

# Nonconforming Uses: Amortization, Enlargement, And Rebuilding

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## There's a new use for an old tool.

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**NONCONFORMING USES** are the sore thumbs of land use planning. By definition, they are relics of the past, either because the surrounding neighborhood has already changed or because the city wants it to change in the future. Nonconforming uses stand as obstacles to the separation and uniformity of districts in the city's zoning plan. They are tolerated only as long as the harm they inflict on their surroundings is deemed manageable.

Now that planning is in the process of moving away from the sprawling suburbs of the past, with their rigid separation of uses, the old concern about nonconformity may seem like a quaint relic itself. However, as cities try to reinvent themselves as denser, mixed-use centers of "green" development, the law of nonconforming uses may have an important role to play. Even the politically toxic concept of amortization, or the mandatory removal of nonconforming uses on a specific timetable, may gain new acceptance.

For the purposes of zoning, nonconforming uses come in two basic varieties. First, the use may have been allowed under the original zoning, but have become nonconforming under more recent regulations. For example, junkyards or auto repair shops constructed under the more free-wheeling early days of zoning, but disallowed as zoning hit its stride. The zone change itself is evidence that the use is incompatible with its surroundings and, in

some cases, noxious. In all cases, termination of the existing use is deemed beneficial to the community.

Second, the building or other structure may not conform to current zoning requirements, though the use is lawful. Commonly, setback, height, and coverage requirements evolve over time to meet changes in concepts of design. Buildings constructed to meet atria or open space standards in the 1960s may violate the streetwall requirements of newer zoning ordinances. The building therefore disrupts the visual uniformity of the district, or otherwise fails to meet physical standards.

Nonconforming uses and structures are not the same, though they may co-exist. A nonconforming residential use can occupy a completely conforming industrial building, which could easily be converted to permitted uses. The same residential use could be allowed in the district, but occupy a structure whose height, size, setbacks, and parking all violate current standards. Finally, both the use and the structure can be nonconforming, as would be the case for an industrial incubator located in an old school in a single-family residential zone.

**HISTORICAL BACKGROUND** • In the early days of zoning, its proponents struggled with the two problems of nonconforming uses and structures. Unless a use could be classified as an immediate health hazard, there seemed no way to remove it simply because it no longer fit the city's newly-minted land use plan. Both as a matter of constitutional law, and simple fairness, these holdovers from early zoning regimes were impossible to dislodge. The answer developed in the early days of zoning was amortization, defined as a technique for terminating nonconforming uses after the value of the use has been recovered over a period of time.

The concern was as much political as legal. As long ago as 1915, the United States Supreme Court upheld the summary termination of an established brickyard without compensation in *Hadacheck v.*

*Sebastian*, 239 U.S. 394 (1915). Although cities appeared to have the power to eliminate nonconforming uses without notice under *Hadacheck*, most cities chose to exercise it sparingly, if at all. In the rare cases when termination was mandated, it was phased in under amortization schedules designed to allow the owner to recoup a substantial percentage of its investment.

The biggest challenge, of course, was the large single-purpose building that could neither be used for another purpose nor economically modified to meet current standards. Attorneys and planners wrestled with this problem, and eventually acknowledged defeat. The time required to amortize such buildings was too long for rational planning. As a result, most zoning ordinances terminate these uses only after destruction or abandonment. Local city councils, though, found it difficult to enforce amortization requirements even for nonconforming uses that could be easily and inexpensively relocated.

The same concerns hold true today. After a period of expansion in the 1950s and 1960s, amortization regulations began to lose political acceptability. Under heavy pressure from the billboard industry, Congress agreed to compensate owners of nonconforming billboards through the Federal Highway Beautification Act (FHBA) in 1965. Amortization was affirmatively prohibited in connection with federally funded highways by 1978. While only a limited number of states prohibit amortization of nonconforming uses, it remains politically controversial, even when disfavored billboard uses are involved.

The courts, meanwhile, have continued to uphold reasonable amortization requirements on a case-by-case basis. *See Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690 (8th Cir. 1996) (upholding five-year amortization period for nonconforming billboards as reasonable). Rather than using a rigid rule, the courts have created a balancing test to weigh the value to the public of halting the nonconforming use against the private loss

suffered as a result of the termination. *Metromedia, Inc. v. City of San Diego*, 610 P.2d 407, 427-28 (Cal. 1980), *rev'd on other grounds*, 453 U.S. 490 (1981). It is not necessary for the owner's entire investment to be recouped at the end of the amortization period, so long as there is some opportunity for a return. *Id.* If a property is worth \$100,000 when the amortization period begins and depreciates at a rate of \$10,000 per year, the city is not required to grant a 10-year amortization period to allow the property to fully depreciate.

In calculating a reasonable amortization period the courts consider a number of factors, including:

- The nature of the nonconforming use;
- The amount of the investment or original cost of the property;
- The salvage value of the property,
- The time remaining on any leases under which the use is maintained;
- The remaining useful life of the property; and
- Any harm that may result to the public if the amortization period is extended.

*See Tahoe Regional Planning Agency v. King*, 285 Cal. Rptr. 335, 353 (Cal. Ct. App. 1991). To illustrate, an ice cream parlor that recently underwent a \$100,000 renovation but no longer conforms to the city's zoning ordinance may be entitled to a longer amortization period than a similarly situated junkyard if the court finds that prolonged use of the junkyard is more harmful to the public than ice cream sales. No single factor is determinative in a court's calculation of a reasonable amortization period.

Contrary to popular belief, amortization is generally not required to avoid an unconstitutional taking under the Fifth Amendment or parallel state requirements. Amortization does not provide "just compensation" for lost property, nor is its legality judged by the quantum of remaining use or value. Termination of a nonconforming use or structure typically does not result in a wipeout of the owner's

interest, since the property retains an authorized use, which presumably has some value, albeit diminished.

Amortization is more properly analyzed under "vested rights" theory, which is the most recognizable variant of governmental estoppel. Amortization does not "take" property for a public purpose in the constitutional sense, since both value and permitted uses generally remain. However, it interferes, often severely, with an owner's expectation of continuing a specific use. When the owner's expectation was both reasonable and backed up with cold cash, the rights are considered to be vested and the government is estopped from abruptly changing the rules.

The typical delay in terminating uses under most amortization statutes was intended to mitigate the harshness of the city's decision to eliminate the use. More importantly, it addresses the problem of reasonableness by giving the owner both notice and an opportunity to recoup its investment. The amount of notice depended on the value of the investment when compared to the public urgency of removal. The closer the use to a classic nuisance, the less reasonable the owner's expectation of continued use, and the shorter the required notice. The less valuable the use, the less notice need to meet minimum fairness standards.

Even assuming that a classic amortization ordinance survived the legal and political obstacles to adoption, there was another problem to be faced — market effectiveness. There was no question that a city had the power to terminate nonconforming uses and structures. However, there was no assurance that conforming uses or structure would take their place. In some cases, the cost of demolishing a nonconforming structure makes replacement virtually impossible, unless the new use is particularly profitable. The value of a nonconforming use, especially one with a monopoly position in a zoning district, may be so high that an owner will fight almost indefinitely to maintain it. Of course, during