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Zoning - Elimination of Nonconforming Use by Amortization: Municipal Ordinance Held Unconstitutional as a Taking Without Just Compensation. Hoffmann v. Kinealy (Mo. 1965)

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ZONING—ELIMINATION OF NONCONFORMING USE BY AMORTIZATION: MUNICIPAL ORDINANCE HELD UNCONSTITUTIONAL AS A TAKING WITHOUT JUST COMPENSATION. *Hoffmann v. Kinealy* (Mo. 1965).

The relators owned two adjoining lots that had been used since 1910 by their construction business, for the open storage of lumber. Directly across the alley the construction company also maintained an office and a garage. A zoning ordinance classified the block into two different zones, placing the storage lots in a residential zone and the garage and the office in an industrial zone. Nearby in the industrial zone was located a planing mill which stored lumber in the open. There were several taverns and stores in the residential zone in close proximity of the relators' lots. In 1950 the existing zoning ordinance was amended to provide that "the use of land within any dwelling district . . . for purposes of open storage . . . shall be discontinued within six (6) years. . . ."[1] In 1963 the Building Commission denied the relators' application for a certificate of occupancy. The Board of Adjustment, the defendants in the action, affirmed the decision of the Building Commission, as did the circuit court on certiorari. The relators appealed to the Supreme Court of Missouri. They contended that the ordinance was unconstitutional because it violated article 1, section 26, of the Constitution of Missouri, which states that "private property shall not be taken or damaged without just compensation." The supreme court reversed the lower decision, holding that the termination of a pre-existing lawful nonconforming use by "amortization zoning" was a taking of private property for public use without just compensation and was not justifiable under the police power, which may never transcend constitutional rights and limitations. *Hoffmann v. Kinealy*, 389 S.W.2d 745 (Mo. 1965).

Zoning ordinances seek to subserve the general welfare of the community through the orderly separation of the municipality into districts based on the use of the land. By grouping compatible uses the municipal planners attempt to stabilize the use of the land, conserve the land value, preserve the character of the neighborhood, facilitate the implementation of governmental services, and promote the health, safety, and welfare of the community. The authority to

[1] Hoffmann v. Kinealy, 389 S.W.2d 745, 747 (Mo. 1965), referring to St. Louis, Mo., Ordinance 45309 § 5(B), April 25, 1950. According to the court the later codification reads: "The use of land within any dwelling district for the purpose of open storage is prohibited." ST. LOUIS, MO., CODE § 903.030 (1960).

regulate the use of privately owned land stems from the states' power, commonly called police power, to pass laws to promote health, safety, and property protection. Some of this power is usually passed on to local communities through enabling statutes of the state.[2]

When zoning statutes were first enacted,[3] they were believed by many to be an encroachment on the property rights of the individual without "due process" or just compensation, in contradiction to the fourteenth and fifth amendments of the federal constitution. For prospective zoning[4] the issue was settled in 1926 when the United States Supreme Court approved the constitutionality of zoning in *Euclid v. Ambler Realty Co.*[5] The plaintiff in that case attempted to enjoin the enforcement of a zoning ordinance which classified a portion of his land as residential. He contended that the ordinance deprived him of property without "due process" of law. The plaintiff introduced evidence to prove that the rezoning of his undeveloped land from industrial to residential reduced the value from $10,000 an acre to $2,500. The Court reasoned that such zoning enactments must be justified through the police power of the state, and as such they will be constitutional only if: (1) the goals of the ordinance are the promotion of public health, safety, or general welfare and (2) the provisions of the ordinance are not applied in an arbitrary or unreasonable manner.[6] The Court ruled that the facts in each case must be examined in connection with the particular circumstances and locality and that, where the constitutionality is debatable, the Court will not substitute its opinion for the legislature's.[7] Under the facts in the *Euclid* case, the Court found that the ordinance was reasonably applied and the classification of the property into a residential zone related to the public welfare because it enabled the city

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[2] See 101 C.J.S. *Zoning* §§ 1-7 (1958); 1 YOKLEY, MUNICIPAL CORPORATIONS §§ 115-29 (1956).

[3] The first comprehensive zoning statute was passed by New York City in 1919 and its validity was affirmed in Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (Ct. App. 1920).

[4] Prospective zoning regulates the future use of land or buildings rather than attempting to terminate uses which pre-exist the zoning enactment.

[5] 272 U.S. 365 (1926), 54 A.L.R. 1016.

[6] Euclid v. Ambler Realty Co., *supra* note 5, at 395. To be reasonable an ordinance "must not disfavor some as against others in the same class; must not create unfair discriminations; must not deprive persons of equality before the 'Law'; must not be so arbitrary in their terms or in their administration as to make the granting or the withholding of permission to use property subject to the mere will of some officials; must not deprive of time honored procedure and rights which have become ingrained as part of the 'Law'." 1 METZENBAUM, LAW OF ZONING 187 (2d ed. 1955).

[7] Euclid v. Ambler Realty Co., *supra* note 5, at 388.

to control traffic congestion and fire hazards and improve police protection.[8] As a result, the ordinance was deemed constitutional.

In *Nectow v. City of Cambridge*[9] the Supreme Court held unconstitutional an ordinance which classified a one-hundred foot strip of plaintiff's land as residential when the tract was located between industrial and residential areas. The Court reasoned that the ordinance as it applied to the landowner did not substantially promote the public welfare and was unreasonable in that it rendered the land totally without value.[10]

Applying the logic established in *Euclid*, the Supreme Court of Missouri in 1927 approved[11] the validity of zoning in *State ex rel. Oliver Cadillac Co. v. Christopher*.[12] The Missouri court denied the landowner a permit to construct an automobile showroom and garage in a residential zone. The court reasoned that it was a valid exercise of police power to create a residential district to the exclusion of industry because to do so would enable the city to promote the community welfare.[13] Finding that the application was reasonable as to the landowner,[14] the court affirmed the constitutionality of the ordinance. Further, the court decided that a land use can be regulated by police power without compensation:

> If, on the whole, those affected are benefited by the measure, if the right surrendered can no longer, in the light of advancing public opinion, be retained in its fullness by its present possessor, if the sacrifice to him is slight or if the number affected is great, so that compensation is impracticable—in all such cases compensation is not provided for.[15]

Both *Euclid* and *Oliver Cadillac* dealt with the constitutionality of prospective zoning and not with zoning which provides for the termination of established uses, as does "amortization zoning."

Early city planners thought that nonconforming uses[16] could even-

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8 *Id.* at 391-95.

9 277 U.S. 183 (1928).

10 *Id.* at 187-88.

11 Missouri had previously held zoning laws unconstitutional, although there was no enabling act at the time. See City of St. Louis v. Evraiff, 301 Mo. 231, 256 S.W. 489 (1923); State *ex rel.* Better Built Home & Mortgage Co. v. McKelvey, 301 Mo. 130, 256 S.W. 495 (1923).

12 317 Mo. 1179, 298 S.W. 720, *error dismissed*, 278 U.S. 662 (1927).

13 *Id.* at 1192, 298 S.W. at 724.

14 *Id.* at 1194-96, 298 S.W. at 725-26.

15 *Id.* at 1192, 298 S.W. at 724, quoting WILLIAMS, THE LAW OF CITY PLANNING & ZONING, at 25.

16 A nonconforming use is a lawful use existing on the effective date of a rezoning plan but not in conformity with the provisions of the plan. See 1 YOKLEY, ZONING LAW & PRACTICE 148 (2d ed. 1953).

tually be eliminated by the persistent enforcement of zoning regulations prohibiting the expansion or alteration of such uses and the final termination once the use was abandoned.[17] In spite of such beliefs the nonconforming use remains the most serious difficulty in effective zoning. As one writer commented, "until some method is devised to permanently eliminate the nonconforming use . . . effective city planning cannot be achieved."[18] Two primary methods have been used to combat the problem—condemnation and amortization. While condemnation through eminent domain has proven too costly,[19] amortization has been called "a more realistic and economically sound method . . . to get rid of the existing nonconforming use."[20] Under the amortization technique the property owner is given a period of grace sufficiently long to permit him to amortize[21] his investment, after which the nonconforming use must be terminated. The grace period gives the landowner an opportunity to plan his future as well as a period of time in which his profits might increase because of the restriction on new competition created by the zoning ordinance.

Hoffmann represents the first case in which the Supreme Court of Missouri has considered the constitutionality of amortization zoning. The court expressly refused to be swayed by the holdings of other jurisdictions and focused its attention on the basic constitutional right of the matter.[22] The court reasoned that the relators had established a lawful use on their land which gave them a "vested right"[23] which could not be diminished by the enactment of a zoning ordinance. To bolster its position the court reasoned that an immediate termination of a nonconforming use is unconstitutional[24] and it would be illogical to hold the ordinance constitutional merely because it postponed the

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17 Moore, *The Termination of Nonconforming Uses*, 6 WM. & MARY L. REV. 1, 2-3 (1965).

18 Hertz, *Non-Conforming Uses: Problems and Methods of Elimination*, 33 DICTA 93 (1956).

19 44 CORNELL L.Q. 450, 453 (1959); 1951 WIS. L. REV. 685, 696.

20 3 WITKIN, SUMMARY OF CALIF. LAW, 1990 (7th ed. 1960).

21 In zoning, the word amortization is not used in the accounting sense, and it has been suggested that the term be dropped in favor of "theoretical depreciation," since the nonconforming use may still have a useful life at the end of the grace period. Katarincic, *Elimination of Non-Conforming Uses, Buildings, & Structures By Amortization—Concept v. Law*, 2 DUQUESNE L. REV. 1, 38-39 (1963).

22 389 S.W.2d at 752.

23 Vested rights are those of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived other than by the established methods of procedure and for the public welfare. BLACK, LAW DICTIONARY (4th ed. 1951).

24 *Accord*, Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930) (immediate termination of mental hospitals held unconstitutional).

involuntary termination of the use for a reasonable time. In effect, the court held that once a use has been established it is of such a protected nature that the balancing of private loss with public gain is no longer the appropriate consideration. As a result the *Euclid* test was inapplicable and the court's earlier decision in *Oliver Cadillac* was not controlling. The court echoed the warning of Mr. Justice Holmes:

> We 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.[25]

The holding is in keeping with dicta of many previous Missouri cases,[26] but in other jurisdictions there appears to be a well established trend in the other direction.[27] One of the first amortization clauses to be tested was in *State ex rel. Dema Realty Co. v. McDonald*,[28] where a New Orleans ordinance provided that all businesses in a residential zone were to be excluded within one year. After the year had elapsed, the Supreme Court of Louisiana approved the termination of a grocery store which had operated in the area for many years. In extending the rule of the *Euclid* case the court stated: "The ordinance [in *Euclid*] did not deal . . . with already established business. . . . But, if the village had the authority to create and maintain a purely residential district . . . if . . . not arbitrary and unreasonable, it follows necessarily that the village was vested with authority to remove any business or trade from the dis-

[25] 398 S.W.2d at 753, quoting from Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[26] Brown v. Gambrel, 358 Mo. 192, 198, 213 S.W.2d 931, 935 (1948); Women's Christian Ass'n of Kansas City v. Brown, 354 Mo. 700, 709-10, 190 S.W.2d 900, 906 (1945); *In re* Botz, 236 Mo. App. 566, 159 S.W.2d 367 (1942) (ordinance allowed continuance of nonconforming use). *Contra*, State *ex rel.* Capps v. Burns, 353 S.W.2d 829, 832 (Mo. Ct. App. 1962). ("Many ordinances limit the life of nonconforming uses to a period of years and such ordinances have been approved.")

[27] *E.g.*, Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950) (closing of service station after ten-year period held a reasonable exercise of police power); Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121, 272 P.2d 4 (1954) (termination of cement batching plant within twenty years approved); City of La Mesa v. Tweed & Gambrel Planing Mill, 146 Cal. App. 2d 762, 304 P.2d 803 (1956) (Twenty-year amortization was not reasonable as it applied to defendant); City of Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959) (one-year amortization approved for a repair yard), see criticism in 35 WASH. L. REV. 213 (1959). *Contra*, City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953) (a zoning ordinance may not divest a vested property right in a junk yard after a one-year grace period); Curtis v. City of Cleveland, 130 N.E.2d 342 (Ohio Ct. App. 1955) (amortization ordinances were confiscatory, unreasonable, and discriminatory).

[28] 168 La. 171, 121 So. 613, *cert. denied*, 280 U.S. 556 (1929).

trict and to fix a limit of time in which the same shall be done."[29] After this rather extreme application of amortization,[30] the theory was refined and clarified in many opinions, particularly in *City of Los Angeles v. Gage*[31] and *Harbison v. City of Buffalo*.[32]

In *Gage*, a California case, the city sued to enjoin the defendants from using their property for a plumbing business after the five-year amortization period had lapsed. The district court of appeal upon examining the particular facts found that (1) the zoning ordinance was enacted to regulate the use of property in an effort to protect the public health, morals, safety, and general welfare and (2) the application of the ordinance was neither arbitrary nor discriminatory as it applied to the property of the defendants.[33] The California court reasoned that all zoning affects every piece of property in a retroactive manner since it applies to property already owned at the time of the effective date of the ordinance. The court concluded that there was no material distinction between an ordinance restricting future uses and one requiring the termination of present uses. The distinction would merely be one of degree and the constitutionality of both would depend on the relative importance to be given to the public gain versus the private loss. The court examined the private loss and determined that the defendants' cost of relocating his plumbing business would be $1,000, or less than one percent of his minimum gross business for the five-year amortization period. Thus, his amortized loss was small compared to the public gain.[34]

In *Harbison*, a New York case, it was held that an amortization zoning ordinance would be constitutional if its termination provisions were reasonable as applied to the circumstances in each case. The New York court adopted the following guidelines to determine what is reasonable: (1) nature of the neighborhood; (2) value and condition of the improvements on the premises; (3) nearest area to which the owner may relocate; (4) cost of such relocation; (5) other

29 *Id.* at 182, 121 So. at 617.

30 "The Louisiana decisions in this field . . . sound more like Cossack interpretations of Moscovite ukases than utterances of a court operating under the benign provisions of Magna Carta." Fratcher, *Constitutional Law-Zoning Ordinances Prohibiting Repairs of Existing Structures*, 35 MICH. L. REV. 642, 644 (1937).

31 127 Cal. App. 2d 442, 274 P.2d 34 (1954). The *Gage* case has several approving commentators, see 8 OKLA. L. REV. 239 (1955); 7 STAN. L. REV. 415 (1955); See also 6 W. RES. L. REV. 182 (1955).

32 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958); See also Anderson, *Amortization of Nonconforming Uses—A Preliminary Appraisal of Harbison v. City of Buffalo*, 10 SYRACUSE L. REV. 44 (1959); Note, 30 MISS. L.J. 210 (1959).

33 City of Los Angeles v. Gage, 127 Cal. App. 2d at 461, 274 P.2d at 45.

34 *Id.* at 461, 274 P.2d at 44.

reasonable factors and costs.[35] In *Harbison*, the city had refused to issue a license to operate a junk yard after a three-year amortization period had lapsed. The petitioner obtained an order directing the city to issue the license, and the order was sustained by the Supreme Court, Appellate Division. The court of appeals remanded the case to the trial court with instructions to examine the detriment to the land holder in light of the above criteria and stated that if the public benefit outweighed the private loss the ordinance was to be considered reasonable and not arbitrary. The lower court heard evidence that the structure was worth $10,747, the land worth $5,347, and the cost of moving $20,000; thus, the trial court held the ordinance unreasonable and therefore null and void as to the petitioner.[36]

The court in the instant case did not recount sufficient facts to enable a complete analysis under the rationale of the *Gage* and *Harbison* cases, but with the facts that are given it seems logical that the ordinance would have been found unreasonable as it applied to the relators' use. Such a determination would have rendered the ordinance null and void as to the relators' use without the necessity of declaring "amortization zoning" unconstitutional. The relators could have proven that the neighborhood, with its taverns, stores and planing mill, would not have been benefited by the closing of the lumber yard. The neighborhood's peculiar problems of fire prevention, traffic congestion, and police protection would have remained basically the same with or without the relators' business. As in *Nectow* the public welfare would not have been promoted by the enforcement of the ordinance, since the use at issue was compatible with the surrounding conditions. The relators could prove that their loss would be more than merely the storage yard, since the adjacent garage and office would be of less use to them after the yard was closed. It seems likely that, when compared with the negligible public gain, the value of the relators' loss would enable the court to arrive at a decision similar to that in the final trial of *Harbison.* No facts were introduced relative to the availability or cost of relocation but, in light of the foregoing, the cost of moving the established business would have to be at an extreme minimum before a *Gage* decision could be reached.

In *Hoffmann*, the Missouri Supreme Court has chosen to disapprove of the concept of amortization zoning. In the opinion of the

[35] Harbison v. City of Buffalo, 4 N.Y.2d at 563-64, 152 N.E.2d at 47, 176 N.Y.S.2d at 606.

[36] 44 CORNELL L.Q. 450, 451 (1959).

court the important consideration was that the use was lawful and had existed prior to the enactment of the zoning ordinance. This consideration prompted the court to give the relators a perpetual right to stack lumber on their land as a "vested right." Under the facts in *Hoffmann*, the court had an excellent opportunity to approve both the concept and the constitutionality of amortization zoning and still protect the private rights of the relators. The fact that they did not do so indicates that in the eyes of the Missouri Supreme Court the value of an individual vested property right is far greater than the countervailing rights of society as protected by the broad sweep of the police power.

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