

ELIMINATION OF INCOMPATIBLE USES AND STRUCTURES

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Given a reasonably suitable and extensive piece of open country, it is possible today to design and build a model town with "a place for everything and everything in its place." Recent examples of such developments are the new industrial town of Kittimat, British Columbia¹ and the residential communities of Park Forest, Illinois² and Levittown, Pennsylvania.³

In such developments, incompatible uses are physically separated from each other. For the foreseeable future at least, a conventional zoning ordinance and its honest administration will maintain the desirable *status quo* and protect the town plan against encroachment.

The typical American community, however, was largely built in the period between the early concern over town layout of our colonial forebears and the reawakening of city planning in the twentieth century. Today an admitted cause of residential and commercial slums, traffic congestion, and other indicia of urban obsolescence is the haphazard mixing of incompatible land uses. A large part of the city planning problem today, therefore, is not how to design and build the perfect urban machine but rather how to take out the misfit parts of the machine which we have inherited.

ANALYSIS OF INCOMPATIBILITY

The problem of incompatibility of land uses and buildings was well stated by Justice Sutherland when he wrote in 1926 in the *Euclid* decision,⁴

Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality . . . A nuisance may be merely a right thing in the wrong place,—like a pig

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¹ Stein and Others, *Industry Builds Kittimat—The First Complete New Town in North America*, Architectural Forum, July 1954, p. 128; *id.*, Aug. 1954, p. 121; *id.* Oct. 1954, p. 159.

² *New Satellite Town of 25,000 Planned*, The American City, Jan. 1947, p. 82; *New Satellite Town Financed*, The American City, July 1947, p. 147.

³ Levitt, *A Community Builder Looks at Community Planning*, 17 J. AM. INST. OF PLANNERS 80 (1951). While this article describes the planning of a community for Long Island which was never built, the principles, general plan, and basic house design were all incorporated in Levittown, Pa.

⁴ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 389 (1926).

in the parlor instead of the barnyard. In some fields, the bad fades into the good by such invisible degrees that the two are not capable of being readily distinguished and separated in terms of legislation.

Since 1926 the city planning profession has been trying without as yet complete success to develop standards of compatibility and incompatibility which are objective, scientific, and, as a practical matter, enforceable.

In the earliest days of zoning it was thought that all uses could be classified very simply by a "hierarchy of uses" into three districts—residential, commercial, and manufacturing. Residential districts included nothing but "parlors" other than a few essential accessory uses such as churches, public schools, and suburban railroad depots. Everything allowed in residential districts was permitted in commercial districts. The manufacturing or pig-sty district was a catch-all for every kind of use including manufacturing, commerce, and housing (for people who could not afford to live elsewhere).

As a contrast to this primitive separation of uses and buildings, consider the proposed new zoning resolution for New York City.⁵ Here in the nation's largest and most complicated city the planning consultants find the need for 15 zoning districts in which are permitted 18 different use groups (combinations of compatible uses). The use groups include 3 groups of *residential uses*, 2 groups of *community facilities* which are properly associated with some or all residential districts, 4 groups of *retail and commercial uses*, 3 groups of *wholesale and commercial amusement uses*, one group of *heavy commercial and automotive service uses*, and 6 groups of *manufacturing uses*.

One of the manufacturing use groups includes office, laboratory and manufacturing uses which, when subject to adequate controls over bulk and landscaping, are appropriate in certain locations in low density residential areas, if they comply with certain performance standards. In other words, it is even proposed to let a pig into the parlor provided it is a housebroken pig with a pleasing (preferably red brick colonial) face. The philosophy behind this attempt at classification according to standards of compatibility and incompatibility was most lucidly summarized by New York City Planning Commissioner Lawrence M. Orton when he stated,⁶

As has frequently been said, it isn't so much *what you do* as *how you do it*, that counts. Houses and apartments, stores and even factories, can be mixed harmoniously and advantageously, provided the design is right.

From the standpoint of residential areas, incompatibility of uses and buildings has generally been measured by the following factors⁷ (most of which are cited in the *Euclid* opinion to justify the separation of industry and high density apartments from a single family district):

⁵ PLAN FOR REZONING THE CITY OF NEW YORK, A REPORT SUBMITTED TO THE CITY PLANNING COMMISSION BY HARRISON, BALLARD, AND ALLEN (Oct. 1950).

⁶ 13 J. AM. INST. OF PLANNERS 3 (Summer-Fall 1947).

⁷ See O'HARROW, *Performance Standards in Industrial Zoning*, in AMERICAN SOCIETY OF PLANNING OFFICIALS, ZONING—1951 42, for an excellent discussion of what planners often term "nuisance factors."

(1) *Danger to persons or property* (such as fire, explosion, hazard, corrosive fumes, and auto, truck, railroad, airplane traffic); (2) *danger to health, convenience, and comfort* (such as excessive smoke, dust, odor, noise (including traffic noise), vibration, glare at night, industrial waste, garbage, obstruction to light and air, and overcrowding of people on the land); (3) *danger to morals* (such as commercial gathering places for drinking, gambling, amusement); (4) *miscellaneous other factors* (such as aesthetic, psychological and physical deterioration of neighborhood desirability due to factors including appearance of grounds and buildings, commercial signs, uses with unpleasant associations, decline of neighborhood homogeneity, prevalence of strangers on business visits, encroachment of commercial-visitor parking on residential streets, increased vehicular street traffic induced by commercial and industrial establishments, and parental fear of physical and moral danger to children).

From the standpoint of commercial areas, incompatibility of uses and buildings may be measured by "economic incompatibility factors" such as land uses and buildings which interrupt pedestrian traffic flow in retail areas. "Such interruptions are created by (a) 'dead spots' where shoppers lose interest in going further, (b) driveways and other such physical breaks in the sidewalks, (c) cross traffic, either vehicular or pedestrian, and (d) areas characterized by hazards, noises, odors, unsightliness, or other unpleasant features."⁸ The new shopping centers are setting sensible standards of order and appearance, lack of which in existing business centers includes such nuisance factors as too many commercial signs, heavy vehicular traffic unrelated to the shopping center, and overcongestion of buildings in relation to streets and parking facilities.

Similarly, industry today recognizes the new design standards of modern factories and planned industrial districts and, in general, that residences should be excluded from manufacturing districts on the principle, no doubt, that if people live in the pigsty long enough, they eventually will send the pigs elsewhere.⁹

EFFORTS TO ACHIEVE COMPATIBILITY

A. By Zoning

The basic principles of comprehensive zoning were developed before the automobile era, the great expansion of metropolitan cities, and the technological revolution, still going on, in ways of housing people, business, and industry. A first tenet of comprehensive zoning was and still is that it is possible to map an urban land area into districts in which a class or classes of compatible uses are permitted and uses incompatible with them are prohibited. The first zoners, however, liked their districts "straight" with few or no accessory or mixed uses or building types.

⁸ CITY OF CHICAGO, CITY COUNCIL COMMITTEE ON BUILDINGS AND ZONING, PROPOSED COMPREHENSIVE AMENDMENT TO CHICAGO ZONING ORDINANCE, GENERAL REVIEW 30 (Jan. 1954).

"American zoning received its first great impulse from the utilitarian desire to protect Fifth Avenue, New York City, property values from the demoralization which was being caused by the inroads of manufacturing structures." Bettman, *Constitutionality in Zoning*, 37 HARV. L. REV. 834, 858 (1923).

⁹ See NATIONAL INDUSTRIAL ZONING COMMITTEE, PRINCIPLES OF INDUSTRIAL ZONING (Aug. 1951).

Thus single family districts were considered as areas in which apartment houses were rigidly excluded.

Talented architects and new-town planners like Clarence Stein argued that row houses and apartments could quite properly be mixed with single family houses and demonstrated the fact in developments such as Radburn in unzoned Fairlawn, New Jersey.¹⁰ They railed against the crudity of zoning classifications, but to little avail, since it was widely believed that the general improvement which zoning promised outweighed the admitted rigidities it imposed on design.

When zoning was first developed, its proponents hoped that existing incompatible uses and buildings (classified by the zoning ordinance as non-conforming) would gradually disappear. Thus zoning would act as a comb to straighten out the tangled kinks of past city development.

Zoning, one must remember, was a radical concept in 1916 even as regards regulating the future use of undeveloped land areas. "During the preparatory work for the zoning of Greater New York, fears were constantly expressed by property owners that existing nonconforming buildings would be ousted. The demand was general that this should not be done. The Zoning Commission went as far as it could to explain that existing nonconforming uses could continue, that zoning looked to the future, and that if orderliness could be brought about in the future the nonconforming buildings would to a considerable extent be changed by natural causes as time went on."¹¹

Nonconforming buildings and uses, however, have shown great vitality in persisting because of the simple fact that most nonconforming uses (such as a store or a filling station in a residential district) have the high earning capacity of a well-situated monopoly created and protected by law.

Although most zoning ordinances permit, and a few state enabling acts¹² require, that nonconforming buildings and uses continue when an ordinance goes into effect, their alteration or enlargement is generally prohibited, and their reconstruction after abandonment, discontinuance or destruction by fire, hurricane, explosion or other act of God is denied.¹³

Furthermore, there is an accelerating trend towards the positive elimination of nonconforming uses without compensation under zoning regulations¹⁴ which require discontinuance after a reasonable period of time in which the nonconforming value of a building or use is deemed to be amortized.

¹⁰ "The Borough of Fairlawn, then mainly a rural community, had not yet been sold an official road plan or a zoning ordinance. For this we offered thanks; we were free to design a functional town plan." CLARENCE S. STEIN, *TOWARD NEW TOWNS FOR AMERICA* 39 (1951).

¹¹ EDWARD M. BASSETT, *ZONING* 113 (2d ed. 1940).

¹² *E.g.*, MASS. ANN. LAWS c. 40, §26 (1952); N. J. STAT. ANN. tit. 40, §55-48 (1940); both cited in Note, 102 U. OF PA. L. REV. 91, 92 (1953).

¹³ See Note, *Elimination of Nonconforming Uses*, 35 VA. L. REV. 348 (1949), which contains an excellent discussion of the usual restrictions not generally classified as "retroactive."

¹⁴ This trend has been strengthened by the favorable decision obtained by the City of Tallahassee in eliminating service stations on a ten year amortization basis. See *Standard Oil Co. v. Tallahassee*, 183 F.2d 410 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950).

Thus, for example, the city of Los Angeles requires¹⁵ that nonconforming buildings or structures in residence zones shall be completely removed or made conforming when they reach specified ages from the date of their erection (ranging from 20 to 40 years, depending on their building code class of construction). Nonconforming commercial or industrial use of a residential building or residential accessory building is to be discontinued within five years, where no buildings are employed in connection with such use, where the only buildings employed are accessory or incidental to such use, or where such use is maintained in connection with a conforming building. A nonconforming use of land which is accessory to the nonconforming use of a nonconforming building must be discontinued at the same time as the nonconforming use of the building is discontinued. Nonconforming signs and billboards are to be removed within five years. All nonconforming oil wells, including any incidental storage tanks and drilling and production equipment, must be removed within 20 years.

The Los Angeles ordinance has gained added interest because of a current court test. A wholesale plumber contested the validity of the provision. He resided on the property and had also been using his house and garage for office and storage purposes and the adjoining lot for storage in racks and bins.

The California District Court of Appeals, in its opinion, summed up the issues involved in compulsory amortization by zoning about as successfully as they have ever been stated:¹⁶

Exercise of the police power frequently impairs rights in property because the exercise of those rights is detrimental to the public interest. Every zoning ordinance effects some impairment of vested rights either by restricting prospective uses or by prohibiting the continuation of existing uses, because it affects property already owned by individuals at the time of its enactment. . . . In essence there is no distinction between requiring the discontinuance of a nonconforming use within a reasonable period and provisions which deny the right to add to or extend buildings devoted to an existing nonconforming use, which deny the right to resume a nonconforming use after a period of nonuse, which deny the right to extend or enlarge an existing nonconforming use, which deny the right to substitute new buildings for those devoted to an existing nonconforming use—all of which have been held to be valid exercises of the police power. . . .

The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss. Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance. The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. As a method of eliminating existing nonconforming uses it allows the owner of the nonconforming use, by affording an opportunity to make new

¹⁵ CITY OF LOS ANGELES, COMPREHENSIVE ZONING PLAN, ORDINANCE No. 90,500, as amended.

¹⁶ City of Los Angeles v. Gage, 127 Cal. App.2d 558, 559, 274 P.2d 34, 43-44 (1954).

plans, at least partially to offset any loss he might suffer. The loss he suffers, if any is spread out over a period of years, and he enjoys a monopolistic position by virtue of the zoning ordinance as long as he remains. If the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public. Nonconforming uses will eventually be eliminated. A legislative body may well conclude that the beneficial effect on the community of the eventual elimination of all nonconforming uses by a reasonable amortization plan more than offsets individual losses.

Other cities which have outlawed nonconforming uses include New Orleans, which began in 1927 with a one year discontinuance for all commercial and industrial uses in residential areas,¹⁷ changed to a 20-year period in 1929, and abandoned the principle in 1948;¹⁸ Boston, Massachusetts, which requires elimination of all nonconforming buildings and premises after April 1, 1961 or 37 years after such buildings and premises first became nonconforming due to zoning action; Fort Worth, Texas, which requires certain nonconforming uses of land to be discontinued and all material completely removed by its owner within 3 years, and nonconforming commercial signs and billboards also to be removed within 3 years; Wichita, Kansas, which requires nonconforming commercial or industrial buildings located within specified dwelling districts to be either removed or converted to a conforming use on or before January 1, 1997 or within 60 years as to such buildings for which a permit was issued after January 1, 1937; Seattle, Washington, which requires in two residence districts any nonconforming use of premises which is not in a building to be discontinued within a period of one year; Chicago, Illinois, which requires discontinuance of nonconforming uses upon transfer of ownership or termination of the existing lease unless the nonconforming use is carried on in a building designed for the purpose, and in this latter event discontinuance is required upon expiration of the normal useful life of such building (which is fixed at 100 years for buildings of solid brick, stone or reinforced concrete with structural members of steel; 75 years for buildings of solid brick, stone or reinforced concrete with structural members of metal, reinforced concrete, masonry, timber or a combination thereof; and 50 years for buildings of all other construction); Tallahassee, Florida, which requires discontinuance of certain commercial uses in residential districts after 10 years;¹⁹ Richmond, Virginia, which requires discontinuance of nonconforming uses of land only within one year and discontinuance of nonconforming buildings in residence districts at different times, such as 3 years for boarding houses and 20 years for commercial and industrial buildings which were at least 20 years old at the time of the ordinance, or, if not 20 years old, then 40 years from the date of the issuance of the building permit.²⁰ Other cities with amortization provisions in their zoning ordinances in-

¹⁷ State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), *cert. denied*, 280 U.S. 556 (1929). See also State *ex rel.* Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929).

¹⁸ See [1951] WIS. L. REV. 685, 692 n. 31.

¹⁹ Sustained in Standard Oil Co. v. Tallahassee, *supra* note 14.

²⁰ See Note, 35 VA. L. REV. 348, 356 (1949).

clude Cleveland, Ohio, St. Petersburg, Florida, Kansas City, Kansas, Richmond Heights, Missouri, Corpus Christi, Texas,²¹ and Akron, Ohio.²²

Compulsory amortization of nonconforming uses, as an exercise of the police power under zoning, seems to be a reasonable and useful method of eliminating three categories of incompatibility—namely, (1) most uses involving no structures or structures of an impermanent nature, (2) nonconforming structures of an impermanent nature or representing a relatively small investment, and (3) nonconforming uses in conforming structures. These include such developments in residential districts as (1) commercial storage on open lots (junk yards, lumber yards, etc.), (2) filling stations, sheds for commercial use, and billboards, and (3) residential buildings used for commercial purposes.

In short, nonconformities which may be reasonably eliminated by up to ten years' amortization are properly disposed of by this method, especially when their incompatibility is so inherent in their operation that no reasonably enforceable performance standards could be devised to make them compatible. In many situations, for example, the commercial traffic essential to the nonconforming use makes its presence in a residential neighborhood a permanently deteriorating influence.

When the nonconforming structure represents such a large investment that more than ten years is required to eliminate it, the amortization method seems inadequate. To wait a generation or two before eliminating or even lessening the effect of an incompatible use is futile as a means of preventing the spread of the infection of incompatibility, unless the incompatibility is more imaginary than real.

B. By Abatement of Nuisance

Where an incompatible use or structure representing a major investment is a genuine menace to the area in which it is situated, it may be ordered discontinued or removed as a nuisance. Long before zoning, the courts sustained municipal regulations which required the immediate elimination of uses and buildings which, while short of a common law nuisance, had definite, tangible, physical effects which menaced public health, safety, and welfare.

Thus a Los Angeles regulation requiring the discontinuance at once of the manufacture of bricks in a section of Los Angeles which was developing as a residential area was sustained by the Supreme Court of the United States in a leading case.²³ In its opinion the Court said,

It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any

²¹ See *City of Corpus Christi v. Allen*, 254 S.W.2d 759 (Tex. 1953), in which the application of the ordinance to a particular automobile wrecking yard in a light industrial district was held improper.

²² See *City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953), in which the court held that an ordinance providing that any nonconforming use was to be discontinued whenever the city council determined that a "reasonable" time had elapsed was arbitrarily invoked in an attempt to outlaw a 29 year old junk yard in one year.

²³ *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

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.

The same Los Angeles ordinance had previously been sustained by the state supreme court as applied to eliminate 110 Chinese laundries²⁴ and a lumber yard.²⁵ Subsequently, an ordinance prohibiting livery stables in residential areas was sustained by the Supreme Court of the United States,²⁶ as have ordinances against other uses—for example, smoke nuisance and oil tanks.²⁷

The nuisance doctrine as applied to elimination of incompatible uses has had much less attention paid to it in recent years than it deserves. It generally has been felt that the use to be enjoined must be of a very tangible, crude and physical nature—a use so obviously detrimental to public health, safety, and welfare as to be a nuisance by common law reasoning, if not a common law nuisance (such as storage of gunpowder in a residential district). Perhaps this is because the early proponents of zoning, eager to make it palatable to land owners and investors, disassociated the harsh doctrine of nuisance from the broad regulation of future developments based on a community plan.

The courts are ready, however, to sustain regulations requiring discontinuance of practices which are demonstrated to be harmful to the public. In the often-cited case of *Jones v. Los Angeles*²⁸ where the court refused to sustain a law which prohibited all sanatoria for nervous diseases outside of specified districts and would have required discontinuance of four such sanatoria, the court made it clear that it could not find an "undoubted menace to public health, safety or morals." Similarly, in a case quite similar to the *Hadacheck* case,²⁹ the court refused to sustain an ordinance requiring the cessation of gravel pit operations because it found the discomfort "more imaginary than real."³⁰

What makes an activity an abatable nuisance depends upon the facts of the situation. As our understanding of nuisance factors in urban development increases through medical, sociological and economic research, and as the city planners develop performance standards against which such factors can be measured, the nuisance doctrine will take hold in some situations where amortization under zoning would be ineffective. The cumulation of nuisance factors may at least justify the shortening of the period of grace given nonconforming uses. The zoning ordinance of Seattle,

²⁴ *Ex parte* Quong Wo, 161 Cal. 220, 118 Pac. 714 (1911).

²⁵ *Ex parte* Montgomery, 163 Cal. 457, 125 Pac. 1070 (1912).

²⁶ *Reinman v. City of Little Rock*, 237 U.S. 171 (1915).

²⁷ See Noel, *Retroactive Zoning and Nuisances*, 41 COL. L. REV. 457 (1941); Willis, *The Elimination of Nonconforming Uses*, [1951] WIS. L. REV. 685. A Bulletin of the Highway Research Board of the National Academy of Sciences on elimination of highway nuisances by court injunction is now under preparation by J. H. Beuscher of the University of Wisconsin Law School.

²⁸ 211 Cal. 304, 295 Pac. 14 (1930).

²⁹ See note 23 *supra*.

³⁰ *Village of Terrace Park v. Errett*, 12 F.2d 240, 243 (6th Cir. 1926).

Washington,³¹ for example, requires certain nuisance-type industries (cement manufacturing, glue manufacturing, slaughter houses, etc.) in other than an industrial district to be discontinued within six months.

The county of Los Angeles has devised what appears to be a significant combination of the amortization and nuisance doctrines. By an ordinance adopted in 1950, existing nonconforming uses are granted an "automatic exception" to continue. Such exception remains in force for specified times, except that it may be revoked by the Regional Planning Commission if the Commission finds:³²

(a) That the condition of the improvements, if any, on the property are such that to require the property to be used only for those uses permitted in the zone where it is located would not impair the constitutional rights of any person.

(b) That the nature of the improvements are such that they can be altered so as to be used in conformity with the uses permitted in the zone in which such property is located without impairing the constitutional rights of any person.

The basis for such findings includes the grounds that the use is exercised so as to be detrimental to the public health or safety or as to be a nuisance.

C. By Special Permit

Throughout the history of zoning there has been a quest for some formula which would enable law makers to establish a complete series of fixed regulations to guide logical urban development by rules of law. No such formula has ever been found.

The variance procedure, conceived originally as zoning's "safety value" to relax pressures arising from minor situations involving "practical difficulty and unnecessary hardship," has been much used and abused (thereby often adding new incompatible uses more rapidly than nonconforming uses were eliminated). Spot zoning, illegal but usually untested, has given the veneer of conformity to incompatible uses. Other devices such as the "legislative permit"³³ and New Jersey's "variance recommendation" procedure³⁴ have added another slow leak to the watertight concepts of the zoning pioneers.

To make zoning more flexible and still maintain a rule of law, the special permit exception or "conditional use" based on an administrative finding that specific standards have been complied with has come into common use. By this method new, otherwise nonconforming uses are permitted to be introduced into any districts where they are deemed to be compatible under suitable standards—for example, private schools, nursing homes or garages in residential areas. A recent development

³¹ CITY OF SEATTLE, ORDINANCE No. 45382 (1923).

³² Description of this ordinance is taken from excerpts reported in *Livingston Rock and Gravel Co. v. Los Angeles County*, 260 P.2d 811, 815 (Cal. Dist. Ct. App. 1953), in which the lower court declared the ordinance unconstitutional, a decision subsequently reversed by the California Supreme Court, in 43 Cal.2d 121, 272 P.2d 4 (1954). In this latter decision the immediate compulsory removal of an \$18,000 cement batching plant from a light manufacturing district was sustained.

³³ See *Spot Permits—Spot Zoning by Legislative Special Permit*, 71 REGIONAL PLAN ZONING BULL. (1954).

³⁴ N. J. REV. STAT. tit. 40, §50-39(d).

in this area of zoning is the concept of the "designed shopping district" which may be fitted into residential areas.³⁵

The fixed guideposts of urban development are tending to be only the major divisions of areas as predominantly residential, commercial or industrial, while the details of community development are increasingly being based on a bundle of performance standards by which compatibility and incompatibility are measured by an administrative agency.

If a new, otherwise nonconforming use can be admitted into a district by special permit, why cannot an existing nonconforming use be permitted to remain, if it can be improved so as to qualify under performance standards?

Thus it has been suggested³⁶ that a "well located" nonconforming local grocery store in a residence district be allowed to continue indefinitely if its owner brings it up to standards which were similar to those which a community planner might include in the design of a new residential community.

The practical trouble with this procedure today is that it is built upon the shifting sands of the performance standards concept carried to its logical conclusion.

The practical difficulties are obvious. In the first place, performance standards have not as yet been developed to the point where they can be applied objectively to such a situation by an administrative agency or a municipal governing body. Secondly, the Achilles' heel of performance standards is the constant and almost superhuman enforcement problem connected with so many of them. In the third place, the history of the administration of zoning by boards of appeal and municipal governing bodies leads one to the conclusion that the licensing of nonconforming uses would result in a breakdown of zoning in the present state of our objective knowledge of city development and our ability to administer land development regulations.

The logic of licensing nonconforming uses, however, is compelling. Certainly those uses which are today allowed only by special permit could also be permitted to continue under special permit even though nonconforming.

D. Eminent Domain

There seems little doubt that elimination of incompatible uses is a sufficient public purpose to justify a public taking with just compensation. Zoning by eminent domain, though impractical, was held constitutional in the states in which it was tried.³⁷ Condemnation of incompatible uses and buildings as a part of a scheme of urban redevelopment now rests upon the firm ground of the recent decision of the Supreme Court of the United States³⁸ in which the taking of a department store in

³⁵ See ZONING ORDINANCE TOWN OF CORTLANDT, N. Y. (1951), and ZONING ORDINANCE CITY OF NIAGARA FALLS, N. Y. (1951).

³⁶ Horack, *Planning for Better Zoning Laws* (address at 1954 National Planning Conference), to be published in AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING—1954.

³⁷ Young, *City Planning and Restrictions on the Use of Property*, 9 MINN. L. REV. 593 (1925). See also [1951] WIS. L. REV. 685, 695 (1951).

³⁸ *Berman v. Parker*, 348 U.S. 26 (1954).

an area to be redeveloped for residential use was sustained. In this case the property condemned was not itself substandard and under the redevelopment plan it might be sold to other private interests.

Eminent domain is a last resort for the elimination of incompatible uses but one which may be increasingly used in urban redevelopment programs and in "stop-blight" situations where the incompatibility of relatively large investments is built-in and permanent and where amortization would take too long.³⁹ Public opposition to the costs of eminent domain and owner resistance to condemnation will require a clear-cut case to be made for the necessity of removing an incompatible building or use and the public benefits which will flow therefrom. In areas which are not yet substandard but only declining, this will require a more precise knowledge of cause and effect of urban blight than we now have.

CONCLUSIONS

From this discussion we may conclude that many incompatible uses may be ordered to be discontinued without compensation.

The term "retroactive zoning" as applied to the elimination of nonconforming uses should be abandoned. All zoning is basically retroactive in nature.

The elimination of incompatible uses of land and buildings can become as normal a part of administration of municipal government as street improvements or urban redevelopment.

Incompatibilities should be classified for administrative purposes into four categories: (1) nonconforming buildings; (2) nonconforming use of buildings; (3) nonconforming use of land; and (4) nonconforming lots.

Every zoning ordinance should prevent the alteration, enlargement, reconstruction after abandonment, discontinuance or destruction of any nonconforming building unless the structure is made conforming or is temporarily continued under the special permit discussed below.

Every municipality should analyze and classify all incompatible and nonconforming uses of land and buildings. Some categories may be dismissed as of insufficient importance or of such a widespread nature as to be ineligible for a program of compulsory conformity. The doctrine of *de minimis*, for example, may rule out minor lot and building measurement nonconformities. While lots nonconforming as to size may be required to be combined with adjoining vacant lots in the same ownership, in general, nonconformities due to up-grading of zoning standards may have to be tolerated until areas are reclaimed by redevelopment from the deadly subdivision and building practices of a generation or more ago.

Analysis of nonconforming uses may lead to their legalization by proper rezoning. In one city in New Jersey, for example, by variance and spot zoning enough heavy commercial automotive uses and buildings were permitted and built since 1946 in a

³⁹ MICH. STAT. ANN. c. 54, §5.2933(1) (1949) authorizes cities and villages to acquire "by purchase, condemnation or otherwise private property for the removal of non-conforming uses and structures" (see Note, 102 U. OF PA. L. REV. 91, 93 n. 19 (1953)).

business district so as to change the predominant nature of a whole area. This area is now about to be rezoned for repair garages and similar heavy commercial uses.

In other parts of municipalities, analysis of incompatible and nonconforming uses may lead to the obvious conclusion that nothing short of condemnation or purchase of an entire area under a redevelopment plan will suffice to eliminate the built-in chaos. This is typical of the worst residential, commercial and industrial slum areas of the nation's older cities.

After analysis of incompatible and nonconforming uses, a program of action for large parts of the municipalities can be formulated. All uses of buildings and land which are determined to be of such a nature as to be subject to elimination can be placed under a permit of continuance. Such permits will allow certain structures and uses to continue only for a specified period of months or years. In some classes of uses, performance standards could be required to minimize nuisance factors.

The methods available for the elimination program include: (1) amortization by zoning; (2) injunction as a nuisance; (3) eminent domain; and (4) license by special permit or as a conditional use. Amortization and license could be combined in some categories of uses.

Administration of a general elimination program could properly include a program of municipal acquisition of undeveloped land suitable for certain classes of high nuisance-factor uses. This land could be made available to such uses, if they were ordered to discontinue elsewhere. Indeed, without offering nuisance industries a place to go, some municipalities would be open to the charge of "dumping,"⁴⁰ a charge no longer academic since the *Cresskill*⁴¹ and *Dumont*⁴² decisions.

Finally, the program of elimination of incompatible and nonconforming uses should take advantage of every type of regulation available to the municipality in addition to zoning. Public health ordinances, police regulations (including traffic regulations), housing laws,⁴³ and provision of municipal services can all play a part in bringing order into today's chaotic urban scene.

⁴⁰ See EDWARD M. BASSETT, *ZONING* 79-81 (2d ed. 1940).

⁴¹ *Duffcon Concrete Products v. Borough of Cresskill*, 137 N.J.L. 81, 58 A.2d 104 (1948), *reversed*, 1 N.J. 509, 64 A.2d 347 (1949).

⁴² *Borough of Cresskill v. Borough of Dumont*, 28 N.J. Super. 26, 100 A.2d 182 (1953), *aff'd*, 15 N.J. 238, 104 A.2d 441 (1954).

⁴³ A bill has been introduced in the New York City Council with the following major objectives: (1) to halt the perpetuation of "old-law" tenements built before 1901 by requiring that alterations to these tenements must not add to sub-standard housing; (2) compulsory improvement of standards of existing old-law tenements in stages, or steps, over the next few years; (3) rigid control over tenements to facilitate enforcement of the law. This bill, if enacted into law, would affect an estimated 260,000 dwelling units in buildings over 50 years old in the Borough of Manhattan, representing more than one third of all apartments in Manhattan.