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ZONING AND NONZONING REGULATION UNDER THE POLICE POWER

Introduction

The growth of zoning and nonzoning regulatory ordinances has been phenomenal in the last twenty-five years. Both types of regulation derive their existence from the police power of the United States Constitution. However, zoning ordinances undertake primarily to direct the future growth of the municipality, whereas nonzoning regulatory legislation is based upon that branch of the police power which deals directly with the public health and safety.

Prior to the enactment of nonzoning regulatory ordinances the common-law nuisance action was often employed where a tangible harm threatened the community. Nonzoning regulatory legislation has not only encompassed within its scope many situations which would be considered nuisances in law or in fact but has been extended to many situations where the nuisance doctrine would not apply, yet where there exists a threat of tangible harm or noxious use, whether in the present or future, to the public health, safety, and welfare.

Although both types of ordinances, when exercised reasonably and for the public good, have been upheld in most cases, a problem usually arises when they purport to prohibit a business or use of the land. Here the line between the police power and the power of eminent domain becomes almost indistinguishable.

1 Zoning is that phase of the police power "which in the interests of the general welfare permits a city to so limit the class of structures which can be erected and the kind of business which can be maintained within various areas or zones as to regulate and control the future growth and development of the city." Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528, 531 (9th cir.), cert. denied, 284 U.S. 634 (1931). The constitutionality of comprehensive zoning as a legitimate exercise of the police power was initially upheld in the celebrated case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

2 For the purposes of the logical formation of this article an attempt was made to separate the two classes of police power legislation, the determinant being the primary purpose for which the ordinance was enacted. If town growth and future community planning were the primary purpose of a particular ordinance, it was categorized as a zoning ordinance. If the primary purpose was protection of the community against some tangible harm, then the ordinance was placed in the category of nonzoning regulatory legislation. See Town of Hempstead v. Goldblatt, 189 N.Y.S.2d 577 (Sup. Ct. 1959).

3 "The common law's control over the use of land in the hands of private owners was largely embodied in, and limited by, the doctrine of nuisance." Note, 32 N.Y.U.L. Rev. 1261 (1957). "The law of nuisance, however, was inadequate to take care of all the exigencies that arose in zoning development and the courts were driven to such an elasticity of definition of the uses that could be declared nuisances that the term lost all meaning as a practical measure of legislative power." Comment, 39 YALE L.J. 735, 738 (1930). See also Noel, Retroactive Zoning and Nuisances, 41 COLUM. L. Rev. 457, 459 (1941).

4 A very important distinction between the police power and the power of
In what instances the ordinance in question will be upheld as a valid exercise of the police power, and in what instances it will be struck down as being confiscatory, is a question of degree and can only be determined by application of the ordinance to a particular set of facts.

Several problems loom large in this area. May the legislature prohibit the carrying on of a beneficial business or use of land because that land falls within the purview of a comprehensive zoning plan? What effect, if any, does the nonconforming use have on such regulation? Further, may the legislature expressly prohibit the continuation of a vested business interest because it deems that interest to be detrimental to public health and safety? May it accomplish this same result by regulations which are so stringent in their effect as to constitute a practical prohibition? What standards are applied to determine the reasonableness of these ordinances? In the succeeding paragraphs an attempt shall be made to discuss and to answer these questions.

The Police Power Defined

Any definition of the police power must necessarily be nebulous.\(^5\) One writer has summarized it thusly:

[It] is clear that the police power has been developed by the legislatures and approved by the courts until it now extends to the protection of public health, safety, order, morals, conservation and development of natural resources, increasing industries, wealth, prosperity, and the promotion of public convenience. In short, it may now be used for all public needs and the greatest welfare.\(^6\)

The futility of attempting to define this most limitless of all governmental powers arises primarily because it is undergoing a continuous process of evolution to meet the needs of the times.\(^7\) Of necessity, therefore, it must be free from burdensome restrictions. However, this power must never be exerted arbitrarily or unreasonably.\(^8\) To insure reasonable application the ordinances are always subject to

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eminent domain is that regulation under police power requires no compensation to be rendered although valuable individual rights may be greatly restricted. Where land is taken for the public good under the power of eminent domain, however, compensation must be rendered. See Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85 (1851).

\(^5\) "This power is, and must be from its very nature, incapable of any very exact definition or limitation." See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1872).

\(^6\) Young, City Planning and Restrictions on the Use of Property, 9 Minn. L. Rev. 593, 598 (1925).

\(^7\) People ex rel. St. Albans-Springfield Corp. v. Cornell, 257 N.Y. 73, 177 N.E. 313 (1931).

\(^8\) Ibid. "If we assume that the restraint may be permitted, the interference must be not unreasonable, but on the contrary must be kept within the limits of necessity." Id. at 83, 177 N.E. at 316.
judicial scrutiny; \(^9\) although a law itself may be reasonable by virtue of its over-all effects, when applied to a particular situation it may be held unreasonable and arbitrary. However, since all such laws under the police power are presumptively valid, the burden is on the aggrieved property owner to show that the regulation as applied to him was not justified by any reasonable interpretation of the facts.\(^{10}\) And in reviewing an exercise of this power, the function of the courts is not to investigate the merits of a legislative decision—the wisdom of such prohibitions and restrictions being a matter of legislative determination; thus, even though a court may not agree with that determination, it will not substitute its judgment for that of the authorities if there is any reasonable justification for their action.\(^{11}\) Before a court can pronounce such an ordinance unconstitutional, it must be clear that there is no extant tangible harm to protect against or that there is no reasonable relation between the evil and the purported cure or prevention offered by the regulation.\(^{12}\)

When this test is applied to zoning and nonzoning regulatory ordinances, the regulation must be viewed in light of the desired result. Since the object of a zoning ordinance is primarily municipal planning and future community development and is usually not aimed at a specific tangible harm, the burden of showing it to be unreasonable is usually not as great as in attempting to prove the unreasonable-ness of a nonzoning regulatory ordinance enacted to protect against some tangible harm.\(^{13}\)

Where a nonzoning regulatory ordinance purports to destroy an existing beneficial use of land, the question must be considered whether such action is not in effect a taking of property without compensation under the guise of the police power.\(^{14}\) The same prob-

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\(^{9}\) "The validity of a law is to be determined by its purpose and its reasonable and practical effect and operation, though enacted under the guise of some general power, which the legislature may lawfully exercise, but which may be and frequently is used in such a manner as to encroach, by design or otherwise, upon the positive restraints of the Constitution." Forster v. Scott, 136 N.Y. 577, 584, 32 N.E. 976, 977 (1893).


\(^{11}\) See Armour v. North Dakota, 240 U.S. 510, 513 (1915); Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 33 P.2d 672, 674 (1934). "Where the suitability of plaintiff's property for residential use presents a debatable question, the court may not substitute its judgment for that of the local legislative body." Ulmer Park Realty Co. v. City of New York, 270 App. Div. 1044, 1044-45, 63 N.Y.S.2d 143, 144 (2d Dep't 1946) (mem. opinion), aff'd mem., 297 N.Y. 788, 77 N.E.2d 797 (1948).

\(^{12}\) See Booth v. Illinois, 184 U.S. 425 (1902).

\(^{13}\) This point is clearly illustrated in Town of Hempstead v. Goldblatt, 189 N.Y.S.2d 577 (Sup. Ct. 1959), where the defendant was granted a nonconforming use under the town zoning ordinance, but later was refused a nonconforming use under a nonzoning regulatory ordinance enacted to protect the public against the dangers of open excavations. See text accompanying note 77 infra for a discussion of the Goldblatt case.

\(^{14}\) "The general rule at least is, that while property may be regulated to a
lem is raised under zoning legislation which attempts to prohibit absolutely the beneficial use of land. In the next three sections an attempt will be made to show in what instances zoning and nonzoning regulatory ordinances have been upheld as reasonable and when they have been struck down as confiscatory. Both phases of the problem will be considered, namely, regulation and prohibition of a business or structure on the land and also regulation and prohibition of the beneficial use of the land itself.

Regulation Under Zoning Ordinances

It is now well established that zoning ordinances may completely exclude future businesses from a particular district. However, as in all such regulation, the ordinance must be reasonable as applied to a particular case. In *Vernon Park Realty, Inc. v. City of Mount Vernon*, the subject premises were in the middle of a zoned business district, the land having theretofore been used as a parking lot. Subsequently, the land was zoned residential, following which the parking of automobiles was continued as a valid nonconforming use. Later, a variance was issued to permit the installation of a gasoline station. The land was then sold to plaintiff, who unsuccessfully applied for a variance to erect a shopping center, prohibited under the zoning ordinance. An action was brought and the ordinance as applied to plaintiff was held to be arbitrary and unreasonable, constituting an invasion of property rights contrary to due process. The court reasoned that the property in question was ideally situated for business use. Consequently, the restriction imposed by the ordinance was unreasonable and hence invalid.

Again, in *Arverne Bay Constr. Co. v. Thatcher*, an ordinance was enacted which zoned a certain area residential, although there was little likelihood that the area would develop residential in the near future. Plaintiff desired to erect a gasoline station on land situated within the area affected by the ordinance. In an action to secure a determination that the restrictions placed upon the use of the land resulted in deprivation of property without due process of law, the New York Court of Appeals held the ordinance invalid as applied to the plaintiff's property. Here there was sufficient evidence to show that the land could be put to no other profitable use, and

certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). (Emphasis added.)

15 See Noel, *supra* note 3, at 457.
17 The court rejected the city's attempted justification of the ordinance on the basis of an acute traffic problem. On this point the court said: "However compelling and acute the community traffic problem may be, its solution does not lie in placing an undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose." *Id.* at 498, 121 N.E.2d at 519.
18 278 N.Y. 222, 15 N.E.2d 587 (1938).
the hardship imposed on plaintiff was more than merely temporary. Consequently, the regulation constituted a taking without due process of law.

Zoning regulations are often enacted which necessarily affect the use of land itself. This is a necessary and legitimate exercise of the police power, and when such legislation is reasonable and not arbitrary it is usually upheld. It is frequently the case that a zoning ordinance will prohibit the future use of land for a particular purpose. In People v. Calvar Corp., defendants were convicted of violating the building zone ordinance of the Town of Hempstead by using premises located in a residential zone. The ordinance did not absolutely prohibit such use of the land, but provision was made whereby a permit might be obtained by compliance with certain regulations. The New York Court of Appeals upheld the validity of the ordinance reasoning that since the ordinance did not constitute a prohibition of the non-conforming use, but was in effect merely regulatory, it could not be said to be unreasonable.

The court in Calvar expressed the opinion that forceful argument could be made that the difference between regulation and confiscation is merely one of degree, and when regulation goes too far it constitutes a taking of property without compensation. The constitutionality of a general prohibition of a beneficial use of land has not been passed on by the New York Court of Appeals and, in the Calvar case, it expressly stated that it was an open question in New York.

Several lower court decisions in New York have indicated that an absolute prohibition of the beneficial use of land will be declared

19 "The situation, of course, might be quite different where it appears that within a reasonable time the property can be put to a profitable use. The temporary inconvenience or even hardship of holding unproductive property might then be compensated by ultimate benefit to the owners or, perhaps, even without such compensation, the individual owner might be compelled to bear a temporary burden in order to promote the public good." *Id.* at 232, 15 N.E.2d at 592. See Rockdale Constr. Corp. v. Incorporated Village of Cedarhurst, 301 N.Y. 519, 93 N.E.2d 76 (1950) (memorandum decision), where a village zoning ordinance limited the use of plaintiff's corner lots to residence purposes. The lots fronted on a turnpike and a village street and were unadaptable for residential use. The court struck down the ordinance as applied to plaintiff, concluding that it destroyed the value of the property and thereby amounted to a practical confiscation.


21 286 N.Y. 419, 36 N.E.2d 644 (1941).

22 Defendant could have applied for a temporary and conditional permit for a period not to exceed five years for structures and uses in contravention of the requirements of the ordinance. People v. Calvar Corp., supra note 20.

23 "Forceful argument may be made that a general and complete prohibition of such use of property, even where such use might be permitted without causing substantial injury to the community, would be unreasonable. *That question must await determination until it arises. We express no opinion on it.*" People v. Calvar Corp., supra note 20, at 421, 36 N.E.2d at 645. (Emphasis added.)
invalid. However, these decisions are of questionable authority and have been limited and distinguished by later courts.24 Nevertheless, it would be well to consider them.

In *Bartsch v. Ragonetti* 25 the court denied an injunction brought to restrain the defendant from excavating sand on his property in violation of a zoning ordinance. The court maintained that a municipality could only regulate the erection and use of structures on the land and not the use of the land itself. However, such a limited view of zoning regulation is not held today.26 The *Ragonetti* decision was cited with favor in another case in 1924, *People v. Linabury*.27 There the defendant appealed a conviction for violation of certain zoning ordinances which restricted the use of the premises in question to certain uses, such as the erection of dwelling houses, churches and schools. The defendant was carrying on a wholesale sand business. In holding that the ordinance was invalid as applied to the defendant the court said:

A man cannot be prevented from taking from his property valuable material, whether it be sand, minerals, or oil, without being duly compensated, and if, as we must assume in this case, the sand in the lots is valuable property, the zoning ordinance cannot arbitrarily deprive him of the right of taking it therefrom. If the zoning ordinance prevented his taking the sand from the lot, then he is being deprived of valuable property without compensation, in contravention of the Constitution.28

Approximately fourteen years later the question of the constitutionality of a zoning ordinance imposing an absolute prohibition on the beneficial use of land again arose in *Town of Harrison v. Sunny Ridge Builders, Inc.*29 There an action was brought to enjoin the defendant from removing topsoil from certain premises in violation


26 The *Ragonetti* decision, to the extent that it did not recognize the right of the municipality to regulate the use of the land under a zoning ordinance, may be considered overruled—characterized as "erroneous"—by the lower court opinion in *People v. Calvar*, 69 N.Y.S.2d 272 (Sup. Ct. 1941). However, the court there considered that it did not know the answer if the statute absolutely prohibited one from excavating. *Id.* at 280. See *City of New York v. Holzman*, 71 N.Y.L.J. 1523 (1924), where the plaintiff sued to enjoin the defendant from removing sand from certain lands on the ground that the lands were situated in a residence district. The court refused the injunction stating that: "Sand is valuable property, and the owner of land upon which there is sand or other valuable deposits cannot be prevented by the action of the board of estimate, or even by the Legislature itself, from severing and selling the same. To do so would be to deprive the owner of his property without due process of law." *Ibid.*

28 *Id.* at 128-29.

29 170 Misc. 161, 8 N.Y.S.2d 632 (Sup. Ct. 1938).
of the town zoning ordinance. The injunction was denied, the court holding that the ordinance as applied here was not a valid exercise of the police power. It seemed to imply, however, that if there was evidence of a nuisance or some real danger, the ordinance might have been upheld. The municipality had relied heavily on the adverse effect the activity had upon the appearance of the community.\footnote{The general proposition must still pertain, in spite of the serious incursions made upon it by recent legislation, that the owner of property has a constitutional right to make any use of it that he desires so long as it does not affect the safety, health, comfort or general welfare of the community.” Id. at 164, 8 N.Y.S.2d at 635.}

Courts in other jurisdictions have also been reluctant to uphold zoning ordinances which absolutely prohibit the beneficial use of land. In \textit{Pacific Palisades Ass’n v. City of Huntington Beach},\footnote{196 Cal. 211, 237 Pac. 538 (1925).} an ordinance was held to be arbitrary and unreasonable because it prohibited an owner from operating an oil well on his property while in other districts of the city, more thickly populated and devoted to residence purposes, such operations were permitted. Another instance where a prohibitory zoning ordinance was declared invalid as applied was in \textit{Village of Terrace Park v. Errett}.\footnote{12 F.2d 240 (6th Cir), cert. denied, 273 U.S. 710 (1926).} There a zoning ordinance established business and residence districts; the defendant was the owner of a gravel business in a prohibited area. The court, recognizing the substantial difference between an “ordinance prohibiting manufacturing or commercial business in a residential district that may be conducted in another locality with equal profit and advantage, and an ordinance that wholly deprives the owner of its valuable mineral content,”\footnote{Id. at 243. See also People v. Hawley, 207 Cal. 395, 279 Pac. 136 (1929), where a zoning ordinance which prohibited excavating or dredging of any kind within a particular residence district, except for construction purposes, was held to impose an unreasonable restraint on the use by the defendant of its property and an unwarranted interference with the right of the defendant to carry on a lawful business. The court was influenced by the trial court’s finding that the operation of the defendant’s business would not constitute a nuisance.} refused to uphold the ordinance as applied to the plaintiff.

It seems apparent from viewing the foregoing cases that courts are reluctant to sanction an absolute prohibition of the beneficial use of land under a zoning ordinance; the reason advanced is that the indirect and somewhat speculative benefit accruing to the community by virtue of zoning legislation is usually not sufficient to outweigh the right of property owners to the beneficial use of their land.

Zoning ordinances must further be considered in light of the existence of a nonconforming business, structure or use of the land. For example, a zoning ordinance which prohibits all cemeteries in a particular area zoned residential may be considered reasonable as to all future cemeteries, but may be held invalid with respect to a ceme-
tery in existence prior to the enactment of the ordinance. Similarly, may a nonzoning regulatory ordinance, which prohibits the excavation of sand or gravel in the municipality because of possible danger to the inhabitants, extinguish a pre-existing vested business interest in the land where such interest depends on the use of the land itself? In order to understand these problems better a brief discussion of the nonconforming use is necessary.

The Nonconforming Use

The term nonconforming use describes a business, structure or use of the land which existed prior to the enactment of the zoning ordinance and which does not conform to the terms of the ordinance. Originally it was thought that a zoning regulation to be valid must operate prospectively, especially where there was a sufficient business interest to be protected. Consequently, because few were willing to test the constitutionality of their zoning plans by inserting retroactive provisions, a nonconforming use was usually not disturbed. Moreover, it was generally felt that such nonconforming uses would be gradually eliminated. The opposite result occurred, however; nonconforming uses flourished in a monopolistic atmosphere created by the granting of this immunity from regulation.

As a consequence, instances began to occur where zoning regulations were enacted to prohibit the continuation of nonconforming uses. The question naturally arose whether such regulation did not in effect destroy existing property rights without due process of law. In Fox Lane Corp. v. Mann a permit was necessary under the Building Zone Resolution for the construction of the building in question. Respondent had obtained a permit; subsequently, the resolution was amended thereby dissolving the permit. In an action brought to compel the re-issuance of the permit, the New York Court of Appeals affirmed the holding that "the expenditures made and

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34 See Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930), where the invalidity of retroactive zoning was supposedly established in California. There, a zoning ordinance was enacted which provided that no sanitarium could thereafter be operated in certain specified areas reserved for residential construction and use. At the time there were several sanitariums already existing and in operation in the area. The California Supreme Court refused to enforce the ordinance and stated: "We are asked to uphold a municipal ordinance which destroys valuable businesses, built up over a period of years . . . . Only a paramount and compelling public necessity could sanction so extraordinary an interference with useful business." Id. at 314, 295 Pac. at 19. But see City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (2d Dist. 1954).


37 Ibid. "There is little hope that such uses will disappear by themselves where the nonconforming use enjoys a monopolistic advantage, protected from further invasion by the zoning ordinance." Id. at 763.

38 243 N.Y. 550, 154 N.E. 600 (memorandum decision).
obligations incurred by the respondent in reliance upon the permit in question were insufficient to give it a vested right to erect the building . . . in violation of the amendment."  30

Citing the Fox Lane case with favor, the New York Court of Appeals decided the case of People v. Miller.  40 There the defendant was engaged in the hobby of raising pigeons. Subsequently, a zoning law was enacted prohibiting such use of the property in question. The defendant claimed that his pre-existing use of the premises rendered the regulation unenforceable against him. The ordinance was upheld as valid, the court stating:

In this state, then, existing nonconforming uses will be permitted to continue, despite the enactment of a prohibitory zoning ordinance, if, and only if, enforcement of the ordinance would, by rendering valueless substantial improvements or businesses built up over the years, cause serious financial harm to the property owner.  41

The court was of the opinion that pigeon raising was a mere hobby and such incidental use of the land did not warrant striking down the ordinance in question.  42 The rationale underlying the Miller rule as set forth by that court is as follows:

The destruction of substantial businesses or structures developed or built prior to the adoption of a zoning ordinance is not deemed to be balanced or justified by the advantage to the public, in terms of more complete and effective zoning, accruing from the cessation of such uses.  43

Because of these and other decisions it was generally believed that zoning ordinances prohibiting further operation of a nonconforming use would be struck down as unreasonable by the New York courts where a substantial investment had been made or structure built. Several other jurisdictions, however, in order to provide for the eventual elimination of undesirable nonconforming uses, employed a method known as amortization.  44 Amortization is achieved by

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41 Id. at 109, 106 N.E.2d at 36. See Barkman v. Town of Hempstead, 268 App. Div. 785 (2d Dep't 1944) (memorandum decision), aff'd mem., 294 N.Y. 805 (1945), where an ordinance similar to the ordinance in the Miller case was upheld.
42 People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952). "This rule, with its emphasis upon pecuniary and economic loss, is clearly inapplicable to a purely incidental use of property for recreational or amusement purposes only." Id. at 109, 106 N.E.2d at 36. In People ex rel. Ortenberg v. Bales, 224 App. Div. 87, 229 N.Y. Supp. 550 (2d Dep't 1928), aff'd mem., 250 N.Y. 598, 160 N.E. 339 (1929), a builder who had received a permit and made substantial excavations on the land was deemed to have a vested right which could not be destroyed by a subsequent change in a zoning regulation.
43 People v. Miller, supra note 42, at 108, 106 N.E.2d at 35. See also Noel, Retroactive Zoning and Nuisances, 41 Colum. L. Rev. 457, 458-59 (1941).
44 Reasonable fixed periods of amortization have been upheld in Standard
providing in the ordinance for the discontinuance of the nonconforming use within a prescribed time. Thus, while an order for the immediate elimination of a substantial interest would often be held invalid, amortization of a nonconforming use within a reasonable period of time has been upheld.\footnote{See, e.g., cases cited note 44 supra.}

In 1958 the New York Court of Appeals in \textit{Harbison v. City of Buffalo} \footnote{4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958).} was asked to pass on the validity of a city ordinance which required the termination of the nonconforming use of certain premises as a junk yard within three years.\footnote{47 The pertinent section of the ordinance as quoted by the Court of Appeals reads substantially as follows:}

The City of Buffalo did not base its claim on the nuisance theory but rather on several decisions from other jurisdictions which had sustained ordinances containing reasonable amortization periods.\footnote{48 See note 44 supra.} In reversing and remanding the case, the court stated that the lower courts had not "considered the question of whether the particular period prescribed by the ordinance was reasonable under the facts of the case."\footnote{49 Harbison v. City of Buffalo, supra note 46, at 553, 152 N.E.2d at 47, 176 N.Y.S.2d at 605.} Thus, while the lower courts here had categorically rejected an amortization period as being at odds with the New York rule as set forth in the \textit{Miller} case, the Court of Appeals reasoned that such a provision was merely one more factor to be considered in determining

\textit{But see City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953) (amortization of junk business within a "reasonable" time held invalid).
if the ordinance in question was reasonable as applied to a particular set of facts.\footnote{50} The rule of the \textit{Harbison} case is to apply both to structures\footnote{51} and to uses.\footnote{52} It is submitted that this method for the gradual elimination of nonconforming uses is perhaps the most equitable that can be employed. But, since it imposes severe restrictions on vested property rights, any such provision should be subjected to the closest judicial scrutiny.

From the foregoing it can be seen that comprehensive zoning regulation must operate prospectively where it might affect substantial business interests, unless a reasonable period of amortization is provided. This limitation to prospective operation does not exist, however, under nonzoning regulatory ordinances enacted for the public health and safety. Here the evil usually consists of some tangible harm to the community,\footnote{53} and consequently, only measures which may operate on existing conditions so as to regulate and, if necessary, to prohibit a presently existing danger would be effective.

Thus, a regulation requiring fire escapes on all buildings may include within its purview not only buildings to be erected in the future but also those presently standing. The danger of fire, the basis for the regulation, is of course not restricted to structures to be

\footnote{50} "When the termination provisions are reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner, we may not hold them constitutionally invalid." \textit{Id.} at 562-63, 152 N.E.2d at 47, 176 N.Y.S.2d at 605. Two judges concurred, indicating that the rule in the \textit{Miller} case encompasses this concept of reasonable amortization.

\footnote{51} "With regard to prior nonconforming \textit{structures}, reasonable termination periods based upon the amortized life of the structure are not, in our opinion, unconstitutional." \textit{Id.} at 561, 152 N.E.2d at 46, 176 N.Y.S.2d at 604.

\footnote{52} "To enunciate a contrary rule would mean that the use of land for such purposes as a tennis court, an open air skating rink, a junk yard or a parking lot—\textit{readily transferable to another site}—at the date of the enactment of a zoning ordinance vests the owner thereof with the right to utilize the land in that manner in perpetuity . . . ." \textit{Id.} at 562, 152 N.E.2d at 47, 176 N.Y.S.2d at 605 (emphasis added). It seems significant that the court does not allude to a situation where a use of the land constitutes a use of the natural resources to be found thereon. Also the court cites here with seeming approval, \textit{Town of Somers v. Camarco}, 308 N.Y. 537, 127 N.E.2d 327 (1955), where defendant conducted a nonconforming sand and gravel business under a zoning ordinance providing for such nonconforming use. Subsequently the ordinance was amended whereby such protection no longer applied. The court held the ordinance invalid as unreasonably depriving defendant of a vested right. \textit{Quaere:} What constitutes a "reasonable" period of amortization for a nonconforming use which is dependent for its very existence upon the resources of a particular piece of land?

\footnote{53} See Noel, \textit{Retroactive Zoning and Nuisances}, 41 \textit{Colum. L. Rev.} 457 (1941). "[I]n almost all of the cases where legislation of this kind has been sustained, the enterprise prohibited has been of a type causing a tangible kind of harm, such as an invasion of the atmosphere with soot, or odors, or noise. . . ." \textit{Id.} at 464.
built in the future. Under this type of regulation where there is a present or future danger which constitutes a real and serious threat to the public health and safety, unreasonableness is much more difficult to prove, and the burden on the one attacking such an ordinance is greater. In the next section the effects of nonzoning regulatory ordinances on businesses and structures on the land and also on the beneficial use of land itself will be analyzed.

Nonzoning Regulatory Ordinances

As was stated previously, the municipality may enact reasonable regulations to protect and promote the public health, welfare and safety. As will be seen, unlike zoning regulation, the nonzoning regulatory ordinance has been upheld even where it resulted in an absolute prohibition of a substantial business on the land, the test being whether the destruction of valuable property rights was deemed necessary by the legislature for the protection of the public health and safety.

In Reinman v. City of Little Rock, an ordinance was enacted which made it unlawful to conduct a livery stable in certain defined portions of the city. The petitioner contended that the operation of a livery stable did not constitute a nuisance per se and consequently could not be prohibited by such an ordinance. The Supreme Court rejected this contention:

Granting that it is not a nuisance per se, it is clearly within the police power of the State to regulate the business and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment.

Citing the Reinman case with favor, the Supreme Court decided Hadacheck v. Sebastian. In that case a Los Angeles ordinance was enacted prohibiting the establishment or operation of a brick yard or brick kiln within described limits in the city. Plaintiff in error was convicted of a violation of the ordinance. He claimed that the ordinance, if declared valid, would compel him to entirely abandon his business and would deprive him of the use of his property, and that the prohibition, therefore, constituted a taking without compensa-

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55 237 U.S. 171 (1915).
56 Id. at 176.
57 239 U.S. 394 (1915).
tion. The Court rejected these contentions and upheld the validity of the ordinance in a carefully worded opinion. It distinguished between a prohibition of the manufacturing of bricks on the land and a prohibition of the removal of the clay itself. The Court maintained that although the removal of clay to some other locale for manufacturing purposes might be financially prohibitive, it was not a sufficient reason for striking down the ordinance since it did not constitute a physical impossibility.

It would seem, therefore, that a nonconforming business interest or structure, which in the eyes of the legislature presents a tangible harm to the community, may be absolutely prohibited from further operation if the prohibition does not destroy completely the beneficial use of the land.

A different problem arises where a nonzoning regulatory ordinance is aimed at the regulation or prohibition of the beneficial use of the land itself. While most businesses may be carried on in various localities, a business, the very essence of which depends upon the natural resources of the business situs, obviously cannot be moved.

Conceding that reasonable regulations may be imposed, do not ordinances which result in the absolute prohibition of the beneficial use of land go beyond mere regulation and constitute a taking of property without due process of law? There are opinions to support both sides of the question. Each decision must necessarily rest on its own facts since general rules in this area appear difficult of formulation.

Where there is an actual danger constituting a nuisance, prohibition will often be upheld. However, where the use is not dangerous per se but may become so by inadequate protection or faulty operation the decision usually rests on the imminence of the danger and the degree of destruction of the profitable use of the land. In Ex parte

58 Several other cases have been decided which have entirely prohibited various businesses or structures on the land because they were deemed to constitute a danger to the public health, safety or morals. See, e.g., Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919) (prohibition of oil tanks); Murphy v. California, 225 U.S. 623 (1912) (prohibition of billiard hall); Powell v. Pennsylvania, 127 U.S. 678 (1888) (prohibition of oleomargarine factory); Mugler v. Kansas, 123 U.S. 623 (1887) (prohibition of brewery). Note, however, that none of these cases deprive the property owner of all beneficial use of his land.

Although the Reinman case appears more extreme on its face since all present use was prohibited, the Court in Hadacheck in fact extended the Reinman holding by prohibiting a use which was economically inseparable from the property. Separation of the brick kiln from its source of raw material necessarily resulted in a termination of the business and retention of the right to extract clay became valueless. This was not the case in Reinman where the livery stable could be conducted in another locale.

59 It is well established that mere financial difficulty in complying with the provisions of a police power regulation will not of itself render the ordinance invalid. Hadacheck v. Sebastian, supra note 57.
Kelso the California court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock quarry within a certain portion of San Francisco. The court stated that the removal could be regulated but that "an absolute prohibition of such removal under the circumstances could not be upheld." Some time later in the Hadacheck case the Supreme Court commented on this problem but expressly reserved any opinion on it.

Perhaps the landmark decision in the area of absolute prohibition is Pennsylvania Coal Co. v. Mahon. Although not completely solving the problem, the decision demonstrated that, at least in certain instances, an ordinance which absolutely prohibits the only beneficial use of land will be declared invalid as a taking of property without due process of law. The coal company had deeded land to the defendant in error, which deed conveyed the surface of the land but in express terms reserved the right to mine all the coal under the surface. The grantee waived all claim for damages that might arise from mining the coal. Subsequently, a Pennsylvania statute was passed which forbade the mining of coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation. In holding the statute invalid as applied to the plaintiffs, the Court set forth a basic test for determining when regulation becomes confiscation.

Some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

Concerning the landowner's claim that the statute might have been justified as a protection of personal safety, the Court was of the opinion that this could be provided for by notice of intention to mine under the house. Thus, even though there was a positive element of danger here the Court did not feel that this warranted the total destruction of a valuable estate in land when protection might be provided for by means less stringent than absolute prohibition.

147 Cal. 609, 82 Pac. 241 (1905).
Id. at —, 82 Pac. at 242.
"In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve." Id. at 412. (Emphasis added.)
260 U.S. 393 (1922).
Id. at 413. (Emphasis added.)
It has been contended that the Court's decision in the Pennsylvania Coal case rested primarily on the reserved right to mine the coal in as much as an absolute prohibition of the mining of the coal would destroy existing contract rights. However, the court in Village of Terrace Park v. Errett, 12 F.2d
It would seem, therefore, that the Pennsylvania Coal Company decision is strong authority for the proposition that an ordinance, whether zoning or nonzoning regulatory, which absolutely prohibits the only beneficial use of land does not come within the purview of the police power but constitutes a taking of valuable property rights without compensation. Several decisions have been handed down, however, which appear somewhat contrary to the Pennsylvania Coal case.

In Marblehead Land Co. v. City of Los Angeles, an ordinance was enacted which included land on which oil drilling operations were contemplated. As a result the beneficial use to which the property owner was putting his land had now become unlawful. The Circuit Court of Appeals recognized that the appellant's land was oil-bearing land, and that the ordinance preventing him from drilling thereon had in effect destroyed the value of the property in that respect. Nevertheless, the court upheld the ordinance as a reasonable exercise of the police power basing its decision to a great extent on the findings of the trial court, which indicated clearly that the further operation of oil wells on the property would have created a nuisance.

A vigorous dissent in the Marblehead Land Co. decision developed two very important points, namely, that "the city has not attempted by reasonable regulations to accomplish what it seeks by the absolute prohibition, and thus to preserve a measure, at least, of the value of the property right which it would wholly destroy." The dissent stated further that "differing from most of the cases where such controversy has arisen, the ordinance under consideration affects the inherent value of a natural resource which can be utilized only upon the ground."

240 (6th Cir.), cert. denied, 273 U.S. 710 (1926), in an excellent analysis, answers this contention in the following manner:

"[I]t is sufficient to say that a reservation in a deed does not create title or enlarge the vested rights of a grantor, but merely reserves the specific interest named therein from the operation of the grant. The owner of a fee-simple estate in land has the same vested interest and property rights in the minerals in or underlying the land as an owner who has executed a deed to the surface, reserving the minerals. In either case, the same rule applies in determining whether an ordinance is regulatory in its nature, or amounts to a taking of private property without compensation." Id. at 241.

Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir.), cert. denied, 284 U.S. 634 (1931).

The trial court made certain findings of fact concerning fumes and odors, the creation of a fire hazard, and the depreciation of local property values. Id. at 530. The court was also influenced by the fact that the value of the land in question was worth approximately $10,000 per acre. Id. at 529. The case was distinguishable from the Pennsylvania Coal case where the land had only one beneficial use—the mining of coal—and where the Court felt that any danger could be foreclosed by notice.

Ibid. at 537 (dissenting opinion).

Ibid. The dissent cited with favor the dictum in Hadacheck and the Ex parte Kelso, and Village of Terrace Park decisions and concluded: "With reasonable regulations the operation may be continued without substantial in-
Two New York cases have also upheld the validity of nonzoning regulatory ordinances prohibiting the beneficial use of land. In *Lizza & Sons, Inc. v. Town of Hempstead* the three Nassau County towns of Hempstead, North Hempstead and Oyster Bay enacted uniform ordinances regulating the removal of top soil. A second ordinance subsequently replaced the first and was so severe in its terms as to render the plaintiffs’ excavating operation impractical and thus prohibitory. The court acknowledged that the New York Court of Appeals had never passed on the question of whether the state or its subdivisions has the right to prohibit absolutely the removal of topsoil. Nevertheless, the validity of the ordinance was upheld; the decision based on two factors, namely that the top soil problem on Long Island was very acute and necessitated extreme regulation, and, secondly, that the prohibition of the removal of top soil affected only a small part of the plaintiffs' over-all business and did not impose a prohibition on all beneficial uses of the land. Thus, where the ordinance does not preclude the property owner from making at least some beneficial use of his land, and where there is some tangible danger to protect against, the prohibition may be upheld as valid.

In *Post Brick Co. v. Thompson* an ordinance was enacted which precluded the plaintiff from excavating clay for business purposes. The plaintiff contended that the ordinance was arbitrary and based on purely aesthetic conditions; that the objection to the excavations of clay was not that life and health might have been endangered, but that the vista or outlook of some property owners might have been impaired. Rejecting these claims the court held that such prohibition was not an unreasonable exercise of the police power since "the deep excavations . . . are filled with water, and on the face thereof constitute hazards which amount to public nuisances."
Here, again, there was evidence of a tangible harm to the community which the court felt justified such regulation.

It should be remembered that when the municipality wishes to take land for the public good it must render compensation therefor. Merely because the legislature deems that the public health and safety require that certain regulations be imposed, this does not mean, ipso facto, that such regulation is a legitimate exercise of the police power. If the regulation is such that the property owner is deprived of all profitable or beneficial use of his land, has not that land in fact been confiscated without due process of law?

The question of the constitutionality of an absolute prohibition on the beneficial use of land has recently been raised in a New York Supreme Court case, *Town of Hempstead v. Goldblatt*.77

**The Goldblatt Case—A Practical Prohibition?**

Since 1927 defendant had conducted a sand gravel business on water-filled property thirty-eight acres in size. On April 9, 1956, on the strength of his substantial operation of the sand pit prior to the enactment of the ordinance, defendant had obtained a judicially declared nonconforming use notwithstanding the town zoning ordinance. In 1945 Ordinance No. 16 of the Town of Hempstead was enacted and subsequently amended in 1958. In 1959 the defendant was convicted of a violation of this ordinance; an injunction issued restraining further operation of the sandpit until all the regulations had been complied with.

The court clearly distinguished between the town zoning ordinance under which the defendant had been granted a nonconforming use and Ordinance No. 16 by which the town “regulates uses regardless of locations or zones under its governmental police powers for ‘the safety, health and general welfare of the people of the Town’ . . . .” 80

One of the 1958 amendments to Ordinance No. 16 is Article I, section 4, subdivision H which states that “No excavation shall be made below two feet above the maximum ground water level at the site.” 81 The defendant contended that as applied to him the

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77 "The constitutional prohibition against taking property for public use without compensation, applies to injury and destruction as well as to appropriation . . . ." Freund, The Police Power § 511 (1904).

78 189 N.Y.S.2d 577 (Sup. Ct. 1959).

79 Id. at 582. The judgment granting the nonconforming use under the zoning ordinance was entered on April 9, 1956 on the strength of People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952), and Town of Somers v. Camarco, 308 N.Y. 537, 127 N.E.2d 327 (1955). See note 52 and text accompanying note 41 supra.

80 See Record, pp. 10-13, for the new version of the ordinance.


82 Record, pp. 10, 12-13.
ordinance was confiscatory since he had been dredging for sand and gravel below the water level for approximately thirty years. He also contended that if the ordinance were enforced it would result in an absolute prohibition of the beneficial use of the land.\textsuperscript{82} Rejecting this contention, along with several others, the court upheld the ordinance as a reasonable exercise of the police power, stating that there was nothing in the evidence to show that the defendant could not conform to the ordinance or what it would cost if he attempted to conform.\textsuperscript{83} The court in dicta stated that even if the defendant had established that the enforcement of the ordinance resulted in a practical prohibition "it would not be of assistance to them in this case where the danger to the public safety and welfare is a real and serious one."\textsuperscript{84} Thus, the court indicates that where there is a real danger to the community, an ordinance absolutely prohibiting the beneficial use of land is a valid exercise of the police power. It is questionable, however, whether the cases cited in support of this proposition are controlling authority.\textsuperscript{85}

The Court in the \textit{Hadacheck} case, while upholding an absolute prohibition of a business on the land, had expressly reserved opinion as to the validity of an absolute prohibition of the use of the land itself.\textsuperscript{86} The ordinance in \textit{People v. Gerus} had made provision for the obtaining of a permit under which excavation could be lawfully continued.\textsuperscript{87} Consequently, the ordinance did not absolutely prohibit but merely regulated the use of land. The case of \textit{Lizza & Sons v. Town of Hempstead} is perhaps the strongest authority cited. There the court, while conceding that the New York Court of Appeals has not as yet passed on the validity of an absolute prohibition of the use of land,\textsuperscript{88} nevertheless, upheld certain ordinances absolutely prohibiting the removal of topsoil. Stating that "these ordinances are a reasonable exercise of the police power and do not prevent a beneficial use of land beyond the modest limitations imposed by the statute,"\textsuperscript{89} the court seems to infer that the prohibition did not destroy all beneficial use of the land, but was at most a partial prohibition. It is doubtful, however, that this reasoning can be applied to the situation

\textsuperscript{82} In his motion to dismiss, the attorney for the defendant stated: "The practical effect of that application, Judge, is to tell us to put a padlock on our door, because I tell your Honor now we cannot dig one more barrel of sand, except maybe on one or two of the berms, and we are out of business if that is put against us. I say on a constitutional basis it would be confiscation of our property without just compensation." \textit{Id.} at 223.

\textsuperscript{83} \textit{Town of Hempstead v. Goldblatt, supra} note 80.

\textsuperscript{84} \textit{Town of Hempstead v. Goldblatt, supra} note 80, at 586.


\textsuperscript{86} See text accompanying note 58 \textit{supra}.

\textsuperscript{87} See \textit{People v. Gerus, supra} note 85, at 288.

\textsuperscript{88} See \textit{Lizza & Sons, Inc. v. Town of Hempstead, supra} note 85, at 299.

\textsuperscript{89} See \textit{Lizza & Sons, Inc. v. Town of Hempstead, supra} note 85, at 300.
in *Goldblatt*. The land in question here consists of a sprawling, water-filled excavation, and it might prove extremely difficult to put it to some other profitable use. This ordinance, therefore, seems to have rendered the defendant's property useless if in fact he cannot conform. Also, the presence of danger to the community from the excavation does not necessarily justify an absolute prohibition. This is well illustrated by the *Pennsylvania Coal* decision where the danger from mining was held not to warrant the destruction of valuable property rights.  

If the defendant had been able to prove to the court that the ordinance in question made it impossible for him to carry on further excavation and that the land could be put to no other beneficial use, then notwithstanding the presence of some "real and serious danger," it would seem that the ordinance was not merely regulatory but was in fact confiscatory, an attempt to do under the police power that which should be accomplished under the power of eminent domain.

**Conclusion**

The police power is the most limitless of all governmental powers and any regulation under this power must be upheld absent a showing that the ordinance is unreasonable and arbitrary as applied to a particular set of circumstances. Zoning regulation may validly regulate future uses of the land as long as the owner is not deprived of every beneficial use thereof. Where there is no substantial business interest to be protected, a zoning ordinance may operate on existing conditions and prohibit a nonconforming use. However, where such nonconforming use constitutes a substantial interest, it can only be eliminated by a reasonable period of amortization. What is a reasonable period must be determined according to the facts of each particular case. It is submitted that the courts should subject such provisions requiring amortization of nonconforming uses to close judicial scrutiny because of the possibility of abuse in this area.

Nonzoning regulatory ordinances may be validly employed not only to regulate but, if necessary, to prohibit nonconforming businesses and structures on the land since there is usually some tangible danger to protect against. Regulation of the use of the land itself where such regulation is reasonable has also been upheld. However, the law has not as yet been clearly defined where ordinances prohibit, either expressly or practically, the beneficial use of land. Here a constitutional question is raised since under the reasoning of the *Pennsylvania Coal* case it would seem that when all beneficial use of land is prohibited, the ordinance ceases to be regulatory and becomes a taking without due process of law. In such an instance the power of eminent domain should be exercised and compensation

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90 See text accompanying note 66 supra.
rendered for the destruction of valuable property rights even if the public health and safety justifies such interference.  

91 "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).