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religion, or because of any other reason having no rational relation to the regulated activities" violates the equal protection clause of the Constitution.[45] In the light of the previously discussed arguments, it cannot be said that one who believes in God is more trustworthy or better qualified to carry out the duties of a notary public. The rational basis for the requiring of a declaration of belief to qualify for a notary public commission is non-existent, and therefore, such a requirement violates the equal protection clause.

Perhaps the impregnable wall of separation between Church and State has crumbled slightly since the *Zorach* decision; yet, it has not disintegrated to such an extent as to allow a state to ban a man from public office because of his religious belief. Although the Supreme Court has not as yet held specifically that irreligion is a religious belief protected by the religious guarantees of the First Amendment, the language of previous cases and the compelling arguments in favor of the proposition indicate that the Court will so hold.

> The sanctified principle of freedom of religious belief does not distinguish between believers and nonbelievers. It embraces both, and accords one as much protection and freedom as the other. A sect or tenet which is intolerant of those of a different sect or tenet is the precise antithesis of religious liberty. Freedom is negated if it does not comprehend freedom for those who believe as well as those who disbelieve. The law is astute and zealous in seeing to it that all religious beliefs and disbeliefs be given unfettered expression. . . . Authentic free thinking involves the indubitable right to believe in God, as well as the unfettered license not to believe or to disbelieve in a Deity.[46]

Therefore, to require a declaration of belief in the existence of God in order to hold public office is a violation of the First and Fourteenth Amendments.

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AMORTIZATION OF NONCONFORMING USES

Nonconforming uses have been a problem since the inception of zoning as a prime tool in systematic city planning.[1] Initially, no provisions were made for their elimination, since it was felt that such uses would be few in number and likely to be eliminated in the course of time by various restrictions on their expansion. In addition, those inaugurating these city plans doubted the validity of ordinances requiring the summary disposition of nonconforming uses.[2] Considerations of fairness and constitutional limitations (primarily the Due Process Clause of the Fourteenth Amendment) lay behind the reluctance to zone retro-

45. Kotch v. River Port Pilot Commissioners, 330 U.S. 552, 556 (1947).

46. Lewis v. Board of Education, 157 Misc. 520, 285 N.Y.S. 164 (Sup. Ct. 1935), aff'd, 247 App. Div. 106, 286 N.Y.S. 175 (1st Dep't 1936), motion for leave to appeal or for reargument denied. 247 App. Div. 873, 288 N.Y.S. 751 (1st Dep't 1936), appeal dismissed, 276 N.Y. 490, 12 N.E.2d 172 (1937).

1. 1 Yokley, Zoning Law and Practice 362 (2d ed. 1953).

2. Note, 9 U. Chi. L. Rev. 477, 481 (1942).

actively.[3] Thus, most zoning ordinances provided for the continuance of uses existing at the time the ordinance was enacted, although new nonconforming uses were prohibited.[4] Moreover, since the avowed purpose of zoning is to induce conformity as quickly as possible, restrictions were placed on the expansion, repair, and rebuilding (after substantial destruction) of nonconforming uses and structures.[5]

However, nonconforming uses have not disappeared as originally anticipated. In fact, the general regulation of future uses and changes, with many existing uses largely uncontrolled, have put these latter, nonconforming uses in a preferred, oftentimes monopolistic position.[6] As a result, the inability to eliminate nonconforming uses is presently viewed as the fundamental problem in the field of zoning.[7]

The courts soon confirmed the apprehensions of those who initiated zoning schemes. They held almost unanimously, and the view prevails, that it is arbitrary and unreasonable, and therefore unconstitutional, for a zoning law to compel immediate discontinuance of otherwise lawful nonconforming uses.[8] In consequence, various devices have been resorted to, in the attempt to eliminate existing nonconforming uses. The tools employed have included eminent domain, the law of nuisance, refusal to supply governmental services to the nonconforming user, and others.[9] None of these, for one reason or another, has proved very satisfactory. The conclusion has been reached, that if nonconforming uses are to be substantially eliminated with some rapidity, the law of zoning must be applied.[10] Consequently, in recent years, many state and local legislative bodies have begun to utilize statutes and ordinances requiring the removal of certain uses and structures after a period of sanctioned nonconformity.[11] These so-called amortization periods vary in length according to the nature of the particular use or structure involved.[12]

Amortization has been termed the only positive method of eliminating nonconforming uses.[13] It is sometimes explained as the determination of the normal, useful remaining life of a building and the prohibition of its main-

3. Comment, 102 U. Pa. L. Rev. 91, 92 (1954).
4. E.g., Scerbo v. Bd. of Adjustments of Jersey City, 4 N.J. Super. 409, 67 A.2d 472 (1949).
5. E.g., Hay v. Bd. of Adjustments of Borough of Fort Lee, 37 N.J. Super. 461, 117 A.2d 650 (1955).
6. Supra note 2 at 485.
7. City of Los Angeles v. Gage, 127 Cal. App.2d 442, 274 P.2d 34 (1954).
8. Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930); Standard Oil Co. v. City of Bowling Green, 244 Ky. 362, 50 S.W.2d 960 (1932).
9. Anderson, The Nonconforming Use—A Product of Euclidian Zoning, 10 Syracuse L. Rev. 214 (1959).
10. Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957).
11. Comment, 35 Va. L. Rev. 348, 353-354 (1949). See Grant case, supra note 10 at 309 n.1, 129 A.2d 366 n.1 for some of the jurisdictions which have enacted zoning laws incorporating amortization provisions.
12. Note, 1951 Wis. L. Rev. 685, 691.
13. Crolly and Norton, Termination of Nonconforming Uses, 62 Zoning Bulletin 1 (1952).

tenance after the expiration of that time.[14] This, however, is only one definition, and is limited to structures. In effect, a similar practice has been followed in the elimination of nonconforming businesses, whether housed in buildings or operating solely on the use of a particular piece of land (e.g. a natural user).[15] It is notable that the many courts applying notions of amortization have given it a broad scope of application. The term has come to include both ordinances which provide for periods to be determined at the discretion of local administrative boards, and zoning laws prescribing a fixed period for the termination of all uses and structures of a specified nature.[16]

Some courts have refused to draw a distinction between laws requiring summary elimination of nonconforming uses and those demanding cessation only after the termination of an amortization period. These courts hold the latter, as well as the former, unconstitutional.[17] However, a number of courts have held that nonconforming uses could be terminated after specified periods of time. In the famous *Dema Realty* cases,[18] the Louisiana Supreme Court held that an ordinance creating a residence district and requiring established businesses to remove therefrom within one year, was a legitimate and reasonable exercise of the police power, and therefore not subject to constitutional objection. These cases, however, sometimes speaking in terms of eliminating nuisances, have been severely criticized as exhibiting ". . . a confusion between the objects of zoning and nuisance regulation."[19] In *Standard Oil Co. v. Tallahassee,*[20] the court enforced a zoning ordinance providing a ten-year amortization period for a gas station. The court, although presented with evidence of considerable financial loss to the user, held that ". . . considerations of financial loss or so-called 'vested rights' in property are insufficient to outweigh the necessity for legitimate exercise of municipal police power."[21] Similarly, on the basis of a zoning ordinance allowing a twenty-year amortization period for prior nonconforming uses, the Supreme Court of California held, in *Livingston Rock & Gravel Co. v. Los Angeles,*[22] that a cement mixing business could be closed in the legitimate exercise of police power. If, at any time, the use was found to be detrimental to the public health, safety, or welfare, the zoning board might revoke the originally-granted right to continue the nonconforming businesses.[23]

14. Comment, supra note 11 at 353-354.
15. Supra note 7.
16. City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953).
17. Supra note 10 at 309 n.2, 129 A.2d 366 n.2.
18. State ex. rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), cert. denied 28 U.S. 556 (1929); State ex. rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929).
19. Jones v. City of Los Angeles, 211 Cal. 304, 318, 295 Pac. 14, 21 (1930).
20. 183 F.2d 410 (5th Cir. 1950), cert. denied, 340 U.S. 892 (1950).
21. Id. at 413.
22. 43 Cal. 2d 121, 272 P.2d 4 (1954).
23. Ibid.

These cases, among the best-known in this area, similarly base the constitutionality of the amortization technique on (1) the exercise of the police power to terminate the use (2) after a reasonable (in the circumstances) period of time. These opinions reflect the reasoning of the Supreme Court in the foundation case in zoning law—*Euclid v. Ambler Realty Co.*[24] The court declared that zoning ordinances ". . . must find their justification in some aspect of the police power, asserted for the public welfare."[25] The amortization device, although subjected to severe criticism, has not been challenged as an illegitimate exercise of the police power, per se. Rather, the main thrust of criticism has been leveled against the discrepancy in the varying time periods allowed.[26] Critics of the amortization concept argue that the grace periods permitted by various zoning ordinances have little or no relation to the financial interests involved—and this, in spite of the fact that the amortization technique is employed to minimize the pecuniary loss of nonconforming users. To some extent the cases support this argument. In the *Dema Realty* cases, a one-year termination period was provided. In contrast, the California statute in the *Livingston* case initially provided a twenty-year period, which, however, was subject to change. But whatever the time period allowed, the Supreme Court, in the *Euclid* case, has suggested that ". . . the line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions."[27] In keeping with this attitude, the *Livingston* case indicated that reliance may well be placed on administrative bodies to determine amortization periods appropriate to the circumstances of the particular case.

What factors have the New York courts considered most significant in applying the concept of amortization? The recent case, *Town of Somers v. Camarco,*[28] is the latest decision in a running battle between the owners and operators of a sand and gravel business, and the Town of Somers. In an action by the town to enforce a zoning ordinance providing for a five-year grace period, the Supreme Court of Westchester County denied plaintiff town's request for summary judgment. The facts were these: the defendants purchased property on the edge of town in 1943. Since that time they have utilized it as a source of gravel and sand for their business, and have occasionally made improvements on the property, including the erection of structures necessary for their operations. In 1945, the town adopted its first zoning ordinance and the defendants' property fell within a residential area. Although this original ordinance contained the typical provisions for the continuance of prior existing nonconforming uses, amendments in 1952 and 1953

24. 272 U.S. 365 (1926).
25. Id. at 387.
26. Harbison v. City of Buffalo, 4 N.Y.2d 553, 176 N.Y.S2d 598 (1957) (dissenting opinion).
27. Supra note 24 at 387.
28. Town of Somers v. Camarco, 24 Misc. 2d 673, 205 N.Y.S.2d 724 (1960).

sought to eliminate the defendants' use of their property for gravel and sand after a one-year grace period. These amendments were subsequently declared unconstitutional, as applied to the defendants.[29] The Court of Appeals held that the overall effect of the zoning ordinance was ". . . to unnecessarily deprive the defendants of a vested right, and so relegate them to the position of seeking permission to do that which they had a legal right to do."[30] Since that decision, Camarco continued to operate its business, but ran into trouble again in 1959, when the town enacted a new zoning ordinance requiring Camarco to terminate his particular use of the property after five years. Under this latest ordinance, the user is to apply to the Town Clerk for a permit to cover the initial five-year period. At the end of this term, the zoning board may in its discretion, upon proper application to it, grant further extensions of time.

After Camarco failed to comply with the ordinance, the town instituted the present action. Upon the plaintiff town's motion for summary judgment, the trial court ruled that there were questions of fact to be determined before the rights of the parties could be settled. The court then proceeded to take the opportunity presented it to discuss the development of the amortization concept in New York. It cited *People v. Miller*,[31] a leading case which enunciated what was believed to be the New York rule. That case upheld an ordinance prohibiting the maintenance of pigeons, even though a prior nonconforming use, on the ground that the investment was relatively slight as compared to the common good. According to the test laid down, prior nonconforming uses would be allowed to continue ". . . if, and only if, enforcement of the zoning ordinance would, by rendering valueless substantial improvements or businesses built up over the years, cause serious financial harm to the property owner."[32] The court thereby placed particular emphasis on the pecuniary factors involved. The court gave no indication that a prior nonconforming use or structure involving *substantial* investment could be amortized. To the contrary, the court declared that prior nonconforming uses were constitutionally protected, and that the public good to be achieved by uniformity does not justify the destruction of substantial businesses or uses.[33]

In the latest Court of Appeals decision in this area, the much-discussed *Harbison v. City of Buffalo*,[34] this rule was modified. Over a strong dissent, the majority indicated that the termination of a nonconforming use or structure, though involving a substantial investment, might be condoned, if the period of amortization was reasonable, i.e., of a sufficient length of time to permit the user to minimize its financial loss. Whether the period was long enough, and therefore reasonable, was said to depend on a number of factors.

29. Town of Somers v. Camarco, 308 N.Y. 537, 127 N.E.2d 327 (1955).
30. Id. at 541, 127 N.E.2d 329.
31. 304 N.Y. 105, 106 N.E.2d 34 (1952).
32. Id. at 109, 106 N.E.2d 36.
33. Supra note 32 at 107-108, 106 N.E.2d 35.
34. Supra note 26.

The trial courts must consider the nature of the neighborhood, the value and condition of the improvements on the premises, the nearest area to which the user might relocate, the cost of such relocation, and other reasonable costs which might be incurred as damages by the user.[35] The court deemed such factors vital in determining whether the resulting injury to the user would be so substantial that the ordinance would be unconstitutional in the particular circumstances. Accordingly, we may conclude, that as of the time of the present *Camarco* litigation, the New York courts are especially concerned with the possible pecuniary loss to owners of substantial nonconforming uses as the result of applying ordinances with short grace periods. The courts, however, will enforce amortization regulations if proper regard is given to the pocketbook of the user, i.e., if the grace period is based on the financial investment of the user.[36]

As indicated, the Court of Appeals has mounted guard over the economic position of the user. Indeed, the test it lays down may well prevent the speedy elimination of many nonconforming uses. This is especially true under some present ordinances incorporating fixed amortization periods. If the trial court concludes that the time allotted is inadequate under the circumstances, it will have no choice but to declare the application of the ordinance unconstitutional. So, in the instant case on remand, the trial court will receive evidence as to the financial considerations which the Court of Appeals deems relevant. If it finds that the five-year period is insufficient to allow the defendant to amortize its investment, the ordinance will not be enforced. This, in fact, was the very result in the *Harbison* case, upon its return to the trial court.[37] It is very likely that this will also be the result here, in view of the holding in the first *Camarco* case, that the land was particularly suitable to the nonconforming use. In such cases, i.e., of natural users, the financial loss to the owner is likely to be greater than where the land in use has no characteristics making it especially suitable for the particular use.

This approach seems a mild one when compared to the *Standard Oil* case and the *Livingston* case. In both cases, there was considerable evidence to show that substantial loss would result from the termination of the uses. Yet the courts had little difficulty in finding the amortization provisions reasonable.

In the *Harbison* opinion, the court drew a distinction between the treatment to be accorded nonconforming uses, as compared to nonconforming structures. The majority stated that in fixing removal periods for structures, the ordinance should take into consideration the amortizable life (in an accounting sense) of the structure. Presumably, if the ordinance provided for

35. Supra note 26 at 563-564, 176 N.Y.S.2d 606.

36. The dissent in Harbison severely criticized the amortization concept because of the marked failure, in cases of previous application of the doctrine, to base the time periods allowed on the financial investment of the user.

37. Note, 44 Cornell L.Q. 450, 451 (1959).

a time period based on the building's ". . . normal life without extensive alterations or repairs," the Court of Appeals would rule this constitutional.[38] Where nonconforming uses of land per se, e.g. a surface use, are involved, somewhat more complex factors are at work. So, in the first *Camarco* case, the court found that the land had unusual resources which made it valuable for the particular nonconforming use. This factor, then, is to be added to the list of considerations a trial court must review in ruling upon the adequacy of a given amortization period. If the court finds the land so well suited to the nonconforming use that summary disposition would be financially embarrassing to the owner, a more realistic period will have to be allowed.

Although this is the position taken in New York, the United States Supreme Court would probably hold the exercise of the police power to terminate Camarco's use reasonable, in spite of any financial loss. In *Hadacheck v. Sebastian*,[39] where the nonconforming use was clay works worth $800,000 for bricks, and only $60,000 for residential or other permitted uses, and the use for clay was subsequently prohibited by ordinance, the Supreme Court found that there was no taking of property without due process. Although the case smacks of one decided on nuisance grounds, because of evidence of sickness caused by unpleasant odors from the clay works, it has relevancy for the law of zoning to the extent that it indicates how far the Supreme Court will go in upholding regulations based on the general welfare of the community, or a large segment thereof.

This same concern for the general welfare is often viewed as the basis for zoning ordinances in general. In the *Livingston* case, the court reasoned that every exercise of the police power is likely to have an adverse effect on someone's property or pecuniary interest. However, the court concluded that under the theory of police power, incidental injury to the individual will not prevent its operation, where it is exercised to safeguard public health, safety, morals and the general welfare. There must, however, be no arbitrary and unreasonable application of the amortization concept in any given case.

The New York courts seem unwilling to go as far as might constitutionally be feasible. The instant *Camarco* case, in its trial term, suggests by its opinion, though not necessarily by result, a reluctance to apply a fixed amortization period to a substantial use. This stand seems warranted in view of the approach in the *Harbison* case. If the amortization period is to be held reasonable, it must substantially limit the defendant's loss. Yet the Town of Somers has attempted to enforce an ordinance which would terminate the use after a flat five-year period, with some provision made for additional time at the zoning board's discretion. If, in considering extensions of the amortization period, the board carefully weighs Camarco's financial investment, an equitable and fair solution may result. However, were the board to arbi-

38. Supra note 26 at 561, 176 N.Y.S.2d 604.
39. 239 U.S. 394 (1915).

trarily terminate the use after the initial five-year period had run, without regard for the pecuniary exigencies of the case, Camarco would have to once again resort to judicial process for additional time. A round of such legal jousts is foreseeable. A more suitable approach would be to discard that portion of the ordinance which calls for the flat five-year period in all cases, and substitute a realistic appraisal by the zoning board of each nonconforming use. The board would presumably be guided, in setting the grace periods, by an ordinance incorporating a standard based on the factors previously set out by the Court of Appeals.[40]

This approach would concededly have the drawback of requiring an administrative body to determine the proper time period for each nonconforming use. However, a number of very desirable results would be accomplished. First, it would reduce the amount of litigation likely to result in cases such as the instant one. In addition, it would provide the user with a reasonable expectancy as to the future economic position of his business, to the extent it reduced threats to him from the possible vagaries of future zoning boards. Most important—were this method adopted and effectuated by means of suitably drafted zoning regulations, there is little doubt that every nonconforming use or structure would be limited in time. Given a due regard for the private interest involved, but keeping in mind that ". . . zoning legislation looks to the future in regulating district development and the eventual liquidation of nonconforming uses,"[41] the overall goals of zoning would be substantially furthered. This would contrast sharply with the many frustrations of its purposes in recent years.

SANFORD ROSENBLUM

THE PERIPHERY OF "EXCLUSIVE" FEDERAL POWER TO LEGISLATE OVER FEDERALLY CEDED LANDS

An area of less than ten square miles which a state has ceded to the federal government for military purposes and which is on all sides surrounded by land over which the state has undisputed control presents the problem of which government, state or federal, has jurisdiction over the tiny area of land. If the jurisdiction lies not entirely with either government, the more difficult problem is what is the extent of the jurisdiction of each government.

The solution of this problem depends on how Article I, Section 8, Clause 17 of the United States Constitution is interpreted. The pertinent clause reads as follows:

The congress shall have power: . . .

(17) To exercise exclusive legislation in all cases whatsoever over

40. Anderson, supra note 9 at 239.
41. Supra note 22 at 127, 272 P.2d 8-9.