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Eminent Domian - Acts Constituting the Exercise of Powers of Eminent Domain - Validity of Amoritization of Nonconforming Uses

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Recent Case

EMINENT DOMAIN—ACTS CONSTITUTING THE EXERCISE OF POWERS OF EMINENT DOMAIN—VALIDITY OF AMORTIZATION OF NONCONFORMING USES—Plaintiffs applied for a certificate of occupancy which would have allowed them to continue to use their lots for the open storage of lumber, a use which was not in conformance with the local zoning ordinance. Plaintiffs' use had been in existence forty years prior to the enactment of the present zoning ordinance which allowed for the continuance of all pre-existing nonconforming uses except that of open storage, which was to have been terminated within six years after the effective date of the ordinance. The Supreme Court of Missouri, one justice dissenting,[1] *held* that a lawful pre-existing nonconforming use is a vested right and the provisions of this ordinance constitute a taking of private property for public use wiithout just compensation. Therefore it was not a justifiable exercise of the police power. *Hoffman v. Kinealy*, 389 S.W.2d 745 (Mo. 1965).

The U. S. Supreme Court's decision in the *Euclid* case[2] has been accepted as determinative that zoning which seeks to regulate the future uses to which land may be put is constitutional so long as it is not arbitrary or unreasonable and bears a substantial relationship to the public health, safety, morals or general welfare.[3] Unfortunately the termination of pre-existing nonconforming uses does not enjoy the status of such decisiveness. The only thing regarding this type of termination that can be said to be well settled is that it cannot be effected immediately.[4]

From this one point of agreement the decisions seem to diverge into nearly as many rationales for validity or invalidity as there are decisions. It cannot be said with any certainty that any par-

1. The dissenting justice felt that this was a valid exercise of police power.
2. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
3. Moore v. City of Lexington, 309 Ky. 671, 218 S.W.2d 7 (Ct. App. 1948); Comer v. City of Dearborn, 342 Mich. 471, 70 N.W.2d 813 (1955); State v. Coleman 224 P.2d 309 (Nev. 1950).
4. McCaslin v. City of Monterey Park, 163 Cal. App. 2d 339, 329 P.2d 522 (1958); Stoner McCray Systems v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956); State v. Thomasson, 378 P.2d 441 (Wash. 1963).

ticular use,[5] amortization period,[6] investment in the property,[7] or relation to surrounding area[8] will be found to be subject to a valid exercise of police power. Although there are other courts which also hold that pre-existing nonconforming uses are constitutionally protected rights,[9] at the other extreme of the continuum are cases which hold that the owner "holds property subject to a reasonable exercise of the police power"[10] and ". . . take it to be well settled that any business operated in violation or defiance of a zoning ordinance is to be regarded as a public or common nuisance."[11] Between these extremes lie cases which, deciding the validity issue either way with the rationales being logical and reasonable as applied to the facts in each particular case, are completely contradictory in their statements of law.[12] In the midst of this confusion are two notable expedients to the problem. One is a decision which, avoiding the controversy between constitutionally protected property rights and desirable homogenity in urban areas, held an amortization provision to be ultra vires. This is based on the concept of the city as a municipal corporation under the laws of the state.[13] The other is a state statute which specifically permits cities to pass ordinances by which the city governments may provide reasonable amortization periods.[14]

In view of the wide divergence of decisions in this aspect of municipal zoning, it is unfortunate that the court in the principal case chose to characterize nonconforming uses as vested rights. Stating that as a general rule nonconforming uses are constitutionally protected rights and citing cases in support thereof[15] is of little consequence in view of the fact that some courts presume the statute to be valid or require that it be shown to be unreasonable.[16]

Illustrative of the inadvisability of making such conclusive statements are the *Dema Realty* cases which held a nonconforming use

5. Spurgeon v. Board of Comm'rs. of Shawnee County, 181 Kan. 1008, 317 P.2d 798 (1957) (auto wrecking yard); *contra,* Town of Hempstead v. Romano, 33 Misc. 2d 315, 226 N.Y.S.2d 291 (Sup. Ct. 1962) (auto wrecking yard).

6. City of Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959) (one year amortization period); *contra,* City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953) (one year amortization period).

7. Stoner McCray Systems v. City of Des Moines, *supra* note 4 ($600 investment found to create vested right); *contra,* Grant v. Mayor & City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (Ct. App. 1957) (termination at loss of $45,000 annually).

8. City of St. Louis v. Friedman, 216 S.W.2d 475 (Sup. Ct. Mo. 1948) (use in industrial zone); *contra,* City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953) (use in industrial zone).

9. *E.g.,* City of Akron v. Chapman, *supra* note 6; Des Jardin v. Town of Greenfield, 262 Wis. 43, 53 N.W.2d 784.

10. State *ex rel.* Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929).

11. State *ex rel.* Dema Realty v. MacDonald, 168 La. 172, 121 So. 613 (1929).

12. See, *e.g.,* Murphy, Inc. v. Town of Wilton, 147 Conn. 358, 161 A.2d 185 (1960) (to be allowed to continue, owner must show unreasonable hardship); Holgate v. Zoning Bd. of Review of the City of Pawtucket, 60 A.2d 732 (R.I. 1948) (right to continue use cannot be curtailed without compensation).

13. DeMull v. City of Lowell, 368 Mich. 242, 118 N.W.2d 232 (1962).

14. ILL. ANN. STAT. ch. 24 § 11-13-1 (Supp. 1964).

15. People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952).

16. Village of Euclid v. Ambler Realty Co., *supra* note 2; Murphy, Inc. v. Town of Wilton, *supra* note 12; Mile Rd. Corp. v. City of Boston, 187 N.E.2d 826 (Sup. Jud. Ct. Mass. 1963).

to be a nuisance.[17] Notwithstanding that these cases have been discounted as poorly reasoned,[18] they are still good law in their jurisdiction,[19] and have been cited as authority on the validity of amortization.[20] Consequently unnecessarily broad statements of law, supporting decisions which are reasonable as to their particular facts, may too often serve as a deterrent or completely preclude amortization legislation, while in a different factual situation the statements may preclude an equitable determination on the facts.

Although there is a relatively equal division of the courts as to validity of amortization,[21] a review of the cases will show, not a confusion of the courts as to constitutional provisions, but, that they are deciding each case on its particular facts and then justifying their decisions with unnecessarily broad statements of law.[22]

The participation of the courts in this area obviates any attempts which might be made through state legislation to provide for amortization. Therefore it becomes incumbent upon the courts to recognize that "the policy of zoning embraces the concept of the ultimate elimination of nonconforming uses"[23] and that by its very nature all zoning must take a portion of the landowner's right to use his land as he pleases. Recognizing the desirability, indeed the necessity, of segregating some types of land use from others will leave for the courts to determine only whether the city or the landowner more reasonably should bear the cost of amortization. If the courts uniformly adopt this as their policy on amortization they will no longer have the need for finding unnecessarily broad constitutional rationales for their decisions and will be able to decide each case on its merits without fear of being shackled by earlier unnecessarily broad statements.

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17. *Supra* notes 10 & 11.
18. Grant v. Mayor & City Council of Baltimore, *supra* note 7.
19. State v. Carter, 221 La. 547, 59 So. 2d 831 (1952).
20. City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).
21. *Supra* notes 5, 6, 7 & 8.
22. O'Connor v. City of Moscow, 69 Idaho 37, 202 P.2d 401 (1949); State *ex rel.* Dema Realty Co. v. MacDonald, *supra* note 11; Town of Hempstead v. Romano, *supra*, note 5.
23. Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958).