Amortization: An Old Land-Use Controversy Heats Up

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"It is a reasonable way to solve a very difficult problem."
"It is unAmerican, unfair, and little more than highway robbery."
"I don't understand it and don't know what all the fuss is about."

These were some of the divergent comments heard in the halls of the Legislative Building this past spring as consideration of amortization—the subject of one of the more hotly debated bills of the 1991 session of the General Assembly—got under way. Across the state it has blossomed into one of North Carolina's more heated land-use controversies. What is behind this controversy, and why has it become such a hot topic?

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All photographs by Becky Kirkland

Amortization has developed a special meaning when applied to land-use regulation. It is not used in the technical or accounting sense of gradually reducing a fund or loan balance to zero. Instead, it is used to describe the practice of allowing a preexisting land use or structure that does not comply with newly adopted regulations to remain in place for a set period. Then the structure must be brought into compliance at the end of that grace period. In a number of North Carolina communities, grace periods for bringing prior land uses into compliance with new ordinances have recently expired. In these places, and their number is growing, amortization has moved from being an abstract legal concept to a very real practice that has substantial impacts on both individual landowners and the general public.

Nonconformities

Communities grow and change over time, as do attitudes and public concerns about land use. As a result, new land-use ordinances are adopted and existing regulations are amended. How should these newly adopted requirements apply to development that is already in place? For example, what if a new county zoning ordinance is adopted that restricts an area to residential uses, but a landowner in that area has been operating an automobile repair shop there for ten years? Or suppose, in response to a petition from concerned citizens, a city council amends the town's zoning ordinance to prohibit adult entertainment businesses from locating within 1,000 feet of a school, but there is an existing adult book store and massage parlor directly across the

Supporters of amortization contend that older structures built before stricter regulations were in place (for example, a regulation that signs can only be a certain height) have an unfair advantage over new structures.

street from the high school. What if a sign ordinance is amended to reduce the permitted size of signs, but a number of stores already have larger signs in place?

These prior uses that were once lawful but that do not meet new requirements are called *nonconforming uses*. Because structures and lots can also be nonconforming, some zoning ordinances use the broader term *nonconformities* to describe all of these situations. The question of how to deal with nonconformities that are incompatible with a city's plan for its future is as old as zoning. Court cases prior to the 1920s required uniform treatment of existing and future land use, so the framers of early zoning ordinances had a considerable dilemma. If they required all land uses to be brought immediately into compliance, the economic costs and political outcry might well doom zoning before it got started. On the other hand, if they left nonconforming uses in place, they faced potential invalidation of the ordinance by the courts and lost the full effect of their new zoning ordinance.

Three main options emerged as ways of addressing this issue, options that are still in use today. One is to require nonconformities to be immediately brought into compliance. For example, an industry that is discharging toxic wastes into the air or water can be required to stop the discharge, even if that means closing the plant. In some instances this may not be necessary or practical, and immediate compliance may have a harsh impact on landowners who started their land use in an entirely lawful fashion. These concerns led to the second option of *grandfathering* nonconformities—allowing them to continue to operate under the old rules, though frequently limiting any future expansion of that use. This, however, may not only leave important public interests unmet but can create inequities for landowners. For example, a new business that has to comply with a restrictive sign ordinance may feel that it is at a competitive disadvantage with competitors having older large signs. A third option is an intermediate position—amortization. With this option landowners are allowed to keep their nonconformity long enough to recoup much of their investment and plan for an orderly transition to the new requirements, but they are required to come into compliance with the new standards following this grace period. Other options exist, such as declaring nonconforming uses to be nuisances or using eminent domain power to condemn nonconformities, but they have been used only rarely.

All three of these main options for dealing with nonconformities have been used in North Carolina. As it is concern with the fairness and adequacy of the first two options that has led to the use of the third, it is useful to start with a review of the rules on terminating and grandfathering nonconformities before looking at the amortization issue.

Terminating Nonconformities

As a general principle, regulations needed to protect the public health, safety, and welfare are applied uniformly to all citizens. Where public health and safety considerations warrant, local regulations have long required certain nonconformities to be terminated. For example, in 1908 the state supreme court upheld an Edenton ordinance that required nonconforming awnings overhanging sidewalks to be removed because they were a fire hazard and aesthetically unpleasant. In this case Chief Justice Clark took an expansive view of the local government's police power to require the removal of nonconforming uses, holding that this was a policy decision for the town, not a legal issue for the courts:

> The ordinance was within the powers of the governing board of the town, and was properly held by his Honor to be reasonable. If it does not meet the approval of the citizens of the town, they can secure its repeal by instructing their town council to that effect, or by electing a new board. Such local matters are properly left to the people of a self-governing community, to be decided and determined by them for themselves, and not by a judge or court for them.[1]

In this and similar situations, where prior lawful land uses were deemed to be a public health or safety problem or a nuisance, the courts have allowed the police power to be used to require the uses to be brought into conformance with newly adopted requirements or be terminated. Current land-use issues that could fit into a similar public health and safety setting include restrictions on development in floodplains and public water supply watersheds.

A series of five state supreme court decisions in the late 1920s involving gasoline filling stations raised the possibility that termination of nonconforming uses might be constitutionally required in North Carolina for the new regulation to be valid. The court ruled in these cases that a general police power ordinance that treats existing and proposed land uses differently is illegal. In the first of these[2] a Clinton ordinance said no more filling stations could be built in the city's fire district but allowed six existing stations to remain in operation. Citing the state constitutional prohibition of monopolies, the court invalidated the ordinance for failing to apply uniformly to existing and proposed businesses. Other cases in this series invalidated an ordinance that allowed the

nonconforming use to remain for six months (an early experiment in amortization) and upheld an ordinance that required a gas station that had been in operation for twenty-five years to be closed.[3] These cases established the general principle that regulations adopted to protect public health and safety are to be applied uniformly to both existing and future land uses.

Grandfathering Nonconformities

The gas station cases raised a serious question as to whether local governments could make the policy choice of allowing the continuation of nonconformities when they adopted city-wide zoning ordinances.

The answer to this question came early in the state's zoning experience. In a 1931 landmark case upholding zoning in North Carolina, an exception was created to the requirement that nonconforming uses have to be eliminated. The court distinguished a *comprehensive* zoning ordinance from a *special purpose* ordinance dealing with one use, such as gasoline stations, and permitted comprehensive zoning ordinances to allow nonconforming uses to be retained. In this instance the property on which the landowner wished to build a new filling station was zoned by Elizabeth City as part of a business district that did not allow gasoline filling stations. There were four existing stations in that district that were allowed to continue operation as nonconforming uses. The court recognized the necessity of allowing the continuance of nonconforming uses if comprehensive zoning was to work:

> Unless the theory of nonconforming uses is practically applied it will be well-nigh impossible to zone the cities and towns of the State. It is an almost invariable rule to find a filling station in that part of town or city which in the interest of the public welfare should, under the zoning system, be devoted to other uses. If the ordinance destroys an existing business it is retroactive; if it cannot be enforced because such business exists zoning as a practical matter is not possible.[4]

Thus the court allowed zoning ordinances to discriminate between existing and future uses. Allowing nonconforming uses to continue under zoning ordinances was so well and quickly accepted that Justice Sam Ervin in 1949 dismissed a contention that such was unlawful discrimination in a single sentence, noting that a nonconforming use exemption "has a sound basis and is not unreasonable."[5]

For years this authority to grandfather prior nonconforming uses was allowed only for zoning ordinances.[6] In recent years, however, there are indications that the courts are becoming more sympathetic to land-use ordinances other than zoning that treat existing and future uses differently. For example, a Henderson County sign ordinance that allowed nonconforming signs to be temporarily continued was upheld in 1989 by the state court of appeals even though the regulation was not part of a comprehensive zoning ordinance.[7] In its analysis the court emphasized that judicial review of classifications of land uses for different treatments (such as treating preexisting and future land uses differently) should be based on whether the classification is reasonable and relates to legitimate public objectives rather than whether the different treatment was based on a zoning ordinance adopted under the general police power or the specific power of zoning. These considerations will probably be critical factors in future review of the constitutionality of grandfathering provisions, given that many modern general regulatory ordinances are increasingly comprehensive, either geographically (as with a county-wide sign ordinance) or by subject matter (as with a watershed protection ordinance that regulates all land uses within a water supply watershed). Because local governments are more frequently adopting land-use regulations under their general power, as for example was specifically authorized by the 1991 General Assembly for watershed protection ordinances, this judicial approach will be very important. Of course, even with this expanded judicial tolerance, a local government must be careful to document a reasonable basis for distinguishing between prior and future land uses.[8]

While land-use ordinances may grandfather nonconformities, most such ordinances substantially restrict them to encourage their eventual termination. The intent to phase out nonconformities through obsolescence has a long history in North Carolina law. Early land-use cases regarding the repair and improvement of structures subject to fire protection ordinances illustrate the principle. In 1894 the state supreme court upheld an ordinance prohibiting the repair of a wooden building that had been partially destroyed by fire in a district where the city of Winston's fire code would not allow new wooden buildings.[9] In 1913 the court elaborated on the policy of limiting repair of nonconforming structures in upholding a Lincolnton ordinance prohibiting the installation of metal roofs on wooden buildings in the fire district. The court noted that while the metal roof provided greater fire safety, it would prolong the life of a nonconforming wooden building. The court stated that allowing substantial repairs to a nonconforming structure

> loses sight of the object of the ordinance, which is not only to prohibit the building of wooden buildings within the prescribed limits, but while not requiring the pulling down of the wooden buildings now within the limits, prohibits their repair, in order to prevent their indefinite continuance. . . . [T]his does not prohibit slight repairs, such as putting in broken windows or hanging a shutter, or fixing up the steps. But it does prohibit such repairs as in this case, putting on a new roof, which makes the building habitable and thereby insures its continuance. This is contrary to the spirit and the letter of the ordinance, and defeats its purposes, which . . . contemplates the discontinuance of wooden buildings as fast as they become by decay unfit for further use or habitation.[10]

This notion of gradually phasing out grandfathered nonconforming uses and structures, or at least limiting them to continuation as they existed on the effective date of the ordinance, was incorporated into most of North Carolina's zoning ordinances. The most common limitations on nonconforming uses and structures now in zoning ordinances are those limiting (1) their expansion or enlargement, (2) their repair or replacement, (3) a change in a nonconforming use, and (4) the resumption of nonconforming uses if they are abandoned or discontinued for a specified period.

The exact scope of these restrictions has, however, proven to be particularly controversial. The supreme court and court of appeals have issued eighteen decisions over the past thirty-five years interpreting individual restrictions on nonconformities. Over the years tension has developed between the principle of eventually bringing all uses into compliance through the gradual elimination of nonconformities and the principle that government restrictions on the use of private property are to be construed so as to favor the free use of property. This tension between legal principles has increased uncertainty for both local governments and landowners as to the interpretation of restrictions on grandfathered nonconformities. The general resolution that seems to be emerging is that substantial restrictions on nonconforming uses and structures will be upheld, but they must be stated clearly, and any doubts about their application will be resolved in favor of the landowner.

Amortization

North Carolina's seventy years' experience with zoning has proven that the passage of time does not invariably lead to the elimination of nonconformities. They do not fade away due to obsolescence, and, in fact, most have proven remarkably resilient. Some of these enduring nonconformities have proven not to be a problem for the community. Others, however, cause substantial detriment to surrounding neighborhoods. Nonconforming commercial uses may obtain a monopoly position that is deemed unfair. Therefore local governments have begun turning to amortization as a way of dealing with particularly troublesome nonconformities, especially those that are less expensive to remove.

Amortization is not a new idea—the Louisiana Supreme Court upheld New Orleans' use of amortization to remove commercial uses from residential neighborhoods in 1929. Specific authority to amortize nonconforming uses was included in local legislation for Forsyth County's zoning in 1947, though it is still not explicitly mentioned in the state's zoning enabling statutes.[11] Even so, amortization was used nationally only rarely before the 1950s and only came into wide use in North Carolina in the 1980s.

Amortization has been applied primarily to junkyards and signs, both nationally and in North Carolina. However, it is possible to apply the concept to any nonconformity. Several North Carolina ordinances require older mobile home parks to be improved, after a grace period, to meet new standards, such as those requiring paved roads of a certain width. Applications in other parts of the country have covered everything from dog kennels to adult entertainment facilities. Courts in a vast majority of states where amortization requirements have been challenged have held that use of the concept is constitutional.

The North Carolina Supreme Court first considered the amortization concept in a 1974 case challenging a Winston-Salem zoning ordinance that required a nonconforming building-material salvage yard to be removed within three years.[12] The salvage yard operator challenged the amortization requirement on two grounds: first, that it deprived him of his property without due process of law, and second, that it was an unconstitutional, uncompensated taking of his property.

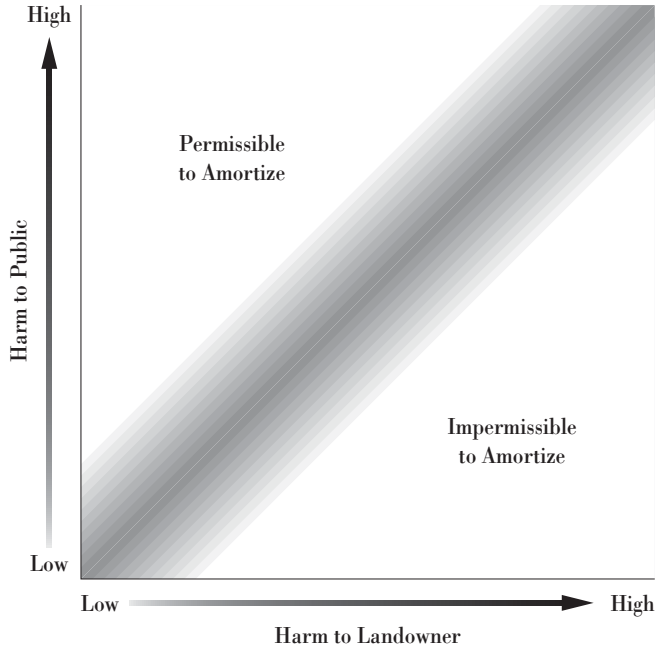
The court upheld the concept of using amortization to remove nonconforming land uses. Writing for the majority of the court, Justice Dan Moore quoted with approval a leading zoning text's statement of the rationale behind amortization: "It is reasoned that the opportunity to continue for a limited time cushions the economic shock of the restriction, dulls the edge of popular disapproval, and improves the prospects of judicial approval."[13]

As for the two specific constitutional challenges, the court upheld amortization on both counts. On the due process issue, the comprehensive nature of the zoning ordinance and the city's conscious effort to balance the burdens on the individuals who had to remove their nonconforming uses with the public good were key considerations. This led the court to conclude that the amortization requirement did not violate due process, as the requirement was not unreasonable and was substantially related to valid governmental objectives. In considering the takings claim, the court noted the earlier gas station cases that required nonconforming uses to be immediately terminated and other prior cases approving ordinances that prohibited expansion of nonconforming uses. The court said that in essence there is no legal distinction between requiring discontinuance of a nonconforming use after a grace period and limiting its expansion or enlargement—both were valid exercises of the police power. In dissent, however, Justice Beverly Lake argued that amortization is always a taking unless the nonconforming use is a nuisance or a threat to the public health, safety, or morals. The court majority, however, joined most other states in ruling that amortization is not a taking *in and of itself* and is valid if the grace period is reasonable in length.

In recent cases the "reasonableness" of the length of the grace period allowed has been a key factor in determining the legal validity of individual amortization requirements. Because amortization requirements may be challenged under either the North Carolina or the United States constitutions, both state and federal court analyses must be considered. In North Carolina the supreme court applies the following questions in cases involving due process and takings analysis: (1) are the ends sought to be achieved by the regulation legitimate and the means used reasonable, and (2) is the owner left with a practical use of the property that has reasonable value.[14] In takings cases under the United States Constitution, the question is whether the requirement denies the owner economically viable use of the property, with the key factors in the analysis being the economic impact on the owner, the degree of interference with distinct investment-backed expectations, and the character of the governmental action. For cases involving due process and takings analysis in the amortization context, the length of the grace period is important both in determining whether the means used by the government to bring all uses into compliance are reasonable and in determining whether the owner of the nonconforming use or structure

Amortization may be used to deal with a number of nonconformities: a junkyard in a rezoned area, a mobile home park required to pave its roads, or a billboard in a residential area.

Figure 1
Authority to Amortize Nonconformities



has been provided or left with practical use and reasonable value. Two sets of detailed factors will be considered by the courts in such cases.

The first set of factors focuses on the public interest in amortization, particularly the extent of harm to the public caused by continuing the nonconformity. This requires that attention be given to the nature of the use and the character of the surrounding neighborhood, with particular attention to whether the nonconforming use is harming neighbors, poses a threat to public health or safety, significantly harms community aesthetics, and the like. If the potential harm to public interests is high enough, the local government can move beyond amortization to immediate termination of the nonconformity, even if this causes substantial harm to the individual landowner.

The second set of factors involves the economic impact on the individual affected by the amortization requirement. Here the courts examine whether the grace period allows owners to recoup a substantial portion of their investment in the nonconformity. This requires that attention be given to the amount of the investment in the nonconforming use or structure, the income flow it generates, any improvements on the land, the age and depreciation involved with improvements, the feasibility and costs of relocation, and any salvage value. Neither the North Carolina nor the United States constitutions require that land-use regulations have no detrimental economic impact on landowners or that the costs of compliance with the regulations be compensated. Indeed, zoning restrictions can substantially reduce property values without being an unconstitutional taking. So, from a constitutional standpoint, an amortization period need not be designed to allow an owner to recoup all of his or her costs. But it does need to allow enough cost recovery that an undue burden is not placed on the individual and the individual gets some practical use from the previously lawful use.[15]

While both of these sets of factors are independently important, a critical concern is that there be an appropriate balance of these two sets of considerations. That is, as the negative impact of amortization on the owner increases, so should the public need for the amortization. This interrelationship is illustrated in Figure 1. The figure shows that it is important for a local government considering an amortization requirement to assure that the private losses are not disproportionate to the public benefit.

Recent court cases on takings emphasize that a very detailed case-by-case analysis of the economic impacts of amortization requirements is necessary to determine the requirements' constitutionality. It is certainly prudent for governments to undertake this analysis prior to imposing an amortization requirement. Beyond its contribution to establishing a proper legal foundation, this type of economic analysis can also be very useful in making policy choices on whether amortization requirements are appropriate in a particular context and, if so, how long the grace period should be. The closer a grace period comes to allowing owners to eliminate their costs of coming into compliance, the more reasonable it is to require them to make that contribution to the overall community good.

A number of recent North Carolina cases have addressed the application of amortization requirements to signs. Cumberland and Henderson counties and the cities of Raleigh, Durham, Nags Head, and Waynesville have all been in court in recent years defending their amortization requirements. Despite sometimes marathon litigation, so far the local governments have prevailed in all of these cases, as grace periods ranging from ninety days for wind-blown signs to three to five-and-one-half years for more substantial nonconforming signs have been held to be reasonable.[16] However, several provisions requiring total elimination of certain classes of signs are still under review by the federal courts to determine whether monetary compensation will be required.

Legislative Consideration

Despite this substantial body of law on amortization, both legal and policy debates about its use continue. The debate is taking on renewed vigor in North Carolina because the grace periods set in a number of local ordinances, particularly those regulating signs, are now running out.

On the legal front, individual amortization requirements continue to be challenged, primarily on the grounds that the takings clause of the United States Constitution requires monetary compensation to be paid for removal of the use or reduced land values subsequent to amortization. Both North Carolina and federal courts have consistently rejected legal challenges on this ground. However, the law on takings is evolving, and each new pronouncement on the subject by the United States Supreme Court creates new wrinkles in the law that are promptly and fully explored by those opposed to amortization. And while the concept of amortization has been accepted by the courts, that does not mean they will approve every application of the concept. The reasonableness of each individual amortization requirement must be established.

A good deal of the controversy has, however, focused on policy rather than legal questions. Is amortization a fair and reasonable way to deal with nonconformities? How should the interests of the general public be balanced against the rights of individual property owners and investors? Should a landowner be able to continue indefinitely a use denied to his or her neighbors? These questions are being hotly debated in city halls, courthouses, and the legislature.

The debate came to the 1991 General Assembly in the form of House Bill 1009. The bill, introduced late in the session, was short and direct. The substantive section of the original version of the bill, in its entirety, said,

> Any municipality, county government, or other political subdivision of this State which makes a previously conforming use of property nonconforming must either allow the existing use to continue or compensate the owner of the interest for the termination of such right. The phasing out of nonconforming uses through amortization is expressly prohibited.[17]

This bill, if adopted, would have had two major impacts.

First, it would have moved the policy decision as how to deal with nonconforming uses from the local to the state level. North Carolina local governments now use a variety of approaches for dealing with nonconforming uses. Most restrict nonconforming uses, but the severity of the restrictions vary substantially. Some use amortization; many do not. House Bill 1009 would have mandated a uniform state approach to nonconforming uses. Nationally, about a dozen states have some provision in their state zoning enabling statutes protecting the continuation of nonconforming uses, several specifically allow termination of nonconforming uses, and the majority leave the question to local governments.

The second thing House Bill 1009 would have mandated was that the uniform approach applied in North Carolina be grandfathering nonconforming uses or compensating owners for those that are eliminated. Termination without compensation and amortization could no longer be used by local governments as options for addressing this issue. It is important to note that even though most of the discussion in 1991 concerned amortization of nonconforming billboards, this policy choice would be applied to all nonconforming uses.

There were both strong supporters and strong opponents to House Bill 1009 in the 1991 session. The outdoor advertising industry was a leading supporter, with local governments, planning groups, and environmental groups opposed. Under the rules of the 1991 General Assembly, bills had to be approved by the house they were introduced in by May 16, 1991, to be considered further in 1991 or 1992. House Bill 1009 got to the floor of the House of Representatives on May 16 and was approved on second reading by a sixty-one to forty-two majority after being amended to clarify that it did not prevent rezonings and did not apply to amortization provisions that had already run out. However, House rules provide that the third and final reading of a bill can be approved on the same day as the second reading only if two thirds of the members of the House agree. The motion to allow the third reading was approved sixty-two to thirty-eight, but this was five votes short of the required two-thirds majority required. So House Bill 1009 was dead for 1991.

Though not eligible for adoption, legislative work on House Bill 1009 continued. The bill was rereferred to committee and rewritten to change the ban on amortization to a two-year moratorium on amortization, to authorize a study of the amortization concept, to exempt on-premise advertising signs from its coverage, and to increase fees for billboards along federal highways. Although this revised bill was not voted on by the full House of Representatives, the Legislative Research

Commission was authorized to study amortization and the ideas included in House Bill 1009, with any recommendations from that group being eligible for consideration in the 1992 short session of the General Assembly or the 1993 session. A study committee has been appointed and is now at work.

Conclusions

What is the future for amortization in North Carolina? Its future in the courts seems relatively secure. A half dozen cases over the past twenty years have concluded that the concept of amortization is legal. Still the concept must be reasonably applied, and there is the possibility that individual amortization requirements could constitute an unlawful taking.

The political future of amortization is more uncertain. Is it a reasonable way to secure uniform application of new laws and regulations, or is it an unreasonable burden on individual property owners?

For local governments considering this question, a series of inquiries should be a part of their policy analyses. First, does the particular nonconforming use or structure need to be removed or brought into compliance? This involves consideration of whether the nonconformity gives the owner an unfair advantage over those who must comply, whether the activity is harming neighbors or the community, and whether the land-use policies can be achieved without uniform compliance. If the answer to this initial inquiry is that grandfathering the nonconformity is not appropriate, the second inquiry is whether it should be terminated immediately. Here the degree of harm to the public health, safety, and welfare due to the continuance of the nonconformity is the key factor. If a conclusion is reached that the nonconformity should be terminated but there is not an urgent need for immediate compliance or it would be unfair to individual owners to require immediate compliance, consideration of amortization is appropriate. If amortization is to be used, it must be based on a careful analysis of the public benefits to be secured, the burden compliance places on individuals, and creation of a grace period long enough to assure an appropriate and reasonable balance between these considerations.

The principal question for the General Assembly is whether North Carolina needs a uniform resolution of these questions or whether this analysis and judgment should be left to local governments. Should the amortization tool be available to those local governments that undertake the above analysis and conclude it is necessary and reasonable, with the courts resolving any disputes about compensation? Should there be a mandated process for analysis for local governments considering amortization? If there are to be limits to be imposed on the use of amortization, should they be applied to all land uses or only specific types, such as outdoor advertising?

These are the policy choices now before the state's elected officials. The choices will not be easy, as competing legitimate concerns must be balanced. There are large financial stakes involved for those landowners and industries that will have to come into compliance with current and future laws. There also are substantial impacts on neighbors, business competitors, and the public at large if compliance cannot be compelled. These are difficult issues that warrant serious debate and consideration. Given the events of the past year, one thing is certain—it is unlikely that the controversial issue of amortization will quietly fade away. ❖

Notes

1. Small v. Councilmen of Edenton, 146 N.C. 527, 528, 60 S.E. 413, 414 (1908). Several other North Carolina cases upheld requirements that nonconforming uses be terminated. Angelo v. City of Winston-Salem, 193 N.C. 207, 136 S.E. 489, *aff'd*, 274 U.S. 725 (1927); State v. Perry, 151 N.C. 661, 65 S.E. 915 (1909); State v. Pendergrass, 106 N.C. 664, 10 S.E. 1002 (1890). Similar requirements in other states have been upheld by the U.S. Supreme Court. Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reiman v. Little Rock, 237 U.S. 171 (1915); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

2. Town of Clinton v. Standard Oil Co., 193 N.C. 432, 137 S.E. 183 (1927). The court had previously ruled that building regulations must establish a uniform rule of action applicable to all structures, whether new, existing, or under way. State v. Tenant, 110 N.C. 609, 14 S.E. 387 (1892).

3. The other cases in the gas station series are State v. Moye, 200 N.C. 11, 156 S.E. 130 (1930), *appeal dismissed*, 283 U.S. 810 (1931); Town of Wake Forest v. Medlin, 199 N.C. 83, 154 S.E. 29 (1930); Burden v. Town of Ahoskie, 198 N.C. 92, 150 S.E. 808 (1929); and McRae v. City of Fayetteville, 198 N.C. 51, 150 S.E. 810 (1929).

4. Elizabeth City v. Aydlett, 201 N.C. 602, 608, 161 S.E. 78, 81 (1931).

5. Kinney v. Sutton, 230 N.C. 404, 411, 53 S.E.2d 306, 311 (1949). The U.S. Supreme Court recently acknowledged the impact this practice has, noting "The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." City of Columbia v. Omni Outdoor Advertising, Inc., 113 L. Ed. 2d 382, 393 (1991).

6. *See* Shuford v. City of Waynesville, 214 N.C. 135, 198 S.E. 585 (1938) (a nonzoning ordinance prohibiting gas station in

downtown area invalidated for not applying uniformly to future and existing stations); and Grace Baptist Church v. City of Oxford, 320 N.C. 439, 358 S.E.2d 372 (1987) (zoning ordinance requiring new parking lots to be paved while allowing preexisting lots to remain unpaved upheld).

7. Summey Outdoor Advertising, Inc. v. County of Henderson, 96 N.C. App. 533, 386 S.E.2d 439 (1989), *rev. denied*, 326 N.C. 486, 392 S.E.2d 101 (1990). This was an amortization requirement because the nonconforming signs had to be removed eventually. The court allowed the temporary disparate treatment even though the restriction was not part of a comprehensive zoning ordinance. It should be noted that the supreme court also applied a traditional equal protection analysis in upholding the grandfathering provision in Grace Baptist Church v. City of Oxford, 320 N.C. 439, 358 S.E.2d 372 (1987).

8. For an example of a regulation that was invalidated due to the lack of a reasonable basis for such a classification, see State v. Glidden Co., 228 N.C. 664, 46 S.E.2d 860 (1948). This case invalidated a state stream protection law that allowed companies chartered before a set date to discharge deleterious substances into the water.

9. State v. Johnson, 114 N.C. 846, 19 S.E. 599 (1894).

10. State v. Lawing, 164 N.C. 492, 496, 80 S.E. 69, 71 (1913). *See also* State v. Shannonhouse, 166 N.C. 241, 80 S.E. 881 (1914).

11. The 1990 legislation on vested rights does recognize that most zoning ordinances restrict nonconforming uses. N.C. General Statutes Sections 160A-385.1(e)(3) and 153A-344.1(e)(3) provide that "the establishment of a vested right shall not preclude, change or impair the authority of a city [or county] to adopt and enforce zoning ordinance provisions governing nonconforming situations or uses."

12. State v. Joyner, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002 (1975). The case is reviewed at Note, "State v. Joyner—The Future of Amortization as an Effective Zoning Tool for North Carolina," *Wake Forest Law Review* 11 (1975): 754. There is substantial literature nationally on the legal issues and cases on amortization. *See, e.g.*, R. Anderson, 1 *American Law of Zoning 3d* (1986 & Supp. Dec. 1990), §§ 6.69 to 6.78; N. Williams, *American Planning Law* (1986 & Supp. Aug. 1990), §§ 116.01 to 116.10; and the collection of cases at Annotation, "Validity of Provisions for Amortization of Nonconforming Uses," *American Law Reports 3d* 22 (Aug. 1991): 1134. For a proposed statute specifically authorizing amortization in North Carolina, see Comment, "Amortization of Nonconforming Uses," *Wake Forest Law Review* 7 (1971): 255.

13. *Joyner*, 286 N.C. at 373, 211 S.E.2d at 324 [quoting R. Anderson, 1 *American Law of Zoning* (1968), § 6.65, 446–7].

14. Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989); Responsible Citizens v. City of Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983); A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979); Helms v. City of Charlotte, 255 N.C. 647, 122 S.E.2d 817 (1961).

15. The question of whether some residual beneficial use or reasonable value must always be left to the owner, even if the use of the property would cause substantial harm to the community, poses a difficult question in takings litigation. Most cases assume that a substantial public health or safety rationale justifies completely terminating a "nuisance" use, though recent cases have not expressly held this to be so. Guidance on whether and when a public safety regulation constitutes a taking may be forthcoming from the U.S. Supreme Court. The court recently agreed to review a South Carolina case that had ruled that denial of permits to build on lots that did not meet the state's oceanfront setback was not a taking. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991), *cert. granted*, No. 91-453 (U.S. Nov. 18, 1991) (1991 U.S. LEXIS 6625).

16. Georgia Outdoor Advertising, Inc. v. Waynesville, 900 F.2d 783 (4th Cir. 1990); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987), *motion to modify denied*, No. 89-1571 (4th Cir. Apr. 9, 1991) (1991 U.S. App. LEXIS 5714) (per curiam); Summey Outdoor Advertising, Inc. v. County of Henderson, 96 N.C. App. 533, 386 S.E.2d 439 (1989), *rev. denied*, 326 N.C. 486, 392 S.E.2d 101 (1990); Goodman Toyota v. City of Raleigh, 63 N.C. App. 660, 306 S.E.2d 192 (1983), *rev. denied*, 310 N.C. 477, 312 S.E.2d 884 (1984); R.O. Givens, Inc. v. Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982); Cumberland County v. Eastern Federal Corp., 48 N.C. App. 518, 269 S.E.2d 672, *rev. denied*, 301 N.C. 527, 273 S.E.2d 453 (1980).

17. H.R. 1009, 1991 Sess., N.C. General Assembly, § 1. This would have been added to the North Carolina General Statutes as Section 40A-70.