuperscript{75}

Where only a use is sought to be discontinued, such as an auto wrecking lot, the owner still has potentially valuable property available for any use permitted in the district, or, in the case of a residence converted into an office, the structure can be utilized for its originally intended purpose. Nonconforming buildings are sometimes permanently constructed and unadaptable to zoning regulations. A common example is a filling station in a residential zone. It is usually nonconforming as to front, side, and rear yard requirements, as well as to minimum floor standards. The building must be destroyed or remain nonconforming to all requirements except use.

In a majority of cases it will not be necessary to destroy existing structures. The survey of the community revealed that the most numerous nonconforming uses are neighborhood businesses of which there are ninety-eight. Twenty-four were offices in homes, 5 were unimproved uses of lots, 8 were shops located in garages or accessory buildings, and 7 were groceries in homes. Thus, 45 percent of the total neighborhood businesses could be eliminated without destroying any structures. Of the remaining buildings which contain businesses there is no doubt that a considerable number of them are adaptable to permissive uses.\textsuperscript{76} The most difficult structures to convert are storage buildings, filling stations, and permanently constructed groceries and sales rooms.\textsuperscript{77} It is estimated that actual destruction would be necessary in only 30 to 35 percent of the structures housing businesses.\textsuperscript{78}

Of the 39 multi-family dwellings only 11 were apartment buildings designed to accommodate 3 or more family units. Discarding the

\textsuperscript{75} Little is gained by compelling the removal of a use from a nonconforming structure if the building itself is not converted or destroyed. Two such structures were examined in the Bloomington, Indiana, survey. One was an abandoned dry cleaning establishment and the other a grocery store. Both were located in residential neighborhoods and had become neighborhood "dumps." In addition, the structures had fallen into disrepair, and, because of their frame constructions, represent possible fire hazards.

\textsuperscript{76} There is some evidence from the construction and location of neighborhood businesses that the structures were originally converted family dwellings. Many of these buildings have frame construction and contain dwelling units in their upper stories. Such structures could be adapted to residential uses merely by partitioning rooms and installing utilities.

\textsuperscript{77} There were 54 nonconforming structures of which 9 were storage buildings, 9 were filling stations, and 14 were sales rooms and businesses which were of brick or concrete construction. All of these structures would be difficult to convert and most of them could not meet lot and floor space requirements.

\textsuperscript{78} In 32 of the 98 business structures destruction was considered necessary.
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possibility of conversion, destruction would be necessary in less than 28 percent of the cases in this group. In five instances family dwellings were located in industrial zones. All of these homes were in disrepair and suffered from the proximity of the industry. These nonconforming residential uses limit industrial expansion and should be amortized.\footnote{79}

Generally, industries cannot be converted into commercial or residential uses. In 5 of the 11 industries their location was attributable to transportation facilities. One industry was in the final stage of dilapidation and could be abated as a fire hazard. The remaining ten would have to be amortized. It is in this area of nonconforming industrial structures that amortization ultimately would require destruction of the largest number of structures.

In blight areas amortization does not appear to be the practical solution to the nonconforming use problem. Twelve of the 25 uses and structures examined in blight districts exhibited better physical conditions than their surrounding neighborhoods.\footnote{80} The remaining 13 were no more undesirable than the area as a whole. Little would be gained in coercing early elimination of these uses. This is an area of regulation where administrative discretion assumes importance. Structures and uses should be permitted to continue for the maximum period or until municipal redevelopment is initiated. Blight conditions are best improved by district conservation rather than by structure to structure restriction.\footnote{81}

Under performance regulations it is possible that in a particular neighborhood some uses and structures could remain while similar uses and structures failing to adapt themselves to the established standards would be removed. Performance regulation would require individual examination and classification of each use and structure to determine

\footnote{79. It will be noted that the Bloomington ordinance makes residential structures located in industrial districts a nonconforming use when they are not located within 200 feet of an abutting R Zone. Older ordinances regarded a dwelling as the highest division of land use, and permitted it to be located in any of the less restricted zones. Not only do dwellings limit industrial expansion, but the presence of noise, odor, smoke, and dirt in heavy manufacturing areas render them undesirable for home sites. BLOOMINGTON, IND., ZONING ORD. § 119 (A) (1) (1950).}

\footnote{80. This may be explained by the fact that they are the highest income-producing units in the area and have more available capital for structural maintenance.}

\footnote{81. Slum clearance projects and municipal redevelopment have achieved considerable success in recent years. Often an entire area is redesigned so that an integrated plan may be developed. It is not uncommon in such projects for buildings, which do not in themselves imperil health or safety or contribute to blight conditions, to be taken by condemnation. The area must be planned as a whole so that the conditions which cause slum districts can be eliminated. The Supreme Court has indicated that municipal conservation is not limited to individual structure removal. Entire blight areas may be removed even though harmless uses and structures are carried in the wake. Berman v. Parker, 348 U.S. 26 (1954). Due process is satisfied when property owners receive compensation for the property taken. \textit{Id.} at 36.}
whether it conforms to the standards laid down. It is at this point, when individual restriction becomes more personal, that people become increasingly conscious of their constitutional guarantees. By providing for the gradual elimination of inconsistent uses and structures, amortization affirmatively enforces zoning classification. Performance standards would go a step further and distinguish between individual uses and structures in determining their right to continue operation. Such legislation may possibly be judicially attacked as arbitrary regulation if the standards are too indefinite so that administrative discretion is left unchecked.82 On the other hand, it has been suggested that performance standards could be utilized with considerable success in intrazone regulation.83 Even with the present sprinkling of nonconforming uses throughout the city, municipalities have an inclination to divide themselves into districts which are predominantly residential, commercial, and industrial. Current ordinances establish zones in which the permissive uses are further particularized into technical use classes. A typical ordinance sets up an R-1 district in which only single family dwellings with their accessories and government parks are permitted. In R-2 districts two-family homes and adjoining professional offices are added. The categories continue to expand in the R-3 zone where multi-family dwellings, apartments, and nursing homes are allowed, and so on.84 Such particularization in narrow categories causes large numbers of technical nonconforming uses to exist.

A liberalized reclassification of the zones would permit many existing uses to continue if the requirements of the performance standards were met. The location in an R-1 district of two-family homes or adjoining

82. Zoning ordinances must be uniform in application for each class of uses or buildings within a district. The requirement of uniformity was incorporated in enabling acts in the early days of zoning history because property owners feared that zoning officials would grant special favors to parties in the same district. This principle has been carried forward in the courts as an aspect of the broader doctrine that all property similarly situated will receive equal treatment. Basset, Zoning 50-51 (1936). Broadly stated, the courts have required equality and uniformity of treatment for each class of use or kind of building within a particular district. Justensen's Food Stores v. Tulare, 12 Cal.2d 324, 84 P.2d 140 (1938); Hedgcock v. Reed, 91 Cal. 155, 13 P.2d 264 (1932); Chicago Cosmetic Co. v. Chicago, 374 Ill. 384, 29 N.E.2d 495 (1940); Holden Co. v. Connor, 257 Mich. 580, 241 N.W. 915 (1932); Flora Realty & Investment Co. v. Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952); Potts v. Board of Adjustment, 133 N.J.L. 230, 43 A.2d 850 (1945); Village of South Orange v. Heller, 92 N.J. Eq. 505, 113 Atl. 697 (1921); Taylor v. Moore, 303 Pa. 469, 154 Atl. 799 (1931).

83. See Horack, Performance Standards in Residential Zoning, 1952 Planning 153, 155. O'Harrow suggested that zone classification will not be totally abandoned under performance regulation when he said: "[O]ur zoning ordinance will merely set up the standards for each zone, and any industry that can meet those standards will be permitted to locate in that zone." O'Harrow, supra note 53, at 20.

84. Business areas include limited business (B-1), downtown business (B-2), and general business (B-3) zones. Industrial districts are divided into general industry (M-1) and heavy industry (M-2) zones. Examples in this section are taken from the Bloomington, Ind., Zoning Ord. §§ 113-120 (1950).
professional offices has little observable effect on the neighborhood.\textsuperscript{85} Limited commercial businesses, such as filling stations, groceries, and restaurants, by complying with adequate standards could be located in the vicinity of multi-family dwellings and apartment houses. Business and industrial zones are likewise broken down into technical classifications which could be similarly liberalized.\textsuperscript{86} By retaining the three district basis a comprehensive plan would be preserved and uses which will never conform could be channeled toward less objectionable locations. The function of performance standards within the broader zones would be to eliminate the detrimental effects of permitted uses. This would necessitate the removal of fewer uses and place existing nonconformists under official scrutiny.

The courts early recognized that increases in population and complexity of urban growth have required restriction of the use and occupation of private property.\textsuperscript{87} Justification for zoning regulation was found in the police power.\textsuperscript{88} In early federal cases the definition of the police power was couched in broad, sweeping terms. It is one of the least limitable of the powers of government\textsuperscript{89} and may not be restricted even though individual hardship results.\textsuperscript{90} Where a substantial relation to the public

\textsuperscript{85} Six two-family dwellings in single-family zones were examined in the survey. In only one instance a storage shack was located on the rear of a lot. Outside of this no apparent effect on the neighborhood was observed.

\textsuperscript{86} See note 84 supra.

\textsuperscript{87} "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and are constantly developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." Euclid v. Ambler Realty Co., 272 U.S. 365, 386-7 (1926). See also Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925).

\textsuperscript{88} Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Marblehead Land Co. v. Los Angeles, 47 F.2d 528 (9th Cir. 1931); Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925); Lutz v. New Albany City Plan Commission, 230 Ind. 74, 101 N.E.2d 187 (1951); Lincoln Trust Co. v. Williams Building Corp., 229 N.Y. 313, 128 N.E. 209 (1920); Spencer-Sturla Co. v. Memphis, 155 Tenn. 70, 290 S.W. 608 (1927); State ex rel. Miller v. Cain, 242 P.2d 505 (Wash. 1952).

\textsuperscript{89} The Supreme Court stated in Hadacheck v. Los Angeles, 239 U.S. 394, 410 (1915): "It is to be remembered that we are dealing with one of the most essential powers of government, one that is least limitable. It may, indeed, seem hard in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it 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."

\textsuperscript{90} Zahn v. Board of Public Works, 274 U.S. 325 (1927); Standard Oil Co. v. Tallahassee, 183 F.2d 410 (5th Cir. 1950); Marblehead Land Co. v. Los Angeles, 47 F.2d 528 (9th Cir. 1931); Terrace Park v. Erret, 12 F.2d 240 (6th Cir. 1926). \textit{But see Note, 39 YALE L.J. 735 (1930)} where the author suggests that the courts do consider the extent of economic loss to the owner in determining the reasonableness of the regulation.
health, safety, morals, or general welfare can be demonstrated, zoning ordinances are sustained.\textsuperscript{94} With realization of the disparaging effects of nonconforming structures and uses, amortization should come within this limitation. The Supreme Court recognized that with the growth and development of municipalities the police power must also grow to meet the new and changing needs of society.\textsuperscript{92} The judiciary has yielded the function of determining the public need to the legislature\textsuperscript{93} and has restricted legislative determination only where it is shown to be unreasonable or arbitrary.\textsuperscript{94}

State courts, upon whom has fallen the burden of deciding specific cases, have enforced the regulation of nonconforming uses on unimproved land.\textsuperscript{95} Some ordinances that would have compelled the removal of existing nonconforming structures have been ruled unreasonable.\textsuperscript{96} Regulation in the latter instance was said to interfere with vested property rights in violation of the Fourteenth Amendment.\textsuperscript{97}


\textsuperscript{92} See note 87 supra.

\textsuperscript{93} “Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the states legislating concerning local affairs.” Berman v. Parker, 348 U.S. 26, 32 (1954).

\textsuperscript{94} Euclid v. Ambler Realty Co., 272 U.S. 365, 393 (1926). See also Standard Oil Co. v. Tallahassee, 183 F.2d 410 (5th Cir. 1950); Los Angeles v. Gage, 274 P.2d 34 (Cal. 1954).

\textsuperscript{95} The courts are inclined to distinguish between mere uses of land, such as tennis courts, farms, and parking lots, and the restrictive regulation of structural improvements. Acker v. Baldwin, 101 P.2d 505 (Cal., Dist. Ct. App. 3rd 1940); People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952); People v. Kesbec, Inc. 281 N.Y. 785, 24 N.E.2d 476 (1939); People v. Wolfe, 272 N.Y. 608, 5 N.E.2d 355 (1936); Rice v. Van Vranken, 255 N.Y. 541, 175 N.E. 304 (1930); Fox Lane Corp. v. Mann, 243 N.Y. 550, 154 N.E. 600 (1930); West Brothers Brick Co. v. Alexander, 169 Va. 271, 192 S.E. 881 (1937).

\textsuperscript{96} Yuba City v. Chernaivsky, 117 Cal. App. 568, 4 P.2d 299 (1931); Jones v. Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930); Roach v. Board of Zoning Appeals, 175 Md. 1, 199 Atl. 812 (1938); Jenny v. Hymes, 282 Mass. 182, 184 N.E. 444 (1933); Austin v. Older, 283 Mich. 667, 278 N.W. 727 (1938); Adams v. Kalamazoo Fuel & Ice Co., 245 Mich. 261, 222 N.W. 86 (1928); Cassel Realty Co. v. Omaha, 144 Neb. 753, 14 N.W.2d 600 (1944); Corpus Cristi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953).

\textsuperscript{97} Some writers contend that to deprive an owner of his business without compensation is a taking without due process of law. Coerced elimination of uses and structures results in economic waste which is detrimental to the public interest. Fratcher, \textit{Zoning Ordinances Prohibiting Repair of Existing Structures}, 35 Mich. L. Rev. 642 (1937); Note, 102 U. of PA. L. Rev. 91, 105 (1953). It deters business investment because entrepreneurs are deprived of the security that their business may be maintained until voluntarily abandoned. \textit{Basset}, \textit{ZONING 113 (1936)}; Smith, \textit{Land Use Surveys & Legal Limitations in Zoning}, 4 JOHN MARSHALL L.Q. 360, 364 (1939). An undue financial hardship is placed on a few individuals, and the individual interests are too substantial to justify the taking in light of the objectives to be achieved. Thus, it is maintained that since zoning is aimed at uses which are not sufficiently noxious
were ruled to have "vested" from the time there was an improvement on the realty. This interpretation seems unduly conservative in light of the broad powers described by the Supreme Court.

These early state decisions, which ruled unconstitutional regulations requiring the removal of existing nonconforming uses and structures, can no longer be regarded as authority because of their failure to recognize the disruptive effects of such uses on any zoning plan. Recent opinions indicate a receptive attitude toward amortization plans. They acknowledge that the power of a city to establish use districts includes the right to remove nonconforming uses in a reasonable manner. A valid exercise of the police power always requires a preponderate public interest. There are familiar examples where the police power has been used to cause immediate destruction of property or to require affirmative acts of property owners. The tendency of nonconforming uses to promote

to be abated under nuisance law, not serious enough to warrant an exercise of eminent domain, its destructive operation must be limited. Note, U. Pa. L. Rev. 91, 107 (1953).

The basic fallacy of this position is the willingness to assign a fixed meaning to vested rights. The Supreme Court acknowledged the fluctuating nature of private property rights when it said: "[W]hile the meaning of the constitutional guaranties never varies, the scope of their application must expand and contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing society it is impossible that it should be otherwise." Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926). In truth vested rights in property are a social value judgment. A vested right is no more than a judicial declaration of what society would regard as an undue taking at a particular point in time. Comment, 34 Yale L.J. 303, 308 (1934). If the nonconforming use or structure is detrimental to the public interest, then society is ready to restrict their operation.

98. The "vesting" of a property right is demonstrated by the building permit cases. This situation arises where a landowner has acquired a permit to construct a business building, and before the structure is completed, the zoning ordinance is amended so that the business is a nonconforming use. Where the owner has obtained a valid permit and in reliance thereon incurs substantial liabilities or has substantially completed his building, then his right has vested in the intended use. Pelham View Apartments v. Switzer, 130 Misc. 545, 224 N.Y.S. 56 (Sup. Ct. 1927); Wickstrom v. Laramie, 37 Wyo. 389, 262 Pac. 22 (1927). But, where the owner has undertaken only insignificant acts or his investment is trifling, he must abide by the regulation. Brady v. Keene, 90 N.H. 99, 4 A.2d 658 (1939); McCurley v. El Reno, 138 Okla. 92, 280 Pac. 467 (1929).

99. See note 2 supra. See also Note, 9 U. Chi. L. Rev. 477, 484 (1942).

100. Standard Oil Co. v. Tallahassee, 183 F.2d 410 (5th Cir. 1950); Los Angeles v. Gage, 274 P.2d 34 (Cal. 1954); Livingston Rock & Gravel Co. v. County of Los Angeles, 272 P.2d 4 (Cal. 1954); Edmonds v. County of Los Angeles, 40 Cal.2d 642, 255 P.2d 772 (1953).


102. No compensation is required where the structure or use is so noxious that it constitutes a public or private nuisance. See, Noel, Retroactive Zoning and Nuisances, 41 Col. L. Rev. 457, 459 (1941).

103. The early railroad cases sustained statutes and ordinances under the police power which required the performance of affirmative acts. Chicago & Alton Ry. v. Transberger, 238 U.S. 67 (1915) (provide openings for the escape of water); Atlantic Coast Line v. Goldsboro, 232 U.S. 548 (1914) (required flagmen at crossings and tracks raised to grade of city streets); Minneapolis & St. Louis Ry. v. Emmon, 149 U.S. 364 (1893) (maintain fences along right-of-ways).
neighborhood blight, the resulting high cost of municipal services, and the detrimental effect on adjoining property values and home environment make a strong case for municipal regulation. The compelling public necessity to protect property development should place amortization plans completely within the realm of reasonable regulation.

SECTION 8(d) 4 LIMITATIONS ON THE RIGHT TO STRIKE: A CRITICISM

There can be little doubt that the right to strike is an integral part of any system of collective bargaining without which employees have no effective bargaining power. Strikes, of course, may be undesirable for a number of reasons: They may cause inconvenience and perhaps hardship to the general public and under some circumstances may be injurious to the entire economy. Strikes often inflict serious economic loss, not only upon the employer but also upon the individual employees engaged in the activity. The right to strike is, nevertheless, an indispensable element of the right to bargain collectively; it represents the power which, even if not used, constitutes the foundation of the union's

1. The Norris-LaGuardia Act and the NLRA, which were specifically created for the establishing, sanctioning, and protecting of collective bargaining, both specifically provide for the right to strike. "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment." Norris-LaGuardia Act § 4, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1952). "Employees shall have the right . . . to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." National Labor Relations Act § 7, 49 Stat. 452 (1935), 29 U.S.C. § 157 (1952).

2. Professor Frey of the University of Pennsylvania Law School stated that the employee has no effective bargaining power "unless those who can perform the jobs in a given bargaining unit are able to act as one man, and unless that 'one man' is given the privilege which any individual has of refusing to work upon the terms or under the conditions preferred. . . ." Rose, The Right to Strike: Is it an Inalienable Right of Free Man?, 36 A.B.A.J. 439, 520 (1950).

3. In spite of this fact, Senator Taft himself admitted the need for the right to strike: "We recognize that right [the right to strike] in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right." 93 Cong. Rec. 3951 (1947).

4. "Regardless of who initiates such action, both parties are, of course, subjected to costs. In the event of a strike, aimed at the employer's business operations, the employees too are subjected to a cost—their loss of wages—and it will be the employer's estimate of how long his employees will submit to such loss that will partly determine his estimate of the duration of the strike and consequently the cost to him of rejecting the union's terms." Chamberlain, Collective Bargaining 223 (1st ed. 1951).