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Municipal Corporations—Zoning—Termination of Nonconforming Uses—*Hoffman v. Kinealy*, 389 S.W.2d 745 (Mo. App. 1965)

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MUNICIPAL CORPORATIONS—ZONING—TERMINATION OF NON-CONFORMING USES—*Hoffman v. Kinealy*, 389 S.W.2d 745 (Mo.App. 1965).

Appellants owned land which had been used for the open storage of lumber, building materials, and construction equipment continuously since 1910. A 1950 municipal zoning ordinance required that the use of land within residential zones for purposes of open storage be discontinued within six years. In 1962, upon receiving notice to discontinue the use of the lots for open storage, appellants applied for a certificate of occupancy of the lots for a pre-existing nonconforming use, and their application was denied. On appeal, the Missouri Supreme Court reversed. *Held*, that the provision of the zoning ordinance terminating the pre-existing nonconforming use by allowing six years to "amortize" such use constituted an unconstitutional taking of private property for public use without just compensation.

The termination of nonconforming uses¹ has become of prime concern to city planners.² The Missouri court noted that nonconforming uses have not tended to eliminate themselves as had earlier been expected³ and conceded that a municipality has the power through zoning ordinances to regulate the use of property *prospectively*. But it reasoned that when a property owner exercises his right to use his land in a legal manner, that right becomes "vested" and cannot thereafter be taken away by use of an amortization technique.⁴ The court stated that since the ordinance could not require the termination⁵ of the pre-existing nonconforming use immediately, neither could it accomplish that result by delaying for six years the deadline for termination. The court noted a distinction between prospective zoning and the termination of nonconforming uses, and implied that the distinction itself was controlling.

A different result was reached in the recent Nebraska case of

¹ "Nonconforming use" refers to a continuous legal use of property from a time prior to the enactment of a zoning ordinance prohibiting that use.

² Moore, *The Termination of Nonconforming Uses*, 6 WILLIAM & MARY L. REV. 1 (1965).

³ *Hoffman v. Kinealy*, 389 S.W.2d 745, 750 (Mo. App. 1965). See also Katarincic, *Elimination of Non-conforming Uses, Buildings, and Structures by Amortization—Concept Versus Law*, 2 DUQUESNE L. REV. 1, 3-4 (1963).

⁴ "Amortization" is the allowance of a number of years during which a nonconforming use may continue, at the end of which the use must terminate.

⁵ "Termination" as used herein refers to involuntary termination.

Wolf v. City of Omaha.⁶ In that case a municipal ordinance required that all noncommercial dog kennels in districts zoned for residences be removed within five years. Petitioners sought to enjoin enforcement of the ordinance and were denied relief. On appeal, the Nebraska Supreme Court affirmed on the theory that municipal zoning in the interest of public health, safety, morals, and the general welfare is a proper exercise of the police power so long as it "is not unreasonable, discriminatory, or arbitrary, and bears a relationship to the purpose sought to be accomplished."⁷ Thus *Hoffman* and *Wolf* reflect apparently conflicting views on the power to require amortization of nonconforming uses.

The power to zone prospectively was firmly established by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*,⁸ but that case left unanswered the question of the municipal power to interfere with a pre-existing legal use. However, in *Reinman v. City of Little Rock*⁹ and *Hadacheck v. Los Angeles*¹⁰ the Supreme Court held that a municipality may require the elimination of grossly obnoxious nonconforming uses,¹¹ notwithstanding the great financial loss to the owner. In *Hadacheck* the Court said that the police power is one of the most essential and least limitable of governmental powers, and that "[a] vested interest cannot be asserted against it because of conditions once obtaining."¹² The police power may properly be exercised for the involuntary termination of certain enterprises in defined localities because of the detriment to health and public welfare when conducted in those localities.¹³ As the court pointed out, the businesses involved were not nuisances per se but were merely classified as nuisances by the legislature because they were located in residential zones. Thus, the power to define and eliminate offensive uses is certainly broader than the power to abate common law nuisances.¹⁴

⁶ 177 Neb. 545, 129 N.W.2d 501 (1964).

⁷ *Id.* at 569-70, 129 N.W.2d at 515.

⁸ 272 U.S. 365 (1926).

⁹ 237 U.S. 171 (1915).

¹⁰ 239 U.S. 394 (1915).

¹¹ In *Reinman*, the nonconforming use was a livery stable in a residential district; in *Hadacheck*, a brick kiln.

¹² *Hadacheck v. Los Angeles*, 239 U.S. 394, 410 (1915).

¹³ *Id.* at 411.

¹⁴ Later, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926), the Court stated that in ascertaining the scope of the zoning power, the law of nuisances may be referred to for purposes of analogy. This also suggests that pre-existing uses may be eliminated, and that the offensiveness of the use legislated against is an important consideration in determining the constitutionality of the ordinance.

There would seem to be at least three theories on which *Reinman* and *Hadacheck* might be explained: (1) the municipal power to terminate nonconforming uses extends to all cases in which the use might be said to approximate a common law nuisance, notwithstanding private financial loss, but not to cases in which the offensiveness of the nonconforming use is not this great, (2) the power extends to all cases in which it might be said that termination is in some way desirable, notwithstanding private financial loss, or (3) the power extends to cases in which the public benefit derived from termination is sufficient to "outweigh" the private financial loss that it causes.

The first theory has clearly been repudiated in a number of jurisdictions.¹⁵ The second theory was apparently adopted by the Louisiana Supreme Court, when in an early line of cases it held that a pre-existing ladies' clothing store,¹⁶ a grocery store,¹⁷ and a drug store¹⁸ could be eliminated from residential zones under a zoning ordinance. The court conceded that these uses could not be considered obnoxious in the ordinary sense,¹⁹ but stated that their mere presence in contravention of the ordinance constituted them sufficiently a nuisance to make their elimination a proper exercise of the police power.²⁰ The result of these cases is that whatever a city may accomplish by zoning in advance, it may accomplish by zoning after the uses have been established. The severe²¹ and widespread²² criticism to which these cases have been subjected is indicative of a general feeling that some distinction should be made between the power to zone prospectively and the power to terminate nonconforming uses. Thus it is submitted that the third theory accounts for most of the recent decisions in this area.

Since a termination ordinance, like a prospective zoning ordi-

¹⁵ See, e.g., notes 25, 28, 35 *infra*.

¹⁶ *City of New Orleans v. Liberty Shop Ltd.*, 157 La. 26, 101 So. 798 (1924).

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

¹⁸ *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 So. 314 (1929).

¹⁹ A clothing store "could hardly be regarded as a nuisance anywhere except in an exclusive residence neighborhood where business establishments are proscribed by statute or ordinance." *City of New Orleans v. Liberty Shop Ltd.*, 157 La. 26, 27, 101 So. 798, 799 (1924).

²⁰ *Id.* at 27, 101 So. at 799.

²¹ See Fratcher, *Constitutional Law—Zoning Ordinances Prohibiting Repair of Existing Structures*, 35 MICH. L. REV. 642, 644 (1937).

²² "These cases have not been cited with frequency by individuals favoring the amortization theory." Katarincic, *supra* note 3, at 21.

nance, is an exercise of the police power, the test of its constitutionality is its "reasonableness." But whereas the reasonableness of a prospective zoning ordinance depends upon its *design*,²³ the reasonableness of a termination ordinance apparently depends upon its *operation*: It is reasonable if it operates to produce a public benefit which is greater than the private financial loss which it causes.²⁴ In *City of Seattle v. Martin*,²⁵ where the Supreme Court of Washington upheld an ordinance as applied to require the termination within one year of a nonconforming repair lot for construction equipment, the court stated that the test of constitutionality is "whether the significance of the hardship as to appellant is more compelling, or whether it reasonably over-balances the benefit which the public would derive from the termination of the use of the vacant lot as a place for the repair of construction equipment."²⁶

It can be said that in nearly all of the cases in which a termination ordinance has been upheld the public benefit overbalanced the private loss.²⁷ The leading case of *City of Los Angeles v. Gage*,²⁸ where the court sustained the validity of an ordinance requiring termination within five years as applied to the owner of a nonconforming plumbing business,²⁹ may be explained in terms of a balancing test by saying that in light of the legislative determination that termination of the use would be desirable, the court was precluded from saying that the use was in no way detrimen-

²³ "If . . . there was evidence upon which the city commission could have said that the zoning ordinance in question was necessary in consideration of public health, safety, comfort or general welfare, it is beyond the province of the court to say that it is unreasonable . . ." *Cassel Realty Co. v. City of Omaha*, 144 Neb. 753, 760, 14 N.W.2d 600, 604 (1944).

²⁴ For a possible explanation of this distinction, see text accompanying notes 49-51 *infra*.

²⁵ 54 Wash. 2d 541, 342 P.2d 602 (1959).

²⁶ *Id.* at 544, 342 P.2d 604.

²⁷ *But see Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950), allowing termination of a nearly new filling station located near the state capitol and a public school.

²⁸ 127 Cal. App.2d 442, 274 P.2d 34 (1954).

²⁹ The use consisted of a building adaptable for residential purposes and an unimproved lot used for the open storage of supplies. Reversing the trial court's decision that the ordinance was invalid as applied to Gage, the court said that the legislative body has the power to adopt "reasonable" regulations to make zoning effective. But the important question is, what test of "reasonableness" is to be used? The court said that "constitutionality depends on the relative importance to be

tal.³⁰ And since the loss to Gage was small,³¹ it would be justified in order to realize the benefit of termination. This analysis is reinforced by the later California case of *City of LaMesa v. Tweed & Gambrell Planing Mill*,³² where an ordinance requiring termination within five years of nonconforming industrial property with a remaining economic life of twenty-one years was held unconstitutional. The court distinguished *Gage* on the ground that "in this case not only is the private loss greater than in the *Gage* case, but the public gain is less."³³ Here the test of reasonableness used by the court was obviously that of balancing the public and private interests.³⁴

In *Grant v. Mayor & City Council of Baltimore*³⁵ the losses sustained when billboards were amortized under an ordinance requiring elimination within five years were inconsequential, since the practice of the billboard company was to amortize billboards over a five-year period anyway. In *Harbison v. City of Buffalo*³⁶ the court remanded a case under a termination ordinance to ascertain whether the loss to the property owners would be sufficiently reduced within the three-year amortization period to justify termination at that time. The court indicated that elimination would be constitutional if "the benefit to the public has been deemed of greater moment than the detriment to the property owner . . ."³⁷ Subsequent New York cases have allowed termination where the public benefit outweighed private loss,³⁸ and disallowed it where it did not.³⁹

given to the public gain and to the private loss." *Id.* at 460, 274 P.2d 44. This language definitely implies a balancing test.

³⁰ The court also noted that the noise and disturbance caused by a plumbing business is greater than the noise and disturbance that is normal in residential districts. *Id.* at 449, 274 P.2d at 37.

³¹ The loss was "less than half of 1% of the mean of his gross business for five years." *Id.* at 461, 274 P.2d at 44.

³² 146 Cal. App.2d 762, 304 P.2d 803 (1956).

³³ *Id.* at 770, 304 P.2d at 808.

³⁴ See also *McCaslin v. City of Monterey Park*, 163 Cal. App.2d 339, 329 P.2d 522 (1958), where termination of mining operations within 60 days was not allowed.

³⁵ 212 Md. 301, 129 A.2d 363 (1957).

³⁶ 4 N.Y.2d 553, 152 N.E.2d 42 (1958).

³⁷ *Id.* at 559, 152 N.E.2d at 44.

³⁸ See *People v. Bennett*, 40 Misc. 2d 296, 243 N.Y.S.2d 131 (1963); *Town of Schroepel v. Spector*, 43 Misc. 2d 290, 251 N.Y.S.2d 233 (1963).

³⁹ See *Town of Hempstead v. Romano*, 33 Misc. 2d 315, 226 N.Y.S.2d 291 (1962); *Dolomite Prod. Co. v. Kipers*, 42 Misc. 2d 11, 247 N.Y.S.2d 396 (1964).

In *Wolf v. City of Omaha*,⁴⁰ the court seemed to base its decision on testimony which indicated that certain of the kennels involved created noise, odor, and sanitation problems and that the kennels were not to be considered a source of income for their owners. The court could therefore conclude that the detriment to surrounding areas caused by the presence of the kennels, and therefore the public good to be served by their removal, was sufficient to justify the possible burden to the owners.⁴¹

On the other hand, *Hoffman* seems to be a case in which the public benefit did not justify the loss to appellants.⁴² There it appears the offensiveness of the nonconforming use was slight,⁴³ termination would have resulted in substantial loss to the owner,⁴⁴ and the allowance of an amortization period did not operate to effectively reduce loss to the point at which it was justifiable.⁴⁵ Thus even the amortization provision could not save the constitutionality of the ordinance as applied to appellant. While the court did not purport to employ this analysis, perhaps it is comparable to the one used in the case. "Taking" a "vested right" may in this context be equated with "causing financial loss," for there is no apparent reason for protecting a "vested right" exercised in con-

⁴⁰ 177 Neb. 545, 129 N.W.2d 501 (1964).

⁴¹ Under this analysis *Wolf v. City of Omaha* does not give unqualified approval to the use of the amortization technique for the termination of all nonconforming uses. But where a use is detrimental to the public health, and the termination of that use within five years does not impose any substantial burden upon the owner, such termination is a valid exercise of the police power.

⁴² Courts usually do not allow termination where the public benefit is less than the loss to property owners. See, e.g., *City of Corpus Christi v. Allen*, 152 Tex. 137, 254 S.W.2d 759 (1953). See also, cases cited note 39 *supra*.

⁴³ The nonconforming lots were enclosed with a high fence to exclude children and were "landscaped" with a hedge or shrubbery." *Hoffman v. Kinealy*, 389 S.W.2d 745 (Mo. App. 1965). There did not appear to be any unusual noise, dust, or annoying lights in connection with the use.

⁴⁴ It appears that to require termination of the use would have forced appellant either to relocate his entire business, located nearby, or to acquire different land for the storage of his materials. "[T]he record adequately shows that instant relators' use of their lots may not be brushed aside and disregarded as 'relatively slight and insubstantial.'" *Id.* at 754.

⁴⁵ The unimproved lots would not depreciate naturally, as would a building, and no real benefit was derived on the theory that appellant had a monopoly in the area. Appellant's loss would theoretically be the same at the end of the amortization period as it would be if the termination were immediate, thus, the court's description of the amortization as a "postponed taking."

travention of public policy unless financial loss would otherwise result. If the rule of the case is "an arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands" is unconstitutional,⁴⁶ perhaps the termination of a use that has qualities of nuisance, though it not be a nuisance per se,⁴⁷ would not be prohibited: The interference would not be "arbitrary," but based upon sound and substantial reasons of public health, safety, or welfare.⁴⁸

On this basis, *Hoffman* can be reconciled with other termination cases. But the decision is significant in at least two respects. First, it points out that there is a distinction between prospective zoning and terminating nonconforming uses. Perhaps the distinction is based upon the fact that under a prospective zoning ordinance, the public benefit is future and therefore contingent. The benefit lies in an "immunization" against potentially serious detriment to public health, safety, and welfare. This, coupled with the fact that the "immunization" cannot be effected without adversely affecting *some* property values,⁴⁹ has made the courts understandably hesitant to declare that private financial loss will be a controlling consideration in determining the constitutionality of the ordinance.⁵⁰ But under a termination ordinance, the detriments legislated against are present, and may therefore be assessed individually to determine whether the benefit of elimination justifies the cost. Here the courts would not have to say that the design of the ordinance is unreasonable, only that its effect in a particular case is unreasonable. In weighing the relative public benefit and private loss, the court does not decide whether the legislature was reasonable in declaring the desirability of elimination,⁵¹ but only whether the stated desirability of elimination is sufficiently great to justify the private loss incurred. For these reasons courts should closely scrutinize the attempted application of a termination ordinance to determine whether, *in that case*, termination is justifiable.

Hoffman, if the case may properly be read in terms of the

⁴⁶ *Id.* at 753.

⁴⁷ As discussed in *Reinman v. City of Little Rock*, 237 U.S. 171 (1915), and *Hadachek v. Sebastian*, 239 U.S. 394 (1915).

⁴⁸ The basis of this argument is that the court said a "vested right" is protected by the Constitution, but did not say the protection is unlimited.

⁴⁹ 389 S.W.2d 745, 748 (Mo. App. 1965).

⁵⁰ See note 23 *supra*.

⁵¹ "What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body . . ." *Wolf v. City of Omaha*, 177 Neb. 545, 556, 129 N.W.2d 501, 508 (1964).

analysis presented above, also indicates that provision for an amortization period, even a very long one, might not make termination permissible where a balancing test is used. The amortization period is significant only insofar as it allows a minimization of loss to the extent that the loss finally sustained will not justify the continued presence of the nonconforming use. Of course, the advantage of having a monopoly in the neighborhood during the amortization period should be considered in determining the amount by which loss is reduced.⁵²

A balancing test is not always easy to apply, but it seems to be the only way to do substantial justice in resolving conflicts between the rights of property owners and the right of the community to enact effective zoning ordinances to promote the health, safety, and general welfare of its citizens. The legislative determination that elimination is desirable should be controlling where the loss to the property owner is negligible.⁵³ Where the loss to the property owner is significant, so must it also appear that, for reasons more compelling than the mere legislative determination of desirability, the city is attempting to protect its citizens from a real and substantial detriment, if the city is to succeed in terminating the nonconforming use.⁵⁴ Use of an amortization provision is a tool which in many cases will permit the owner to reduce his losses to the point at which they will be justifiable in light of the benefit the community will derive from the termination of the nonconforming use.⁵⁵ The advantage of using a balancing test is that it gives the property owner a degree of protection which he would not have were he precluded from a real judgment on the merits by an almost unassailable presumption that the ordinance as applied to him is "reasonable." Yet it allows a city to eliminate the most offensive nonconforming uses, and even those which are not so offensive where the loss to the owner is slight. This it could not do if "vested rights" were to be given unlimited protection. It is submitted that *Hoffman* is a worthy decision only insofar as it recognizes that *both* interests are deserving of judicial recognition.

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⁵² See Moore, *The Termination of Nonconforming Uses*, 6 WILLIAM & MARY L. REV. 1, 9 (1965).

⁵³ E.g., *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964); *City of Los Angeles v. Gage*, 127 Cal. App.2d 442, 274 P.2d 34 (1954); *Grant v. Mayor & City Council of Baltimore*, 212 Md. 301, 129 A.2d 363 (1957).

⁵⁴ *City of Corpus Christi v. Allen*, 152 Tex. 137, 254 S.W.2d 759 (1953).

⁵⁵ It is submitted that the termination itself should be the measure of public benefit, and a beneficial use to which the land could be put should not be considered in determining public benefit. *But see* 35 WASH. L. REV. 213, 219 (1960).