1992

Pennsylvania Northwestern Distributors, Inc. v. Zoning Hearing Board of Moon Township: Amortization of Nonconforming Uses or Amortization of the Police Power in Pennsylvania

Barry Gosin

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr
Part of the Land Use Law Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol37/iss1/5

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
Notes

PENNSYLVANIA NORTHWESTERN DISTRIBUTORS, INC. v. ZONING HEARING BOARD OF MOON TOWNSHIP: AMORTIZATION OF NONCONFORMING USES OR AMORTIZATION OF THE POLICE POWER IN PENNSYLVANIA?

I. INTRODUCTION

A recurrent problem in modern land-use planning has been that of balancing individuals' property ownership rights against municipalities' need to enact zoning plans that comport with modern socio-economic, geographical, cultural and political realities. Of particular relevance for purposes of this Note are the problems associated with eliminating non-conforming uses. A property use is deemed nonconforming when

1. Bacchetta v. Bacchetta, 445 A.2d 1194, 1197 (Pa. 1982) (citing Mugler v. Kansas, 123 U.S. 623, 668 (1887)) (recognizing the problem and concluding that "'[t]he police power is fundamental because it enables 'civil society' to respond in an appropriate and effective fashion to changing political, economic, and social circumstances, and thus to maintain its vitality and order"); National Wood Preservers, Inc. v. Commonwealth Dep't of Envtl. Resources, 414 A.2d 37, 42 (Pa.), appeal dismissed sub nom. National Wood Preservers, Inc. v. Pennsylvania Dep't of Envtl. Resources, 449 U.S. 803 (1980); see also Butcher v. Bloom, 216 A.2d 457, 463 (Pa. 1966) (Bell, C.J., concurring) (concluding that "regional, social, and economic interests" in each state will "vary from State to State, since each state is unique, in terms of topography, geography, demography, history, heterogeneity and concentration of population, variety of social and economic interests, and in the operation and interrelation of its political institutions"); David G. Drumm, Comment, Conforming the Nonconforming Use: Proposed Legislative Relief For a Zoning Dilemma, 33 Sw. L.J. 855, 855 (1979).

For a discussion of the various means by which municipalities in Pennsylvania have attempted to meet the changing needs of their citizenry, see generally ROBERT S. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE FORMS (1970 & Supp. 1989-1990).


For a general discussion of the mechanics and constitutionality of zoning, see infra notes 19-27 and accompanying text.

2. In Pennsylvania, the state government has delegated the power to zone to local governments by way of the Pennsylvania Municipalities Planning Code (MPC). PA. STAT. ANN. tit. 53, §§ 10101-12100 (1972 & Supp. 1991). The MPC defines a nonconforming use as a use, whether of land or of structure, which does not comply with the applicable use provisions in a zoning ordinance or amendment herefore or hereafter enacted, where such use was lawfully in existence prior to the enactment of such ordinance or amendment, or prior to the
although originally lawful, it no longer complies with a municipality's new or amended zoning legislation. Nonconforming uses are problematic because they hinder the realization of zoning's general objective, which is to further the general public health, safety, and welfare. For the municipality to eliminate the use outright, without paying just compensation, would constitute a taking. Nonetheless, because zoning can

application of such ordinance or amendment to its location by reason of annexation.

Id. § 10107 (Supp. 1991).


In layman’s terms, a nonconforming use is "[a] building, structure or use of land that is in existence and lawful on the date when a zoning ordinance or amendment becomes effective prohibiting such use, but which 'nevertheless' continues unaffected by such an ordinance or amendment thereto." Joseph A. Katarinicic, Elimination of Non-Conforming Uses, Buildings and Structures by Amortization—Concept Versus Law, 2 Duq. L. Rev. 1, 2 (1963). For the statutory definition of the term "nonconforming use" in Pennsylvania, see supra note 2.

4. See Katarinicic, supra note 3, at 2. ("Nonconforming uses . . . are considered to be out of keeping with the desirable land patterns for the community."); Drumm, supra note 1, at 855 ("[T]he continued presence of a use that is incompatible with the city's proposed development may seriously retard development of an area."); Note, Amortization of Property Uses Not Conforming to Zoning Regulations, 9 U. Chi. L. Rev. 477, 479 (1942) [hereinafter Note, Amortization of Property Uses] ("Professional planners and city officials now recognize, however, that the fundamental problem facing zoning is the inability to eliminate the non-conforming use."); Kenneth E. Kulzick, Note, Zoning: Elimination of Nonconforming Uses by Amortization, 2 UCLA L. Rev. 295, 297 (1954) (arguing that court decision permitting amortization was "a commendable recognition that the benefits of a healthy, well-planned community can be effectively achieved only by elimination of existing nonconforming uses"). But see Note, Nonconforming Uses: A Rationale and an Approach, 102 U. Pa. L. Rev. 91, 107 (1953) [hereinafter Note, Nonconforming Uses: A Rationale and an Approach] (suggesting that nonconforming use is not significant obstacle to realization of comprehensive land use planning because those uses that are not eliminated under nuisance law or eminent domain are "least noxious" uses).

5. The United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Similarly, the Pennsylvania Constitution provides: "[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." Pa. Const. art. 1, § 10.

To the extent that an ordinance immediately extinguished a lawful vested property right without providing a mechanism to compensate the property owner, the ordinance would be unconstitutional as a "taking." Hoffmann v. Kinealy, 389 S.W.2d 745, 753 (Mo. 1965) (en banc) (concluding that "[t]o our knowledge, no one has, as yet, been so brash as to contend that . . . a preexisting lawful nonconforming use properly might be terminated immediately").

Similarly, in Bachman v. Zoning Hearing Bd., 494 A.2d 1102 (Pa. 1985), the court concluded that "the continuance of nonconforming uses under zoning ordinances is countenanced because it avoids the imposition of a hardship upon the property owner and because the refusal of the continuance of a nonconform-
be viewed as a means by which municipalities can adjust the composition of their respective communities to comport with modern socio-economic, political, geographic and cultural realities, the continued existence of a use that does not conform to current zoning laws is an obstacle to progress.6

The problems associated with eliminating the nonconforming use must, however, be balanced against the sanctity of private property.7 One's right to use private property is not absolute.8 Nevertheless, in balancing private property owners' rights with municipalities' power to regulate private property, some courts have traditionally favored the rights of property owners.9 Other courts have emphasized municipali-


[a] basic purpose of zoning is to ensure an orderly physical development of the city . . . by confining particular uses of property to certain defined areas. With such a purpose nonconforming uses are inconsistent . . . [sic] Even though zoning ordinances permit the continuance of nonconforming uses, it is the policy of the law to . . . strictly construe provisions in zoning ordinances which provide for the continuance of nonconforming uses. Nonconforming uses, inconsistent with a basic purpose of zoning, represent conditions which should be reduced to conformity as speedily as is compatible with the law and the Constitution.

Id. at 1005 (quoting Hanna v. Board of Adjustment, 183 A.2d 539, 543 (Pa. 1962)).


8. See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987) (holding that act which prohibited mining of more than 50% of coal beneath certain statutorily defined structures is valid exercise of police power); Penn Central, 438 U.S. at 137-38 (upholding landmark preservation legislation, effect of which was to prohibit appellant from vertically expanding building); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (upholding ordinance that prevented appellants from mining on their property because of potential safety hazards associated with such mining); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926) (upholding zoning ordinance, effect of which was to reduce appellant's property value by over 75%).

9. For a compilation of jurisdictions that give property rights greater protection in the balance between individuals' property rights and municipalities'
ties' needs. Many municipalities have employed amortization to balance these two competing interests.

In the context of nonconforming uses, amortization refers to terminating an existing vested property right within a given period defined by statute in order to comply with zoning regulations. Amortization, properly employed, protects constitutional property rights and also gives municipalities the required flexibility to alter often old and outdated zoning plans. Indeed, most states' highest courts that have considered the question have upheld the constitutionality of amortization as a means of eliminating nonconforming uses.

needs, see the discussion of the minority approach to amortizing nonconforming uses at infra note 17 and accompanying text.

10. For a compilation of jurisdictions that give municipalities greater latitude in regulating private property, see the discussion of the majority approach to amortizing nonconforming uses at infra note 14 and accompanying text.

11. "Under this method ... a nonconforming use, structure or building must, within a stated period of time, be eliminated either by its termination, removal, or appropriate modification." Katarincic, supra note 3, at 5. The MPC neither defines nor directly authorizes amortization as a means of eliminating nonconforming uses. For a discussion of how the MPC may implicitly permit amortization of nonconforming uses, see infra notes 106-17 and accompanying text.

Interestingly, the Pennsylvania County Code, a predecessor to the MPC, expressly permitted the amortization of nonconforming uses. Specifically, § 2033 of Title 16 provided that "[t]he board of county commissioners may, in any zoning ordinance, provide for the termination of nonconforming uses . . . by providing a formula or formulae whereby the compulsory termination of a nonconforming use may be so fixed as to allow for the . . . amortization of the investment in the nonconformance." PA. STAT. ANN. tit. 16, § 2033 (repealed 1969).


12. Although the MPC contains no such provision, several states expressly permit the amortization of nonconforming uses in their Zoning Enabling Acts. See 1 ANDERSON, supra note 1, § 6.66 (Colorado, Michigan and Illinois); 6 ROHAN, supra note 1, § 41.04[2] (Georgia). However, the absence of such an affirmative grant has, by no means, been widely taken to prohibit the use of amortization. See Lamar Advertising Assoc., Ltd. v. City of Daytona Beach, 450 So. 2d 1145, 1150 (Fla. Dist. Ct. App.) (same), petition for review denied, 458 So. 2d 272 (Fla. 1984); Oswald v. County of Ramsey, 371 N.W.2d 241, 246 (Minn. Ct. App. 1985) (same); Centaur, Inc. v. Richland County, 392 S.E.2d 165, 169 (S.C. 1990) (upholding validity of amortization provision in municipal ordinance notwithstanding absence of express affirmative grant in enabling legislation).

13. See Drumm, supra note 1, at 872 ("Not only does amortization involve the application of the balancing approach to the nonconforming use problem, but the recognition that the amortization period may serve as compensation to validate an otherwise invalid ordinance provides needed flexibility.").

14. See, e.g., Mayor of New Castle County v. Rollins Outdoor Advertising, Inc., 475 A.2d 355, 360 (Del. 1984) (upholding ordinance that provided three-year amortization period to terminate nonconforming signs); Spurgeon v. Board of Comm'rs, 317 P.2d 798, 806 (Kan. 1957) (upholding ordinance that provided two-year amortization period in which to terminate auto wrecking business); State ex rel. Dema Realty Co. v. McDonald, 121 So. 613, 617 (La.) (upholding ordinance that provided one year in which to terminate nonconforming grocery
Recently, in Pennsylvania Northwestern Distributors, Inc. v. Zoning Hearing Board of Moon Township, the Pennsylvania Supreme Court addressed, for the first time, whether a zoning ordinance that provides for the amortization of a nonconforming use is violative of the Pennsylvania Constitution as a ‘‘taking’’ of property without just compensation. The court joined a distinct minority of state courts in holding that the amortization and discontinuance of a nonconforming use is \textit{per se} confiscatory and violative of the state’s constitution.

\footnote{15. 584 A.2d 1372 (Pa. 1991).}

\footnote{16. \textit{Id.} at 1373. The court considered two constitutional provisions to be relevant to the issue presented in \textit{Pennsylvania Northwestern}: Article 1, § 1 and Article 1, § 10 of the Pennsylvania Constitution. Article 1, § 1 provides in pertinent part: \textquoteleft\textquoteleft All men . . . have certain inherent and indefeasible rights, among which are those of . . . possessing and protecting property . . . .\textquoteright\textquoteright \textit{PA. CONST.} art. 1, § 1. For the text of Article 1, § 10 of the Pennsylvania Constitution, see supra note 5.}

\footnote{17. \textit{Pennsylvania Northwestern}, 584 A.2d at 1376 (citing \textit{PA. CONST.} art. 1, § 1). The proposition that amortization of a nonconforming use is \textit{per se} unconstitutional has been embraced by several states’ highest courts. See James J.F. Loughlin Agency, Inc. v. Town of Hartford, 348 A.2d 675, 678 (Conn. 1974) (invalidating, as ultra vires, ordinance that provided five-year period in which to amortize nonconforming signs); Ailes v. Decatur County Area Planning Comm’n, 448 N.E.2d 1057, 1060 (Ind. 1983) (“We hold, however, that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power.’’), \textit{cert. denied}, 465 U.S. 1100 (1984); Hoffmann v. Kinealy, 389 S.W.2d 745, 753 (Mo. 1965) (en banc) (concluding that “[the court] cannot embrace the doctrine espoused by advocates of the amortization technique that there is no material distinction between regulating the future use of property and terminating pre-existing lawful nonconforming uses’’); United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 366-67 (N.J. 1952) (invalidating, as ultra vires, ordinance that provided two years in which to amortize nonconforming signs); City of Akron v. Chapman, 116 N.E.2d 697, 700 (Ohio 1953) (municipal ordinance permitting termination of nonconforming use after expiration of a ‘‘reasonable time’’ constitutes ‘‘deprivation’’ of . . . property without due process of law’’ (emphasis deleted)).}
This Note proposes that the Pennsylvania Supreme Court, in its fervor to protect property rights against governmental encroachment, ignored and misconstrued precedent. On a broader level, this Note proposes that the court's holding is inconsistent with previous decisions that upheld governmental regulation of vested property rights as valid exercises of police power. This Note concludes by suggesting that the Pennsylvania Northwestern decision will not only hinder effective land-use planning, but will also adversely affect individuals' ability to freely use their property.

II. BACKGROUND

A. The Genesis of Euclidian Zoning

Before attempting to assess the various methods by which municipalities have implemented change in light of existing zoning plans, it is first essential to trace the genesis of zoning as a means of land-use planning. The Supreme Court established the foundation for modern zoning in Village of Euclid v. Ambler Realty Co. In Euclid, the Village of Euclid, Ohio passed an ordinance that effectively prohibited Ambler Realty Co., a developer, from using the developer's land for commercial purposes. The issue before the Court was whether the ordinance was a valid exercise of the police power, and thus constitutional, or con-

18. For examples of Pennsylvania courts permitting regulation of vested property rights, see infra note 126 and accompanying text.

19. 272 U.S. 365 (1926). It is important to note that the ordinance at issue in Euclid had "prospective, rather than retroactive effect," that is, it regulated the way property could be used in the future. Note, Nonconforming Uses: A Rationale and an Approach, supra note 4, at 102. Thus, Euclid did not consider the validity of the retroactive application of a zoning law. Id. Eliminating a nonconforming use through amortization involves retroactive application of a zoning ordinance. Courts that adopt the minority position, such as that adopted in Pennsylvania Northwestern, rely heavily on the distinction between the prospective and retroactive application of a zoning ordinance. See, e.g., Hoffmann, 389 S.W.2d at 753 ("[W]e cannot embrace the doctrine espoused by advocates of the amortization technique that there is no material distinction between regulating the future use of property and terminating pre-existing lawful nonconforming uses."). In contrast, majority jurisdictions dismiss the distinction as "merely one of degree." See, e.g., Mayor of New Castle County v. Rollins Outdoor Advertising, Inc., 475 A.2d 355, 357 (Del. 1984) ("The distinction between an ordinance that restricts future uses and one that requires existing uses to stop after a reasonable time, is not a difference in kind but one of degree . . . ." (quoting Grant v. Mayor of Baltimore, 129 A.2d 363, 369 (Md. 1957))).

For a general discussion of Euclid, see Ryan, supra note 1, §§ 3.1.3, 3.1.8, 3.6.3.

20. Euclid, 272 U.S. at 384. "[The ordinance] establish[ed] a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses [and] single family houses . . . ." Id. at 379-80. Under the ordinance, the Village of Euclid, Ohio was divided into six classes of use districts. Id. at 380. Appellee's land, which appellee owned prior to the ordinance's enactment, was later classified as U-2, U-3 and U-6. Id. at 382. None of these classifications permitted appellee to build a multi-unit apart-
versely, whether the ordinance constituted a taking, and was thus unconstitutional.\textsuperscript{21} Notwithstanding that the ordinance reduced the value of Ambler Realty Co.'s property by seventy-five percent, the Court concluded that the ordinance was a valid exercise of the village's police power.\textsuperscript{22} Thus, \textit{Euclid} established the constitutionality of zoning as a means of land-use planning.

The Court's \textit{Euclid} decision was refined by later decisions which establish that, unless the legislation at issue deprives the owner of \textit{all} reasonable use of the property in question, the legislation is within the state's police power.\textsuperscript{23} Although \textit{Euclid} implicitly established that legislative house on the land, which was the use intended by the appellee when the land was first acquired. \textit{Id.} at 380-81.

Appellee was unable to attack the ordinance on the ground that it constituted a taking as applied to appellee's property because appellee had not applied for a building permit or sought an injunction to prevent enforcement of the ordinance. \textit{Id.} at 370. Accordingly, appellee challenged the ordinance as \textit{per se} unconstitutional. \textit{Id.}

21. \textit{Id.} at 386. The ordinance significantly reduced the value of appellee's land. \textit{Id.} at 384. The land was "in the path" of land being used for industrial purposes and would have been worth $10,000 per acre if zoned for industrial use, whereas the land was only worth $2,500 per acre if zoned for residential use. \textit{Id.} Accordingly, the ordinance reduced the potential value of the land by 75%. The Court stated: "The question is whether the ordinance is invalid in that it violates the constitutional protection to the right of property in the appellee by attempted regulations under the guise of police power, which are unreasonable and confiscatory?" \textit{Id.} at 386. In the Court's view, a 75% reduction in value was neither unreasonable nor confiscatory. \textit{Id.} at 397.

22. \textit{Id.} at 395. The Court concluded that "the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." \textit{Id.} Specifically, the Court considered the following facts to support the conclusion that the ordinance was rationally related to the public health, safety, morals or welfare: (1) "the development of detached house sections is greatly retarded by the coming of apartment houses;" (2) "very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district;" (3) "the coming of one apartment house is followed by others;" (4) apartment houses bring "the disturbing noises incident to increased traffic and business;" and (5) apartment houses detract "from . . . safety and deprive[] children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities." \textit{Id.} at 394.

23. \textit{See} Pennsylvania Coal Co. \textit{v.} Mahon, 260 U.S. 393 (1922). Although the Court held that a taking had occurred on the facts of \textit{Pennsylvania Coal}, the Court noted that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." \textit{Id.} at 413. For further discussion of \textit{Pennsylvania Coal}, see infra note 98 and accompanying text.

Notwithstanding the holding in \textit{Pennsylvania Coal}, the precedents illustrate that even a quite substantial diminution in value will not be construed as a taking. For example, in Keystone Bituminous Coal Ass'n \textit{v.} DeBenedictis, 480 U.S. 470, 497 (1987), the petitioners mounted a facial challenge to the constitutionality of §§ 4 and 6 of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act and regulations promulgated thereunder. \textit{Id.} at 476-77. The
lation could cause a significant diminution in the value of individuals’ property without amounting to a “taking,” the Court’s decision clearly left many questions unanswered.

Specifically, the Court’s decision failed to consider how to introduce flexibility into the system to respond to the needs of property owners who, for various reasons, seek to utilize their property for uses prohibited by a given zoning ordinance.24 Additionally, it is important to re-regulations required that at least 50% of the coal beneath certain designated structures must be left in place and not mined. Id. Petitioners’ primary challenge to the legislation was based upon the Takings Clause of the Fifth Amendment of the United States Constitution. Id. at 474. As a result of the legislation, petitioners were required to leave 27 million tons of coal (two percent of the total coal deposits) in place in 13 mines between 1966 and 1982. Id. at 496. Refusing to treat the 27 million ton parcel as a property interest separate from the entire coal mine and distinguishing the case from Pennsylvania Coal, the Keystone Court held that the legislation at issue was a constitutional exercise of the state’s police power in that it did not deprive petitioners of all reasonable economic use of the property. Id. at 498-99.

Similarly, in Penn Central, the Court upheld state regulation of private property where a property owner was not deprived of all reasonable economic use of its property. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124. The legislation at issue in Penn Central was New York City’s Landmarks Preservation Law (Landmark Law), which required the owners of “designated structures” to keep the exterior features of the building “in good repair” and to obtain the approval of the Landmark Preservation Commission (Commission) prior to altering or expanding the exterior structure of the building. Id. at 111-12. Two other ordinances permitted the owners of landmark properties to transfer their unusable development rights (TDRs) to other lots, thus mitigating the economic loss property owners would suffer as a result of the regulation of their property. Id. at 114. The Grand Central Terminal in New York City was designated as a landmark property. Id. at 116. Penn Central Transportation Co. (Penn Central), the Grand Central Terminal’s owner, entered into a contract with UGP Properties, Inc. (UGP) whereby UGP was to construct an office building above the terminal and Penn Central was to receive a portion of the rents generated. Id. Penn Central and UGP applied to the Commission for approval of their plan to build the office building, but the Commission denied the application. Id. at 117.

The Court conceded that the Landmark Law deprived appellants of the most profitable use of their land, but it also found that it did not deny them of all reasonable economic use of the land. Id. at 120. Specifically, the Court noted that Penn Central could increase revenues by utilizing under-utilized space within the property or by raising rents. Id. Additionally, the Court concluded that the TDRs mitigated the Landmark Law’s economic burden on Penn Central. Id. at 137. Accordingly, the Court held that New York City did not take Penn Central’s property through the operation of the Landmark Law. Id. at 138.

24. As a practical matter, states have provided much needed flexibility by allowing municipalities to issue variances and special exceptions.

A variance is “an authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance.” 3 ANDERSON, supra note 1, § 18.02. It is “a form of administrative relief from the literal import and strict application of zoning regulations.” Id. The language of the MPC indicates that the presumption is against granting variances. With respect to variances, the MPC provides that

(a) The board shall hear requests for variances where it is alleged
that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. The board may by rule prescribe the form of application and may require preliminary application to the zoning officer. The board may grant a variance, provided that all of the following findings are made where relevant in a given case:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

3. That such unnecessary hardship has not been created by the appellant.

4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

(b) In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance.


Similarly, the MPC permits municipalities to provide for special exceptions in their zoning legislation. PA. STAT. ANN. tit. 53, § 10912.1 (Supp. 1991). A special exception is a use that is permitted under an ordinance when all conditions precedent to the applicability of the exception are satisfied. 3 ANDERSON, supra note 1, § 18.03. In contrast to variances, the language of the MPC indicates the there is a presumption in favor of granting a special exception. 1 RYAN, supra note 1, § 5.1.5. The MPC provides:

Where the governing body, in the zoning ordinance, has stated special exceptions to be granted or denied by the board pursuant to express standards and criteria, the board shall hear and decide requests for such special exceptions in accordance with such standards and criteria. In granting a special exception, the board may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

PA. STAT. ANN. tit. 53, § 10912.1 (Supp. 1991). For further discussion of special exceptions, see 1 RYAN, supra note 1, §§ 5.1.1-5.1.3, 5.4.2.
nance. Euclid did not purport to, nor did it in fact, address how such property was to be brought into conformity, if at all, with a new zoning ordinance. This is the problem of the nonconforming use.

B. Eliminating the Nonconforming Use: Traditional Approaches

Most commentators have taken the position that the nonconforming use is a necessary evil that must be conformed as quickly as is constitutionally possible. These commentators emphasize that the longevity of the nonconforming use has hindered comprehensive land-use planning.

Most courts agree that nonconforming uses are inconsistent with the purposes of zoning and should be quickly conformed to existing zoning plans. Moreover, even those courts that are most protective of nonconforming uses have conceded that such uses should be reduced to conformity with existing zoning legislation as quickly as is constitutionally possible.

25. See 1 ANDERSON, supra note 1, § 6.02, at 356.
26. See Drumm, supra note 1, at 859.
27. For definitions of the term “nonconforming use,” see supra notes 2-3 and accompanying text.
28. See Note, The Abatement of Pre-existing Nonconforming Uses Under Zoning Laws: Amortization, 57 Nw. U. L. Rev. 923, 929 (1962) (“[T]here is general agreement that the fundamental problem facing zoning is the inability to eliminate the nonconforming use.”) (quoting Grant v. Mayor of Baltimore, 129 A.2d 363, 365 (Md. 1957)); Drumm, supra note 1, at 881 (“The presence of a land use that is grossly incompatible with the future development strategy of a growing area can obstruct the orderly and rational growth of metropolitan areas.”); Kulzick, supra note 4, at 295-96 (“[T]o effectuate the general purpose of present day zoning ordinances it is necessary to eventually end nonconforming uses.”). But see Note, Nonconforming Uses: A Rationale and an Approach, supra note 4, at 94 (suggesting nonconforming uses are not as great a threat to realization of comprehensive planning as was originally feared).
29. See Drumm, supra note 1, at 863 (“Nonconforming uses have proven to be more durable than the original zoning advocates anticipated.”); Comment, The Elimination of Nonconforming Uses, 7 STAN. L. REV. 415, 416 (1955) (“It was thought that [nonconforming uses] would eventually disappear if their expansion were curtailed, but their position as legally protected monopolies resulted in prosperity and increased longevity.”).

The longevity of the nonconforming use is due in large part to “the artificial monopoly created for nonconforming uses by the zoning ordinance.” See Drumm, supra note 1, at 863. (“Rather than withering away, many [nonconforming uses] have thrived because the establishment of zoning has bestowed on them a monopolistic position by preventing the establishment of competing enterprises . . . .”); Note, The Abatement of Pre-existing Nonconforming Uses Under Zoning Laws: Amortization, supra note 28, at 323 (“[Nonconforming uses] often tend to prosper as never before under the monopolies given them by the zoning laws . . . .”); Note, Nonconforming Uses: A Rationale and an Approach, supra note 4, at 94 (“[N]onconforming uses, often granted by law a monopolistic position in their neighborhood, have become more firmly entrenched with the passage of time.”).
30. For a compilation of courts agreeing with the proposition that nonconforming uses should rapidly be brought into conformity with existing zoning ordinances, see supra note 14.
ally possible. Thus, most courts and commentators agree that non-conforming uses hinder land-use planning. Although the need to bring nonconforming uses into conformity is largely undisputed, the means by which courts and legislatures have eliminated nonconforming uses continues as a source of controversy.

Prior to the advent of amortization, a nonconforming use could be terminated only by the common law doctrines of nuisance or abandonment of the property. For a compilation of courts adopting the minority position with respect to the constitutionality of amortization provisions, but agreeing with the majority of jurisdictions that nonconforming uses should be brought into conformity with existing zoning legislation as quickly as is constitutionally possible, see supra note 17.

31. For a compilation of courts adopting the minority position with respect to the constitutionality of amortization provisions, but agreeing with the majority of jurisdictions that nonconforming uses should be brought into conformity with existing zoning legislation as quickly as is constitutionally possible, see supra note 17.

32. In Muehlieb v. City of Philadelphia, the court defined a public nuisance as an "unreasonable interference with a right common to the general public." 574 A.2d 1208, 1211 (Pa. Commw. Ct. 1989) (citing Restatement (Second) of Torts § 821B (1979)). Muehlieb maintained 20 dogs on her premises in violation of Philadelphia's Animal Control Law, which limited the number of dogs one could house within a residential district to 12. Id. at 1209. Evidence was presented at trial that Muehlieb's property contained huge holes filled with green water that smelled strongly of urine and created an intolerable stench in the area. Id. Additionally, one of Muehlieb's neighbors introduced into evidence a cassette recording of dogs howling at 5:30 in the morning. Id. The Muehlieb court concluded that Muehlieb's property was a public nuisance because "[maintaining the dogs on the property] unreasonably interfered with the rights of Muehlieb's neighbors and local church parishioners." Id. at 1212.

Similarly, in King v. Township of Leacock, 552 A.2d 741 (Pa. Commw. Ct. 1989), the court defined a nuisance as "such a use of property . . . as, irrespective of actual trespass against others or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom." Id. at 743 (quoting Groff v. Borough of Sellersville, 314 A.2d 328, 330 (Pa. Commw. Ct. 1974)). In King, portions of appellant's property were boarded up because it constituted a safety hazard to children, upstairs portions of the building were rotted out, the premises lacked water and a functioning sewer system, the plumbing fixtures were rusted through, the doors and windows of the building were largely missing, there was evidence of rats on the premises and the yard was overgrown with weeds. Id. at 742. The court upheld the lower court's decision that the property constituted a public nuisance. Id. at 743.

The preceding cases illustrate how nuisance law works to restrict the ways in which individuals can use their property. A brief hypothetical illustrates how the law of nuisance produces the same result where the "offending" property is a nonconforming use.

Suppose ABC, Inc. (ABC) builds a tire manufacturing plant in section A-1 of Hypotown, Pa., which is zoned to accommodate tire manufacturing plants. Two weeks after ABC obtains the necessary licenses to operate the tire manufacturing plant, Hypotown amends its zoning ordinance to prohibit tire manufacturing plants in section A-1. The use is permitted to continue as a valid nonconforming use. The factory operates 24 hours a day and emits thick black smoke from its plant. Each morning, Mark awakens, after a night of sporadic sleep (due to the noise from the plant), only to find his lawn covered by a thin layer of black dust from the plant. Arguably, the preceding facts can be characterized as a nuisance. Notwithstanding that ABC owns a valid nonconforming use, it can be forced to abandon the use if the use is held to rise to the level of a nuisance. See Pennsylvania Northwestern, 584 A.2d at 1375.
33. The theory of abandonment is at issue where the owner of a nonconforming use or building ceases to utilize the property for an extended period of time, thus permitting the municipality to deem the use no longer in existence. See 2 Ryan, supra note 1, § 7.3.1. For example, suppose Fred owns a parcel of land in Villanova, on which he operated a bar and restaurant from 1975-1980. In 1976, the land on which the restaurant was operated was rezoned for residential use only. Fred was permitted to continue to operate his restaurant on the land after 1976 as a lawful nonconforming use. In 1980, a fire destroyed the restaurant. In 1991, the restaurant still had not been rebuilt. Although Fred is, of course, still the owner of the property, he may nonetheless be deemed to have abandoned his lawful nonconforming use.


The presumption against a judicial finding of abandonment is further evidenced by the principle that “minimal use of a nonconforming use is enough to prevent a finding of abandonment.” Rubin v. Zoning Hearing Bd., 578 A.2d 1372, 1374 (Pa. Commw. Ct. 1990). In Rubin, the court agreed with the Board’s finding that a nonconforming commercial business had not been abandoned even though “[s]ubsequent to Harrington’s discontinuance of production operations, no employees were stationed at the subject premises and few if any business visitors had occasion to access the property.” Id. The court reasoned that “the infrequent usage of the non-conforming use, consist[ing] of ‘casual visits’ . . . made by [Harrington’s employees] when it was necessary to access the interior of the building . . . [constituted] minimal utilization . . . sufficient to perpetuate its status as a non-conforming use.” Id. at 1374 (quoting Kuhl v. Zoning Hearing Bd., 415 A.2d 954, 956 (Pa. Commw. Ct. 1980)).

Further, merely altering the character of the use will not necessarily lead to a finding of abandonment. For example, in Pappas, the court concluded that a restaurant owner had not abandoned his nonconforming sandwich shop by converting it to a full-service pizza restaurant. Pappas, 589 A.2d at 678.

For further discussion of the doctrine of abandonment as applied to nonconforming uses in Pennsylvania, see 2 Ryan, supra note 1, § 7.3.1-7.3.3. For a more general treatment of abandonment as applied to nonconforming uses, see 6 Rohan, supra note 1, § 41.03 [6].
main through the doctrine of "reasonable expansion." However, these doctrines have proven to be ineffective means of eliminating the nonconforming use. Abandonment and nuisance have only limited application. Eminent domain is also generally inadequate due to its

34. Eminent domain is the state's power to force private landowners to sell the land to the state, provided that the state seeks to use the land for a public purpose and pays the landowner just compensation. 29A C.J.S. Eminent Domain § 1 (1965). The Pennsylvania Constitution provides in pertinent part: "Municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken . . . and compensation shall be paid or secured before the taking." PA. CONST. art. 10, § 4. Thus, the government is only required to justly compensate property owners where the taking of their property is for public use. Best v. Zoning Bd. of Adjustment, 141 A.2d 606, 612 (Pa. 1958). However, where the government is merely regulating property under its police power, as opposed to taking property for public use, it need not compensate the property owner. Pennsylvania Northwestern, 584 A.2d at 1375. In Pennsylvania, eminent domain is also governed by statute. See PA. STAT. ANN. tit. 26, §§ 1-101 to 1-903 (Supp. 1991). For further discussion of eminent domain, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 9-1 to 9-7, at 587-613 (2d ed. 1988).

35. Township of Chartiers v. William H. Martin, Inc., 542 A.2d 985, 988 (Pa. 1988). The doctrine of reasonable expansion permits the owners of a nonconforming use to expand the use to meet certain changes in the community. If the expansion is found to be reasonable, the use remains a lawful nonconforming use. See Pappas, 589 A.2d at 678 (concluding that change in nonconforming use from take-out sandwich shop to full-service pizza restaurant was reasonable expansion).

The doctrine of reasonable expansion would work to terminate a nonconforming use, however, where the expansion of a nonconforming use so dramatically altered the nature or character of the use as to render it a different use. See, e.g., Appeal of Gambone, 598 A.2d 620, 625 (Pa. Commw. Ct. 1991) (transformation of nonconforming apartments into tavern where transformation involved expanding tavern vertically, and thus eliminating apartments, held to constitute a different use); O'Kane v. Zoning Hearing Bd., 582 A.2d 716 (Pa. Commw. Ct. 1990) (construction of parking lot for use by tenants of nonconforming apartment building held to be unreasonable expansion where parking lot was constructed on land adjacent to land on which apartment building was situated).


36. See Note, Nonconforming Uses: A Rationale and an Approach, supra note 4, at 93 ("Eminent domain . . . stand[s] as [an] effective, but limited tool[] for the elimination of undesirable uses of property."). Abandonment is also of limited use because it only applies in those instances where a property owner has manifested an intention to abandon the use. For a discussion of abandonment, see supra note 34 and accompanying text. Nuisance doctrine is also inadequate to terminate many nonconforming uses. See Note, Nonconforming Uses: A Rationale and an Approach, supra note 4, at 94 (concluding that "[p]robably nuisance law could not be brought into operation when the sole purpose of the prohibition is to achieve uniformity in the neighborhood").

37. For discussion of these limitations, see the discussion of abandonment and nuisance, supra notes 32-33 and accompanying text.
prohibitive cost. Further, some commentators suggest that decisions made at the local level, such as those regarding extending nonconforming uses under the doctrine of reasonable expansion, are especially prone to political machination. To the extent that this is an accurate assessment of the reality of local politics, one cannot expect local zoning boards to contribute effectively to terminating nonconforming uses. Accordingly, if nonconforming uses are to be terminated, the task falls largely on state and local legislatures.

C. The Emergence of the Amortization Technique

One of the ways that legislatures have confronted the problem of the nonconforming use is by utilizing the amortization technique. Properly drafted, an amortization provision can serve as a useful way for municipalities to avoid a taking challenge. The theory underlying amortization is that, by offering the owner of a nonconforming use a period of time in which to bring the use into conformity, during which time the owner enjoys an artificial monopoly, the owner will be able to recoup a sufficient portion of the investment so as to bring the ordinance within constitutional guidelines. Further, at the end of the

38. Not only does eminent domain impose a cost on the government in terms of the expenditure it must make to compensate the landowner, the Pennsylvania Eminent Domain Code also imposes costs on the government in terms of time and money when the government seeks to exercise its eminent domain power. See PA. STAT. ANN. tit. 26, §§ 1-401 to 1-411 (Supp. 1991). For example, the government (condemnor) must file a declaration of condemnation in court. Id. § 1-402. The filing of a security bond is also required in many circumstances. Id. § 1-403. The condemnor must also record a notice of the declaration of taking in the office of the recorder of deeds. Id. § 1-404. Within 30 days after the filing of the declaration of taking, the condemnor must give written notice of the filing to the condemnee. Id. § 1-405. The condemnee then has the opportunity to file preliminary objections to the declaration of taking within 30 days after being served with the notice of condemnation. Id. § 1-406. If the parties are unable to agree as to the value of the property, the process may be further lengthened as a result of the board of view process, under which the property's value is determined. Id. §§ 1-501 to 1-511. Additionally, the condemnee can obtain appellate review of the viewers' decision, which results in further government expenditures of time and money. Id. §§ 1-515 to 1-517.


40. See Drumm, supra note 1, at 863 ("The problems caused by the durability of nonconforming uses require that affirmative [legislative] measures be taken if the number of nonconforming uses is to be significantly reduced.").

41. For a definition of amortization, see supra note 11 and accompanying text.

42. For a discussion of how properly drafted amortization provisions serve as a useful way for municipalities to avoid "takings" challenges, see supra notes 4 & 11 and accompanying text.

43. See 1 Anderson, supra note 1, § 6.67, at 508-13. Professor Anderson concludes:

Municipalities which seek to terminate nonconforming uses
amortization period, the property owner may still utilize the property in some other manner, and thereby recoup yet more of the investment in the property.\textsuperscript{44} It is an established principle of law that a zoning ordinance can impose a substantial diminution in the property owner's investment without amounting to a taking.\textsuperscript{45} Accordingly, because the owner has not been deprived of all reasonable economic use of the property, where amortization is properly employed, the owner would theoretically be unable to challenge the ordinance on taking grounds.\textsuperscript{46}

A majority of jurisdictions that have considered the technique have held that amortization is a constitutional means of eliminating nonconforming uses.\textsuperscript{47} This does not mean, however, that amortization of nonconforming uses is constitutional in all circumstances. Courts following the majority approach apply a multi-factor test to assess the reasonableness of the amortization provision.\textsuperscript{48} At its most fundamental level, through amortization proceed on the assumption that the public welfare requires that such uses cease, but that summary termination is illegal, impractical, or unfair. They find a middle ground, between immediate cessation of use and the indefinite continuance thereof, by adopting regulations which permit the nonconforming users, or some of them, to continue for a specified period, but which require them to end the prohibited use upon the expiration of that period. The term "amortization" is derived from the notion that the nonconforming user can amortize his investment during the period of permitted nonconformity. It is reasoned that this 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.

\textit{Id.} at 508-09.

For examples of the courts' recognition of the proposition that amortization provisions may provide owners of private property with the opportunity to recoup a sufficient portion of their investment so as to render government regulation of their property constitutional, see cases cited \textit{supra} note 14.

\textsuperscript{44} If the property were leased, however, and the lease prohibited using the property for anything other than the existing use, an amortization provision would presumably be more prone to constitutional attack. Under such a restrictive lease, because the lessee of the nonconforming property would be unable to alter the use of the property and thereby recover a significant portion of his or her investment, the lessee can more forcefully argue that an amortization provision deprives him of all reasonable economic use.

\textsuperscript{45} For cases supporting the proposition that a zoning ordinance may lead to a substantial diminution in a property owner's investment without constituting a taking, see \textit{supra} note 23 and accompanying text.

\textsuperscript{46} \textit{See} \textit{Agins v. City of Tiburon}, 447 U.S. 255, 260 (1980). The Court concluded that "'[t]he application of a general zoning law to particular property effects a taking if [it] ... denies an owner [all] economically viable use of his land.'" \textit{Id.} (citation omitted). For further discussion of \textit{Agins}, see \textit{supra} note 7.

\textsuperscript{47} For a compilation of cases in which courts have upheld the amortization of nonconforming uses, see \textit{supra} note 14 and accompanying text.

\textsuperscript{48} \textit{Art Neon Co. v. City of Denver}, 488 F.2d 118, 122 (10th Cir. 1973), \textit{cert. denied}, 417 U.S. 932 (1974). The court noted:

\textit{In the application of the reasonableness test to the legislative determination, the courts have used a variety of factors, and combinations thereof. These include the nature of the nonconforming use, the character of the structure, the location, what part of the individual's total...}
therefore, the issue is one of balancing the public gain against the private loss.\textsuperscript{49}

The multi-factor balancing approach employed by a majority of courts is illustrated by \textit{Northend Cinema, Inc. v. City of Seattle}.\textsuperscript{50} In \textit{Northend Cinema}, the Washington Supreme Court considered whether a ninety-day amortization provision for adult theaters constituted a taking of property without just compensation.\textsuperscript{51} Seeking to respond to the “attraction of transients, parking and traffic problems, increased crime, decreasing property values, and interference with parental responsibilities for children”\textsuperscript{52} resulting from the establishment of three adult bookstores located in primarily residential areas, Seattle passed two zoning ordinances that gave the theaters ninety days to cease operating at their present locations.\textsuperscript{53} In affirming the decision of the lower court, the Washington Supreme Court concluded that a municipality has “the power . . . to require termination of nonconforming uses within a reasonable period of time.”\textsuperscript{54} The court then concluded that the ninety-day amortization period was reasonable with respect to Northend Cinema, Inc., because its lease was terminable at will or on short notice, it was not bound by the lease to show adult films and “whatever costs it ha[d] expended for improvements to the building or necessary equipment had been completely recovered through depreciation or were contemplated to be left as property of the lessor.”\textsuperscript{55} Thus, under the

\begin{quote}
\textit{Id.}
\end{quote}

It should be noted that when an amortization provision is challenged, the party contesting the validity of the ordinance has the burden of proving its invalidity. \textit{Id.} at 121 (concluding that contestant has a “heavy burden”); City of Univ. Park v. Benners, 485 S.W.2d 773, 779 (Tex. 1972) (“[C]omplainant . . . was under the burden of showing that no conclusive, or even fairly issuable facts or conditions exist in support of exercise of the police power.”), \textit{appeal dismissed}, 411 U.S. 901 (1973).

\textsuperscript{49} \textit{Art Neon Co.}, 488 F.2d at 121 (advocating balancing burden on individual against benefit to the public as test to determine validity of amortizing nonconforming uses). \textit{See generally, Annotation, supra note 11, at 1141-44.}


\textsuperscript{51} \textit{Id.} at 1154.

\textsuperscript{52} \textit{Id.} at 1155.

\textsuperscript{53} \textit{Id.} at 1155-56. The court noted that the effect of the ordinance was to create a land use known as Adult Motion Picture Theaters, to prohibit that use in most city zones and to require termination of all nonconforming uses within 90 days of the date the use becomes nonconforming. \textit{Id.} at 1156.

\textsuperscript{54} \textit{Id.} at 1159 (citing City of Seattle v. Martin, 342 P.2d 602 (Wash. 1959)). The court further concluded that “[w]e adopted a balancing test to determine the reasonableness of the termination period, that is, whether the harm or hardship to the user outweighs the benefit to the public to be gained from termination of the use.” \textit{Id.} at 1159-60.

\textsuperscript{55} \textit{Id.} at 1160. The statute was reasonable as to Gaiety Theaters, Inc. for
balancing test, the amortization provision was reasonable as applied to the theater.

By contrast, several jurisdictions have expressly rejected amortization as a means of eliminating nonconforming uses. For example, in Hoffmann v. Kinealy, the appellants maintained lots for the open-air storage of lumber, building materials and construction equipment. The City of St. Louis promulgated an ordinance that rendered appellants' property use nonconforming. The ordinance gave appellants six years in which to comply with the ordinance by terminating the nonconforming use. Confronted for the first time with the issue of whether amortization constituted a valid means by which to eliminate a prior, lawful nonconforming use, the Missouri Supreme Court concluded that amortization of nonconforming uses constituted a taking of property without just compensation.

Prior to Pennsylvania Northwestern, the Pennsylvania Supreme Court had not directly addressed the question of whether amortization was a constitutional means by which to eliminate nonconforming uses. However, the issue had been addressed by the lower state courts. In Sullivan v. Zoning Board of Adjustment, the Commonwealth Court of Pennsylvania considered the question of the constitutionality of amortization as a means of eliminating nonconforming uses. In Sullivan, the

56. For a compilation of jurisdictions that have expressly rejected amortization as a means of eliminating nonconforming uses, see supra note 17. For further explanation of the reasoning employed by courts adhering to the minority approach, see infra note 98 and accompanying text.

57. 389 S.W.2d 745 (Mo. 1965) (en banc).

58. Id. at 746.

59. Id. at 747. Section 903.010 of the Revised Code of the City of St. Louis provided: "No building or land shall be used for a use other than those permitted in the district in which such premises are located unless (a) such use is permitted by other provisions of this Chapter . . . or (b) such use existed prior to April 25, 1950." Id. Section 903.030 provided that "[t]he use of land within any dwelling district for purposes of open storage is prohibited." Id.

60. Id. Section 5B of Ordinance 45309, which was later codified by the Revised Zoning Code of the City of St. Louis of 1960, provided that: "The use of land within any dwelling district . . . for purposes of open storage . . . which do not conform to the provisions of this ordinance shall be discontinued within six (6) years from the effective date of this ordinance." Id.

61. Id. at 754-55. Specifically, the court stated that "[i]n our view of the matter, termination of realtors' pre-existing lawful nonconforming use of their lots for the open storage of lumber, building materials and construction equipment would constitute the taking of private property for public use without just compensation in violation of [the Missouri Constitution]." Id.

62. For a discussion of how Pennsylvania's lower courts assessed the constitutionality of amortization provisions, see infra note 63 and accompanying text.

property in question had been owned by various members of the appellant's family since 1912, and was used primarily for the open-air storage of junk since that date. In 1961, the Philadelphia Zoning Code was amended to provide a five-year amortization provision for "uses conducted or maintained in the open air" in residential districts. Appellant challenged the amendment on the ground that, inter alia, it was unconstitutional under Article I, section 1 of the Pennsylvania Constitution in that it constituted a taking of property without just compensation.

Reversing the decision of the Court of Common Pleas, the Commonwealth Court held that the amortization provision was not, on its face, an invalid exercise of the city's police power, but rather was valid, as applied to the appellant's property, so long as it was reasonable.


64. Sullivan, 478 A.2d at 913. The court also noted that there was one structure on the property. Id. at 913-14. This fact was potentially significant in light of the amortization provision, which provided that "[f]or the purposes of this provision, uses conducted or maintained in the open air shall mean those uses conducted or maintained on land without buildings, or on land containing buildings which cover less than 25% of the area of said land." Id. at 918. Because the structure on appellant's land only covered 10.3% of the property, appellant was not exempt from the ordinance. Id.

65. Id. at 918 (citing Philadelphia Zoning Code § 14-104(13)). The amendment to the Philadelphia Zoning Code stated in pertinent part: "In all residential districts included in Chapter 14-200 of this Title, the following nonconforming uses of land, as specified hereinafter, shall be discontinued and shall not be resumed or maintained at the expiration of five years . . . . (1) Those uses conducted or maintained in the open air . . . ." Id. In Sullivan, the use at issue was "maintained in the open air." Id. at 914. Thus, on the facts of Sullivan, the nonconforming use was to have been extinguished pursuant to the ordinance, on May 1, 1966. Id.

66. Id. The court noted that although the appellant challenged the constitutionality of the statute, he did not state the precise basis for his challenge. Id. The court, therefore, "assume[d] that his attack [was] based upon Article I, Section 1 of the Pennsylvania Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution." Id. For the text of Article I, § 1 of the Pennsylvania Constitution, see supra note 16.

67. Sullivan, 478 A.2d at 920. The court concluded:

[Each case . . . must be determined on its own facts; and the answer to the question of whether the provision is reasonable must be decided by observing its impact upon the property under consideration. The true issue is that of whether, considering the nature of the present use, the length of the period for amortization, the present characteristics of and the foreseeable future prospects for development of the vicinage and
Accordingly, the Commonwealth Court remanded the case for an inquiry into the reasonableness of the amended ordinance.\textsuperscript{68}

Thus, for a period of seven years between 1984 and 1991, the only Pennsylvania judicial pronouncement on the amortization issue was that the amortization of nonconforming uses represented a valid exercise of the police power so long as the amortization period was reasonable.\textsuperscript{69} For those seven years, therefore, municipalities drafting ordinances and attorneys counseling clients on how to comply with those ordinances relied upon \textit{Sullivan} as a correct statement of the law in Pennsylvania. It is against this backdrop that the Pennsylvania Supreme Court addressed the question of whether, under the Pennsylvania Constitution, the amortization of a nonconforming use is a valid exercise of the State's police power, or conversely, whether it is a taking without just compensation.\textsuperscript{70}

\section*{III. DISCUSSION}

\subsection*{A. Pennsylvania Northwestern}

\textbf{1. The Facts}

In November, 1984, Pennsylvania Northwestern Distributors, Inc. (Pa. Northwestern) leased a building in Moon Township, Pennsylvania.\textsuperscript{71} On May 4, 1985, after complying with all licensing requirements, Pa. Northwestern opened an adult bookstore on the property.\textsuperscript{72} On May 23, 1985, the Moon Township Board of Supervisors adopted Ordinance No. 243, which "impose[d] extensive restrictions on the location and operation of 'adult commercial enterprises.'"\textsuperscript{73} The adult

\begin{itemize}
  \item other relevant facts and circumstances, the beneficial effects upon the community that would result from the discontinuance of the use can be seen to more than offset the losses to the affected landowner.
\end{itemize}

\textit{Id.}

\textsuperscript{68.} \textit{Id.} at 921.

\textsuperscript{69.} \textit{Pennsylvania Northwestern}, 584 A.2d at 1373 (citing \textit{Sullivan}, 478 A.2d at 920).

\textsuperscript{70.} \textit{Id.}

\textsuperscript{71.} \textit{Id.} at 1370. The lease was for 36 months, but was contingent upon Pa. Northwestern successfully obtaining all necessary licenses to operate an adult bookstore on the property. \textit{Id.}

\textsuperscript{72.} \textit{Id.} at 1370.


The Commonwealth Court found that:

\begin{itemize}
  \item The Board of Supervisors in enacting the Ordinance indicated that the reason for such regulation was that without regulation such establishments "(1) Tend to attract vagrants; (2) Tend to attract children, especially those in their teenage years; (3) Tend to cause those who traffic in obscene material, those who operate on the edge of law, and
bookstore was an adult commercial enterprise within the meaning of Ordinance No. 243. Thus, following the ordinance's enactment, Pa. Northwestern's adult bookstore became a nonconforming use.

Section 805 of the ordinance provided owners of nonconforming uses with a ninety-day period in which to extinguish the existing use, thereby bringing it into compliance with Ordinance No. 243. Seeking to avoid having to terminate its operations, Pa. Northwestern brought a legal challenge contesting the constitutionality of Ordinance No. 243. Because Pa. Northwestern conceded that it was an "adult commercial enterprise" within the meaning of the ordinance, the only issue was whether the ordinance itself was valid as an exercise of the Township's police power or, conversely, whether the ordinance constituted a taking in contravention of the Pennsylvania Constitution. In a loosely reasoned decision, the Pennsylvania Supreme Court reversed the Commonwealth Court and joined a minority of jurisdictions, holding that the amortization and discontinuance of a lawful pre-existing nonconforming use violates the state's constitution.

those who operate clearly outside of the law to congregate or operate in the community; (4) Tend to impose a law enforcement cost on the community proportionately higher than other types of commercial establishments . . . ; (5) Tend to attract similar commercial enterprises to the vicinity of their location, thus heightening the potential adverse impact of such establishments; (6) Tend to reduce the value and enjoyment of nearby property, both residential and commercial; (7) Tend to foster an environment not in keeping with other permitted and regulated uses such as residential use . . . group care facilities, hospitals, out-patient clinics, nursing homes, mobile home parks, schools . . . recreational parks, churches, etc.; (8) If located unreasonably close to other 'adult' bookstores, adult theaters, massage parlors, or establishments serving liquor, beer or other alcoholic beverages, tend to create, extend or aggravate blighted areas; and (9) Tend to degrade the sanctity of individuals and families in the community."

Id. at 1372 n.5 (citing Moon Township, Pa., Ordinance No. 243, § 805 (May 23, 1985)).

74. Pennsylvania Northwestern, 584 A.2d at 1373.
75. Id.
76. Id. Section 805 of the ordinance provides in pertinent part:
Amortization. Any commercial enterprise which would constitute a pre-existing use and which would be in conflict with the requirements set forth in this amendment to the Moon Township Zoning Ordinance has 90 days from the date that the ordinance becomes effective to come into compliance with this ordinance. This 90-day grace period is designed to be a period of amortization for those pre-existing businesses which cannot meet the standards set forth in this amendment to the Moon Township Zoning Ordinance.

Id. (citing § 805 of Ordinance No. 243).
77. Id.
78. Id.
79. Id. at 1376. The Commonwealth Court reasoned that Sullivan was controlling and that, under Sullivan, amortization provisions were not facially unconstitutional, but rather were valid exercises of the police power if they were reasonable. Pennsylvania Northwestern, 555 A.2d at 1372. The Commonwealth
2. The Pennsylvania Northwestern Court's Reasoning

Before rendering a decision that, in the court's view, furthered the sanctity of property, the court first addressed the decision of the Commonwealth Court in Sullivan v. Zoning Board of Adjustment.80 The Sullivan court authorized a case-by-case evaluation of the reasonableness of amortization provisions.81 Under Sullivan, a zoning hearing board was

Court further reasoned that the reasonableness of an amortization provision is to be determined by an inquiry into: (1) whether the ordinance granted appellant a reasonable period of time in which to recover its investment in, or the value of, the use of the property; and (2) whether the public benefit outweighs the private loss. Id. at 1373.

The Commonwealth Court concluded that the 90-day amortization period was a reasonable period of time for appellant to recover its investment in, or value of, the use of the property. Id. at 1373-74. In evaluating whether the ordinance gave appellant a sufficient period of time in which to recover its investment, the court concluded that neither expenses incurred after the ordinance's enactment, nor litigation fees incurred in challenging the ordinance's validity, nor expenses relating to permits, licenses, rent, insurance, salaries and training of employees were to be considered. Id. Accordingly, the court refused to consider that appellant had incurred over $90,000 in expenses since the ordinance's enactment or that appellant had expended $55,000 in litigation expenses. Id. Thus, the question before the Commonwealth Court was whether the amortization provision provided appellant with sufficient time to recover its investment in inventory, in fixtures that originally cost $16,000 and in a sign for which appellant paid approximately $2,600. Id.

The court concluded that 90 days was a sufficient period of time for the appellant to recover its investment in its inventory, fixtures and sign. Most of the appellant's inventory consisted of books and magazines that were published monthly. Id. at 1373. Thus, the court reasoned, “[m]ost of [a]ppellant's inventory would be out of date and unusable within one month.” Id. Further, the court concluded that, because appellant's property was located in a commercial district, the fixtures (including booths, displays, shelves, cash registers, keys, locks and light fixtures) could be sold to another business. Id. at 1374. The court concluded that the sign could also be sold or could be used by the appellant at another location. Id. Finally, the court noted that because appellant's lease “[i]s contingent upon [its] ability to obtain all necessary governmental licenses,” and because it is “unable to secure the necessary approval from governmental authorities, it may terminate [its] lease without incurring liability for such termination.” Id. Additionally, the lease did not limit appellant to operating an adult bookstore. Id. at 1374 n.11. Accordingly, the Commonwealth Court concluded, the ordinance gave the appellant sufficient time in which to recover its investment. Id. at 1374.

The court appeared to defer to the legislature with respect to the second factor in the reasonableness inquiry, that is, whether the public benefit outweighs the private loss. Specifically, the court concluded that, “[c]learly, the Township has a substantial and legitimate interest here in enacting an Ordinance regulating the location of ‘adult’ establishments.” Id. at 1372. Based upon its conclusions that the ordinance provided the appellant with sufficient time in which to recover its investment and that the public benefit outweighed the private loss, the Commonwealth Court held that the ordinance was constitutional as applied to the appellant. Id. at 1374.

81. Id. at 920.
to consider the following factors in evaluating the reasonableness of a particular amortization provision: (1) the nature of the present use; (2) the length of the period for amortization; (3) the present characteristics of the vicinage; (4) foreseeable future prospects for the development of the vicinage; and (5) other relevant facts and circumstances. 82

Because Sullivan was a Commonwealth Court decision, it was not binding on the Pennsylvania Northwestern court. Nevertheless, as the Pennsylvania Northwestern court stated, "[its] scope of review in a zoning case, where the trial court has not taken additional evidence, is limited to determining whether the zoning hearing board committed an error of law or a manifest abuse of discretion." 83 In Pennsylvania Northwestern, the Zoning Hearing Board of Moon Township heard evidence with respect to the relevant factors as set forth in Sullivan. 84 Thus, as the Pennsylvania Northwestern court concluded, if Sullivan was a proper statement of the law in Pennsylvania, then the Zoning Hearing Board did not commit an abuse of discretion and the Pennsylvania Supreme Court would have been compelled to find in favor of the Township. 85 Accordingly, a fundamental issue in Pennsylvania Northwestern was whether the Sullivan reasonableness test was a correct statement of the law in Pennsylvania.

In determining whether Sullivan was a correct statement of the law in Pennsylvania, the court began by conceding that property rights in the Commonwealth are not unlimited. 86 Rather, according to the court, "all property is held in subordination to the right of its reasonable regulation by the government, which regulation is clearly necessary to preserve the health, safety, morals or general welfare of the people." 87 Notwithstanding this principle, the court concluded that the Sullivan court's endorsement of amortization was an incorrect statement of the

82. Id.
84. Pennsylvania Northwestern, 584 A.2d at 1374. The court stated:

Following [the Sullivan] standard, the Zoning Hearing Board herein heard evidence regarding the impact upon the property in question with respect to the nature of the present use, the period for amortization, the characteristics of the vicinage, etc., and determined that the amortization provision was reasonable as applied. In this regard the Zoning Hearing Board stated that the "real and substantial benefits to the Township of elimination of the nonconforming use from this location ... more than offset the losses to the affected landowner."

Id. (quoting Opinion of Zoning Hearing Board at 13).
85. Id. at 1374.
86. Id. at 1374.
87. Pennsylvania Northwestern, 584 A.2d at 1374 (citing Anstine v. Zoning Bd. of Adjustment, 190 A.2d 712, 714 (Pa. 1963)).
law in Pennsylvania. 88

To support its conclusion, the Pennsylvania Northwestern court cited a series of Pennsylvania cases in support of the proposition that "it has long been the law of [the] Commonwealth that municipalities lack the power to compel a change in the nature of an existing lawful use of property." 89 If the Pennsylvania Northwestern court is correct in asserting that a municipality lacks the power to compel a change in the nature of an existing lawful property use, then Sullivan, which permits municipalities to compel such a change, is an incorrect statement of the law in Pennsylvania. However, as discussed in detail later in this Note, the holdings in the cases relied on by the Pennsylvania Northwestern court do not support such an interpretation. 90 Specifically, in the cases cited by the Pennsylvania Northwestern court, the courts merely held that the state may not deprive the owner of all reasonable use of property without paying just compensation or prohibit the reasonable expansion of an existing, lawful nonconforming use. 91 Accordingly, the cases cited by the Pennsylvania Northwestern court do not support the Pennsylvania Northwestern court's conclusion that the Sullivan court's approach to the amortization of nonconforming uses is an incorrect statement of the law in Pennsylvania.

More specifically, the Pennsylvania Northwestern court posited that the only lawful ways in which a municipality may terminate a nonconforming use in Pennsylvania are through the use of common law nuisance theory, abandonment or eminent domain. 92 Thus, under the Pennsylvania Northwestern court's reasoning, it follows by implication that a nonconforming use may not be terminated through mere governmental regulation of property. Because nonconforming uses, like all other uses, are subject to police power regulation, it is implicit in the court's position that when

---

88. Id.
89. Id. at 1375. For a detailed discussion of the cases relied upon by the Pennsylvania Northwestern court to support its conclusion that the Commonwealth lacks the power to compel a change in an existing lawful property use, see infra note 122.
90. For an analysis of the court's application of precedent to support its stated proposition that municipalities lack the power to compel a change in the nature of an existing lawful property use, see infra notes 122 & 126.
91. For the courts' holdings in these cases, see infra note 122. For a discussion of the limitations on the state's exercise of its police power, see supra notes 32-40 and accompanying text.
92. Pennsylvania Northwestern, 584 A.2d at 1375 (citing Gross v. Zoning Bd. of Adjustment, 227 A.2d 824, 827 (Pa. 1967)). The Pennsylvania Northwestern court stated that "[a] lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain." Id.

For a discussion of the elements of a nuisance action and the application of the theory in Pennsylvania, see supra note 32. For a discussion of the abandonment doctrine and its application by the Pennsylvania courts, see supra note 33. For a discussion of eminent domain and its application in Pennsylvania, see supra note 34.
a municipality terminates a nonconforming use through amortization, the municipality is taking as opposed to regulating property. 93

The Pennsylvania Northwestern court recognized the inherent difficulty in making a distinction between a taking and a valid exercise of the Commonwealth’s police power. 94 Accordingly, the court employed the language of Cleaver v. Board of Adjustment 95 to serve as an analytical framework for distinguishing takings from valid exercises of police power. 96 In attempting to make such a distinction, the court concluded, "[a] 'taking' is not limited to an actual physical possession or seizure of the property; if the effect of the zoning law or regulation is to deprive a property owner of the lawful use of his property it amounts to a 'taking,' for which he must be justly compensated." 97 Under this framework, and in accordance with the reasoning of the Missouri Supreme Court in Hoffmann v. Kinealy, 98 the court concluded that the effect of the Moon Town-

93. Pennsylvania Northwestern, 584 A.2d at 1375. The court concluded:
Neither the Executive nor the Legislature, nor any legislative body, nor any zoning or planning commission . . . has the right—under the guise of the police power, or under the broad power of general welfare . . . to take, possess or confiscate private property for public use or to completely prohibit or substantially destroy the lawful use and enjoyment of property, without paying just compensation therefor . . . .

Id. (quoting Andress v. Zoning Bd. of Adjustment, 188 A.2d 709, 712 (Pa. 1963)).

94. Id.
95. 200 A.2d 408 (Pa. 1964).
96. Pennsylvania Northwestern, 584 A.2d at 1375-76.
97. Id. (quoting Cleaver, 200 A.2d at 412).
98. 389 S.W.2d 745 (Mo. 1965) (en banc). In support of its holding, the Pennsylvania Northwestern court quoted the following language from Hoffmann:
[It] would be a strange and novel doctrine indeed which would approve a municipality taking private property for public use without compensation if the property was not too valuable and the taking was not too soon, and prompts us to repeat the caveat of Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon that “[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”

Pennsylvania Northwestern, 584 A.2d at 1376 (quoting Hoffmann, 389 S.W.2d at 753 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922))). Significantly, both Hoffmann and Pennsylvania Northwestern are factually distinguishable from Pennsylvania Coal. The issue in Pennsylvania Coal was whether the Kohler Act, which effectively prevented Pennsylvania Coal Co. from extracting any coal from one of its mines, constituted a taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922). Unlike the Kohler Act at issue in Pennsylvania Coal, neither the ordinance at issue in Pennsylvania Northwestern, nor the amortization ordinance in Hoffmann, deprived the complainant of all reasonable economic use of its property. See Pennsylvania Northwestern, 584 A.2d at 1376; Hoffmann, 389 S.W.2d at 753. Where legislation deprives one of all reasonable economic use of one's property, the legislation is unconstitutional. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (concluding that legislation regulating uses that can be made of property effects taking if it "denies an owner economically viable use of his land"); see also Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) (same). The ordinance will pass constitutional muster, however, if it im-
ship zoning ordinance was to deprive Pa. Northwestern of its lawful nonconforming use without just compensation. Accordingly, the Pennsylvania Northwestern court rejected the Sullivan court's holding that the amortization of a nonconforming use is a valid exercise of the police power so long as it is reasonable. Rather, the Pennsylvania Northwestern court held, the amortization of a nonconforming use is per se unconstitutional.

B. Pennsylvania Northwestern: The Concurrences

Significantly, three out of seven Justices would have followed the majority of jurisdictions' approach regarding the constitutionality of amortizing nonconforming uses. More specifically, Chief Justice Nix and Justice Papadakos, in concurring, and Justice McDermott, in partially concurring, agreed with the majority as to the result on the facts of Pennsylvania Northwestern. However, these Justices disagreed with the majority of the Pennsylvania Northwestern court that the amortization provision at issue worked, on its face, a taking of property without just compensation. Rather, in their view, "nonconforming uses [are] inconsistent with a basic purpose of zoning [and] represent conditions which should be reduced to conformity as speedily as is compatible with the law and the Constitution." However, the ninety-day amortization period provided by the ordinance at issue in Pennsylvania Northwestern was, in their view, unconstitutional as applied.

poses a substantial diminution in value, but does not deprive one of all reasonable economic use of property. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926) (upholding ordinance that decreased value of appellee's property by 75%).

100. Id.
101. Id.
102. Id. at 1377-78 (Nix, C.J., concurring); id. at 1378 (McDermott, J., concurring and dissenting). Accordingly, because only one additional vote is necessary to overrule Pennsylvania Northwestern, as the composition of the court changes, it will be interesting to observe whether the court hears another amortization case.

103. Justice Nix, joined by Justice Papadakos, "disagree[d] with the finding that any provision for the amortization of nonconforming uses would be per se confiscatory and unconstitutional." Id. at 1377 (Nix, C.J., concurring). Similarly, Justice McDermott concluded, "I do not agree that pre-existing nonconforming uses are beyond reasonable regulation for health, safety and morals of a community." Id. at 1378 (McDermott, J., concurring and dissenting).

104. Id. at 1378 (Nix, C.J., concurring) (quoting Hanna v. Board of Adjustment, 183 A.2d 539, 543 (Pa. 1962)).
105. Id. at 1377 (Nix, C.J., concurring) ("I agree with the result reached by the majority, that Section 805 of Ordinance No. 243 is invalid in this case . . . ."); id. at 1378 (McDermott, J., concurring and dissenting) ("Ninety days is too short a period to erase a pre-existing use.").
C. Pennsylvania Northwestern: The Court's Errors

The Pennsylvania Northwestern majority erred in renouncing the approach advocated by the Sullivan court as a correct statement of the law in Pennsylvania. First, the court erred by not addressing the possibility that the Pennsylvania Municipalities Planning Code (MPC) grants municipalities the power to regulate nonconforming uses through amortization. To understand why it was erroneous to fail to address the statutory implications of Pa. Northwestern's challenge to Ordinance No. 243, it is important to consider the source of a municipality's authority to zone.

Moon Township's power to zone is derived from a statute promulgated by the state legislature. Specifically, in Pennsylvania, the authority to zone is derived from the MPC. The MPC neither expressly grants municipalities the power to amortize nonconforming uses, nor imposes upon them a duty to refrain from so doing. Nevertheless, the authority to amortize nonconforming uses is arguably granted by the text of the MPC.

The MPC provides that "[t]he governing body of each municipality, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal zoning ordinances to accomplish any of the purposes of this act." The MPC further provides that "[t]he provisions of zoning ordinances shall be designed to promote, protect and facilitate any or all of the following: the public health, safety,

106. See Cleaver v. Board of Adjustment, 200 A.2d 408, 412 (Pa. 1964). In Cleaver, the court concluded that:

Municipalities are not sovereigns; they have no original or fundamental power of legislation; a municipal or councilmanic body can enact only the ordinances and exercise only the zoning powers which are authorized by the Legislature, and the Legislature can delegate or grant only those legislative or zoning powers which are Constitutionally permitted.


108. See id. Several states' legislatures have expressly authorized amortization as a means of eliminating nonconforming uses. For a compilation of these jurisdictions, see supra note 12.

Interestingly, § 2033 of the Pennsylvania County Code provided:
The board of county commissioners may, in any zoning ordinance, provide for the termination of nonconforming uses, either by specifying the period or periods in which nonconforming uses shall be required to cease, or by providing a formula or formulae whereby the compulsory termination of a nonconforming use may be so fixed as to allow for the recovery or amortization of the investment in the nonconformance.


109. See 2 Ryan, supra note 1, § 7.1.4, at 5-6.

110. PA. STAT. ANN. tit. 53, § 10601.
morals, and the general welfare." Additionally the MPC states, "[zoning ordinances] may . . . regulate . . . [u]ses of land." The above language, taken as a whole, suggests that the MPC permits the regulation of nonconforming uses where such regulation is designed to "promote, protect, or facilitate the public health, safety, morals or general welfare." With respect to Ordinance No. 243, the Commonwealth Court concluded that the Township of Moon had a "substantial and legitimate interest . . . in enacting an [o]rdinance regulating the location of 'adult' establishments." Thus, under the reasoning of the Commonwealth Court, Ordinance No. 243 is a valid exercise of Moon Township's zoning authority under the MPC.

Strangely, however, the Pennsylvania Supreme Court omitted any explicit discussion of the MPC from its analysis in Pennsylvania Northwestern. Why is this significant? After all, it can be argued that even if the text of the MPC permits the amortization of nonconforming uses, the MPC may be held unconstitutional to the extent that it permits such legislative action. The Pennsylvania Supreme Court's failure to address the relevance of the MPC to the issue in Pennsylvania Northwestern is significant because the question of the validity of legislation is entitled to judicial deference. Accordingly, if the General Assembly, by way of the MPC implicitly authorized amortization as a means of eliminating nonconforming uses, that legislative judgment is entitled to deference by the court. Thus, although the Pennsylvania Supreme Court decided the case on constitutional grounds, at the very least, the court should have been explicit about how it reached the constitutional question.

Second, the court not only failed to defer to the state legislature,
but it failed to defer to Moon Township’s legislature as well. In Pennsylvania, “a presumption of validity attaches to a zoning ordinance.”118 Yet the court conducted its analysis as if the presumption was in favor of the invalidity of Moon Township’s zoning ordinance.119 Specifically, the court appeared to overlook precedent that reasonably could be read to support the Moon Township legislature’s determination that requiring the amortization of a nonconforming use is a valid exercise of the Commonwealth’s police power.120

The most important flaw in the Pennsylvania Northwestern court’s analysis, however, concerns the court’s application of precedent to the facts of the case. The court cited a number of cases to support the proposition that “it has long been the law of this Commonwealth that municipalities lack the power to compel a change in the nature of an existing lawful use of property.”121 However, the court overstated the holdings of these cases.122 Taken together, these cases merely stand for the


119. For a discussion of how it appears that the Pennsylvania Northwestern court erroneously conducted its inquiry as if a municipality bears the burden of proving the validity of its legislation, see infra note 120.

Some commentators argue that a presumption of invalidity is appropriate in light of the potential politization of zoning that occurs at the local level. See, e.g., Delogu, supra note 39, at 81 (suggesting that courts should closely scrutinize municipal legislation because of extensive political machination occurring at local level).

120. See, e.g., Sullivan v. Zoning Bd. of Adjustment, 478 A.2d 912, 920 (Pa. Commw. Ct. 1984). The Sullivan court recognized that there is precedent to support the proposition that retroactive zoning legislation, such as that involved in the amortization of a nonconforming use, is constitutional in Pennsylvania. Id.

For example, in Silver v. Zoning Hearing Bd., 255 A.2d 506 (Pa. 1969), the Pennsylvania Supreme Court held that owners of nonconforming uses have the constitutional right to “mak[e] such necessary additions to the existing structure as were needed to provide for its natural expansion and the accommodation of increased trade.” Id. at 507 (quoting In re Gilfillan’s Permit, 140 A. 136, 138 (1927)). The Silver court recognized, however, that this protection is not unlimited. Specifically, the court concluded that the proposed expansion must “not be detrimental to the public welfare, safety and health.” Id.

Similarly, in Hanna v. Board of Adjustment, 183 A.2d 539 (Pa. 1962), the court concluded that “it is the policy of the law to closely restrict . . . nonconforming uses and to strictly construe provisions in zoning ordinances which provide for the continuance of nonconforming uses.” Id. at 543.

121. Pennsylvania Northwestern, 584 A.2d at 1375. For a detailed discussion of these cases, see infra note 122 and accompanying text.

122. Pennsylvania Northwestern, 584 A.2d at 1375. For example, the court quoted an earlier decision for the proposition that “our law has long recognized the priority that must be given to lawful nonconforming uses.” Id. (quoting In re Miller, 515 A.2d 904, 909 (Pa. 1986)). In Miller, the appellant, a homeowner, maintained a boarding house for the aged, mentally retarded and physically handicapped. Miller, 515 A.2d at 905. The home was in compliance with local
proposition that municipalities may not immediately terminate a prior lawful nonconforming use. These cases did not purport to, nor do they in fact, speak to the issue in the present case, that is, whether a municipality may regulate a nonconforming use by requiring that property owners terminate nonconforming uses after a period of time. A more accurate reading of these cases is that they do not forbid compelling a change in the nature of an existing use, but rather, that they merely forbid a municipality from compelling a particular kind of change. Specifically, these cases forbid a municipality from enacting a zoning ordinance that requires the immediate cessation of a prior lawful nonconforming zoning law until 1978, when Middletown Township amended its zoning ordinance to alter the definition of family. The effect of the ordinance was to render appellant's home nonconforming. Significantly, the issue in Miller was not whether the Township could regulate property pursuant to its police power, but rather, whether it could compel the immediate cessation of a prior lawful nonconforming use. Accordingly, although the court concluded that the ordinance was invalid, the issue addressed is distinguishable from that confronted in Pennsylvania Northwestern. The Pennsylvania Northwestern court quoted another case for the proposition that the "continuance of nonconforming use is permitted to avoid a wrong notwithstanding that the use is an obstruction to a public purpose. The balance is settled by avoiding the injury to the property owner only so long as the governmental body fails to compensate for its loss." Pennsylvania Northwestern, 584 A.2d at 1375 (quoting Bachman v. Zoning Hearing Bd., 494 A.2d 1102, 1106 (Pa. 1985)). In Bachman, the appellant had moved a nonconforming bungalow onto a different portion of his land. Bachman, 494 A.2d at 1103. The court concluded that this constituted the institution of a new use, in violation of the zoning ordinance. At 1106. Accordingly, regulation of a vested property right was not even at issue in Bachman. Thus, the case does little to buttress the proposition for which Bachman was cited by the Pennsylvania Northwestern court.

The Pennsylvania Northwestern court also cited Hanna v. Board of Adjustment for the proposition that the "continuance of nonconforming uses [has been] countenanced to avoid imposition of [a] hardship on property owner[s] and because refusal of continuance 'would be of doubtful constitutionality.'" Pennsylvania Northwestern, 584 A.2d at 1375 (quoting Hanna v. Board of Adjustment, 183 A.2d 539, 543 (Pa. 1962)). The issue in Hanna was whether, where appellant's land was presently utilized as a used car business, the appellant could lawfully utilize his property to erect a gasoline service station, even though doing so would violate the zoning ordinance. Hanna, 183 A.2d at 540-41. Thus, the language quoted from Hanna, when viewed in light of the facts of the case, does little to support the Pennsylvania Northwestern decision.

Additionally, the Pennsylvania Northwestern court cited In re Yocum for the proposition that "[a] municipality is without power to compel [a] change in [the] nature of [a] use where property was not restricted when purchased and is [now] being used for a lawful purpose." Pennsylvania Northwestern, 584 A.2d at 1375 (citing In re Yocum, 141 A.2d 601, 604 (Pa. 1958)). However, the Yocum court recognized that the Commonwealth may regulate property pursuant to its police power. Yocum, 141 A.2d at 604.

123. See, e.g., Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965) (en banc). The court stated "'[t]o our knowledge, no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use properly might be terminated immediately.'" Id. at 753.
Additionally, the court erroneously concluded that "a lawful non-conforming use establishes in [its] owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain." 125 Dissecting the preceding assertion yields the following propositions: (1) a lawful nonconforming use is a vested property right; and (2) a vested property right can only be abrogated or destroyed if it is a nuisance, if it is abandoned or if the government exercises its power of eminent domain. Unquestionably, the Pennsylvania Northwestern court did not intend to assert that a municipality lacks the power to regulate vested property rights. 126 Rather, implicit in the court's assertion is the conclusion that abrogation differs from regulation of vested property rights, that the amortization of a nonconforming use amounts to abrogation rather than regulation and that abrogation of vested property rights is unconstitutional. 127 However, the Pennsylvania Northwestern court's assertion does not withstand scrutiny.

By attaching the label of "abrogation" to the effect of Ordinance No. 243, the court avoided the difficult issue in the case. Properly characterized, the issue in Pennsylvania Northwestern was whether Ordinance No. 243, which regulated property retroactively, was a permissible or impermissible regulation of property. It is submitted that eliminating nonconforming uses retroactively through amortization does not materially differ from regulating property uses prospectively. 128

124. For a discussion of the reasoning employed in these cases, see supra note 122 and accompanying text.
125. Pennsylvania Northwestern, 584 A.2d at 1375.
126. The proposition that a municipality lacks the power to regulate vested property rights would not withstand scrutiny. Indeed, the court has previously permitted municipalities to regulate vested property rights through their inherent police power. See Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 592 (Pa. 1973) ("[T]he Commonwealth always had a recognized police power to regulate the use of land, and thus could establish standards for clear air and clean water consistent with the requirements of public health ...."); see also Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1339 (Pa. 1986) (state, pursuant to its police power, may regulate private property to protect free speech); Commonwealth Dep't of Envtl. Resources v. Pennsylvania Power Co., 416 A.2d 995, 1003 (Pa. 1980) (state may use police power to regulate property, by forcing property owners to utilize certain technology that reduces pollution).
127. Pennsylvania Northwestern, 584 A.2d at 1376. Quoting language from the Missouri Supreme Court, the Pennsylvania Northwestern court concluded that "[i]t would be a strange and novel doctrine indeed which would approve a municipality taking private property for public use without compensation if the property was not too valuable and the taking was not too soon." Id. (quoting Hoffmann v. Kinealy, 389 S.W.2d 745, 753 (Mo. 1965) (en banc)).
For example, suppose that after a year of exhaustively researching potential locations for her manufacturing plant, Kimberly buys twenty-five acres of land in Hypotown, Pennsylvania. Suppose further that, by the time she actually purchased the land in Hypotown, she had expended $25,000 in legal and other professional fees. In order to purchase the land, she borrows $2,000,000 from a local bank. Kimberly projects that, conservatively, the plant should be able to realize a net profit, after taxes, of $150,000 in the first year of operation. Fearing that noise, disruption, danger and pollution may be natural concomitants of Kimberly's venture, Hypotown passes Ordinance No. 244, which amends the existing zoning legislation and re-zones Kimberly's land for light industrial use only, prohibiting Kimberly's intended use. The ordinance also contains a Transfer Development Rights (TDRs) provision. However, Kimberly, in fact, receives no offers from other landowners with respect to her TDRs. Recognizing Kimberly's disadvantaged bargaining position, Ed leases the land from Kimberly at a price enabling Kimberly merely to service her debt without making a profit. The ordinance thus deprives Kimberly of the expenditures she made for professional services, the potential to earn a salary and a $150,000 net profit in the first year of operations. Although Kimberly has been deprived of the most profitable use of her land, she has not been deprived of all reasonable economic use of her land and therefore, the ordinance would probably be held to be constitutional.

In John Donnelly & Sons, Inc., the Massachusetts Supreme Court, relying upon language quoted from the United States Supreme Court, concluded that "[t]he distinction between regulation and outright prohibition is often considered to be a narrow one: '[t]hat regulation may take the character of prohibition . . . is well established by the decisions of this court.'" John Donnelly & Sons, Inc., 339 N.E.2d at 715 (quoting United States v. Hill, 248 U.S. 420, 425 (1919)). Similarly, the lower Pennsylvania courts have recognized that the distinction between retroactive abolition of nonconforming uses through amortization and prospective regulation of vested property rights is merely one of degree. See Sullivan, 478 A.2d at 919 (citing City of Los Angeles v. Gage, 274 P.2d 34, 43-44 (Cal. Dist. Ct. App. 1954)). Moreover, the Pennsylvania Supreme Court has discussed, in dicta, the constitutionality of abolishing a vested property right. See In re Ammon R. Smith Auto Co., 223 A.2d 683, 684 (Pa. 1966). In Smith, the court noted that where other states' courts upheld amortization their rationale was that "the right to limit, restrict or abolish [a use] on one's own property, is based upon the police power when it is used to reasonably affect health or safety or morals and is not arbitrary or discriminatory . . . it is paramount to the rights of every property owner." Id. (emphasis added).

129. A TDR is a right granted in a zoning ordinance permitting property owners to sell unused development rights to other property owners who own land in certain defined geographic regions. See 6 ROHAN, supra note 1, § 6.01[1]. For an example of a TDR, see Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 114 (1978). For a detailed discussion of Penn Central, see supra note 23 and accompanying text.

130. See Board of Supervisors v. Mc Climans, 597 A.2d 738, 742 (Pa. Commw. Ct. 1991) (appellant could use land for residential purposes, and thus, ordinance prohibiting strip mining did not constitute taking of appellant's prop-
By way of contrast, suppose that David enters into a three-year lease with Canal Zone apartments in Hypotown, Pennsylvania, whereby David is to operate an adult bookstore. Canal Zone is located approximately 900 feet from a school. David agrees to pay Canal Zone $400 per month in rent and purchases $5,000 in assorted supplies for his new enterprise. David opens for business on January 8, 1992. Suppose further that, on January 15, Hypotown, fearing the attraction of criminals, drug addicts and other undesirables to its city, passes an ordinance prohibiting adult commercial enterprises from operating within 1000 feet of a school. David's maximum financial exposure would be the rent of $400 per month for three years and the supplies totalling $5,000. David's total loss would be $19,400, whereas Kimberly's loss would be $150,000. Yet, under the Pennsylvania Northwestern court's reasoning, it is David and not Kimberly who is protected from governmental interference with private property rights.\(^{131}\)

It is submitted that the Pennsylvania Northwestern court's distinction between abrogating and regulating vested property rights is artificial in the context of the amortization of nonconforming uses and that any difference between the two is merely one of degree.\(^ {132}\) Regulation of vested property rights is permitted in Pennsylvania.\(^ {133}\) Accordingly, the Pennsylvania Northwestern court erred by concluding that vested property rights could only be abrogated by nuisance, abandonment or by the government's exercise of eminent domain.

IV. The Effects of the Pennsylvania Northwestern Decision

The Pennsylvania Northwestern court defended its decision on policy grounds. Specifically, the court suggested that permitting the amortization of nonconforming uses would often result in economic waste and would permit local governments to legislate any use, including a private residence, out of existence.\(^ {134}\) However, it is suggested that these property even though appellant had entered into commercial lease for purpose of strip mining).

131. For a discussion of the Pennsylvania Northwestern court's reasoning, see supra notes 80-101 and accompanying text.

132. For a compilation of courts that have characterized the distinction between regulating property prospectively and terminating property rights retroactively through amortization as merely one of degree, see supra note 14.

133. For authority supporting the proposition that regulation of vested property rights is permitted in Pennsylvania, see supra note 126.

134. Pennsylvania Northwestern, 584 A.2d at 1376. Specifically, the court stated that

It is clear that were we to permit the amortization of nonconforming uses in this Commonwealth, any use could be amortized out of existence without just compensation. Although such a zoning option seems reasonable when the use involves some activity that may be distasteful to some members of the public, no use would be exempt from the reach of amortization, and any property owner could lose the use of his or her property without compensation. Even a homeowner could
icy arguments are suspect and that, in fact, the proscription of amortization will lead to economic waste and stagnation in the development of effective land-use planning.\footnote{135}

First, the failure to permit amortization of nonconforming uses arguably promotes economic waste.\footnote{136} As discussed earlier in this Note, a nonconforming use enjoys an artificial monopoly and thus generates profits that the market would not ordinarily sustain given the normal pressures of supply and demand.\footnote{137} These excess profits drain from the community money that could be applied to more productive ends.\footnote{138} By allowing for the protection of certain monopolies, the Pennsylvania Northwestern decision arguably fosters economic waste, and ironically, may actually diminish property owners' ability to utilize their property.\footnote{139}

The court's suggestion that permitting municipalities to amortize nonconforming uses may ultimately result in the amortization of our

\textit{Id.}

139. For a criticism of the court's policy arguments, see infra notes 136-40 and accompanying text.

136. The argument that amortization would foster economic waste is articulated in Note, Nonconforming Uses: A Rationale and an Approach, supra note 4, at 104. The author concludes that "forced destruction [through amortization] will often result in economic waste." \textit{Id.} The author further concludes that: Avoidance of economic waste supplies, in addition, an argument against indiscriminate use of the power of eminent domain. In the case of highly specialized buildings the public benefit of discontinuing their use by eminent domain would be trifling compared to the resultant waste. Even where the improvements are not so specialized and could be readily converted to a conforming use, the reconstruction necessary to relocate the activity may be quite wasteful. A further aspect of economic waste concerns extraction operations, such as mining and quarrying, which must be confined to the places where the materials can be found. Here, especially if the commodity is essential, there may be good reason to allow continuance, to liberalize the rules against expansion and even to permit operation of quarries not yet opened in order to utilize the materials.

\textit{Id.} This reasoning is questioned infra at notes 138-40 and accompanying text.

137. For a discussion of why the nonconforming use becomes a monopoly, see supra note 29 and accompanying text.


139. It seems conceivable that local zoning boards will be more reluctant to grant variances knowing that the grant of the variance will create a vested property right that cannot be amortized.
homes is also unpersuasive. Specifically, such an assertion ignores the limits placed upon the Commonwealth’s regulatory power. In Pennsylvania, “all property is held in subordination to the right of its reasonable regulation by the government, which regulation is clearly necessary to preserve the health, safety, morals, or general welfare of the people.”\textsuperscript{140} It would not be difficult for a homeowner, in challenging such an ordinance, to establish that amortizing homes in a residential area is not \textit{clearly necessary} to further the health, safety, morals or general welfare of the people.

V. CONCLUSION

Naturally, one resists the idea that the government should be able to interfere with our vested property rights. However, individuals derive benefits from an orderly society, one in which uses of land are regulated to balance property owners’ and society’s needs adequately.\textsuperscript{141} It is submitted that the \textit{Pennsylvania Northwestern} court failed to adequately balance individual property rights with society’s needs. The \textit{Pennsylvania Northwestern} court misconstrued precedent and, as a matter of policy, rendered a decision that may ultimately diminish individuals’ ability to use their property in a way that benefits both the property owner and the society of which the property owner is a part. This was unnecessary. To the extent that the Pennsylvania Supreme Court wanted to give property rights greater protection vis-a-vis municipalities, the court could have accomplished this objective through recognition and proper application of taking jurisprudence. Specifically, the court could have recognized the constitutionality of amortization as a means of land-use planning, while concluding that it was unreasonable to require Pa. Northwestern to cease its operations in only ninety days.\textsuperscript{142} Such an approach would have given local legislatures a much-needed device to help them plan their respective communities, and at the same time would have given property owners all the protection to which they are entitled under the Pennsylvania Constitution.

\textit{Barry Gosin}

\textsuperscript{140} \textit{Pennsylvania Northwestern}, 584 A.2d at 1374 (quoting Anstine v. Zoning Bd. of Adjustment, 190 A.2d 712, 714 (Pa. 1963)).

\textsuperscript{141} See Drumm, supra note 1, at 855. Aply, the author states:

As the growth of America’s metropolitan areas continues to accelerate, it has become increasingly necessary to rely on governmental solutions to the problem of fashioning a liveable metropolitan environment. A principal method used to achieve this goal has been the application of comprehensive zoning ordinances; with their use, the growth of a city may be monitored and directed to provide efficient municipal services, to maximize land values and the tax base, and to allow for consideration of environmental and aesthetic factors.

\textit{Id.}

\textsuperscript{142} See \textit{Pennsylvania Northwestern}, 584 A.2d at 1378 (Nix, C.J., concurring).