



OPINION OF THE GENERAL COUNSEL
U.S. DEPARTMENT OF TRANSPORTATION

WHETHER A PROVISION ALLOWING STATES TO PERMIT
NONCONFORMING SIGN REMOVAL BY AMORTIZATION RATHER
THAN MONETARY COMPENSATION IS CONSTITUTIONAL

QUESTION

Whether a provision allowing States to permit nonconforming sign removal by amortization rather than monetary compensation is constitutional under the United States Constitution.

ANSWER

Consistent with the earlier opinion of this office, I conclude that a provision allowing nonconforming highway signs to be removed through amortization for a period that would permit recoupment of a sign owner's investment is not constitutionally vulnerable.

BACKGROUND

On June 26, 1986, this office issued an opinion which concluded that under the Federal Constitution and in most States, removal of nonconforming signs after a period of amortization, without payment of monetary compensation, was constitutional. We wrote the opinion at that time because of a proposal to delete the provision of the Federal Highway Beautification Act that requires States to pay cash compensation upon removing nonconforming signs adjacent to controlled highways. We wanted to determine if the Highway Beautification Act provided protection which was constitutionally based or had only statutory roots.

The Administration has proposed a bill, S. 610, which would end the requirement to pay cash compensation, leaving the question of whether to pay cash compensation to the States. Since 1986, there have been a number of significant land use decisions both in the U.S. Supreme Court and in a number of other State and Federal courts. Thus, a review of the issue, based on post-1986 developments, seemed in order.

DISCUSSION

A provision in a statute or ordinance allowing nonconforming signway signs to be removed through amortization is not invalid per se as violative of the just compensation clause of the Fifth Amendment, or by interpretation, the Fourteenth Amendment of the United States Constitution. The amortization process is one that establishes time periods in which nonconforming uses must be terminated. The Supreme Court has addressed the issue on several occasions and has not required compensation, even where the regulation has resulted in a diminution in the value of particular property, so long as the restriction advanced legitimate State interests. *Agins v. City of Tiburon*, 447 U.S. 255, 261-62, 100 S.Ct. 2138, 2141-42 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 138 n.36, 98 S.Ct. 2646, 2666 (1968).

Generally, court decisions have viewed amortization provisions applied to particular sign and site owners as constitutionally valid when they have met the test of reasonableness. When signs designated for removal (i.e. nonconforming) are allowed to remain in place for a period sufficiently long to permit sign owners to recoup their economic investments in the signs, the zoning or other land use control ordinances have usually been sustained as being reasonable in their application. Most State courts have rejected constitutional challenges to amortization schemes if the period was "reasonably long enough to allow the sign owner to recoup his investment . . ." *Major Media of Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446, 1452-53 (D.N.C. 1985). See also 22 A.L.R. 3d 1134 (1968 and 1990 Supp). Factors which courts have relied upon in reviewing the reasonableness of amortization periods include: the cost of the billboard, its depreciation value and remaining useful life, the length and remaining term of the lease under which the sign is maintained and the harm to the public if the structure remains standing beyond the prescribed period.

Since 1985, there have been a number of Supreme Court cases wherein statutes, regulations, and ordinances purporting to regulate land use as an exercise of the police power have been challenged as "takings" for which just compensation is required under the Fifth Amendment to the Constitution, or as applied to the States, under the Fourteenth Amendment. It has been suggested that certain of these more recent cases may have signalled a change of judicial attitude on the question of amortization, given the heightened scrutiny that land use control regulations have received as a result of the recent challenges. While none of the recent Supreme Court decisions dealt directly or indirectly with the issue of amortization in lieu of compensation for the removal of

billboards, they have considered circumstances in which the exercise of police power by State or local authorities may have resulted in "takings" requiring the payment of just compensation under the Fifth or Fourteenth Amendments.

We have reviewed these cases in an attempt to discern whether they would indicate any change by the courts in their approval of traditional zoning methods for dealing with the termination of nonconforming uses through the process of amortization.

It is apparent that most amortization provisions sustained by the courts before 1986 would remain valid under the more recent Federal cases, although a more detailed evaluation process might be applied in individual cases than was formerly required. State law on the issue of amortization in lieu of compensation remains substantially unchanged.

The land use control cases involving "takings" issues that have received the most attention from the commentators are as follows:

Keystone Bituminous Coal Association v. DeBenedictis,
480 U.S. 476, 107 S.Ct. 1232 (1987)

Nollan v. California Coastal Commission, 483 U.S. 825,
107 S.Ct. 3141 (1987)

Hodel v. Irving, 481 U.S. 704, 107 S.Ct. 2076 (1987)

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 1304, 107 S.Ct. 2378 (1987)

Naegele Outdoor Advertising, Inc. v. City of Durham, 844
F.2d 172 (4th Cir. 1988)

Georgia Outdoor Advertising, Inc. v. City of Waynesville, 900 F.2d 783 (4th Cir. 1990)

None of these cases suggests any fundamental shift with respect to the validity of amortization as a tool to extinguish nonconforming uses.

Keystone takes essentially the same position as *Agins, supra*. A land use regulation effects a taking only if it does not advance a legitimate state interest or denies an owner all economically viable use of his land. *Keystone* noted that the Supreme Court has examined the "taking" question by engaging in "essentially ad hoc, factual inquiries that have identified several factors -- such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action --- that have particular significance."

Keystone went on to say at 480 U.S. 495 and 497:

These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances. . . .

Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction." [Citations omitted.]

Thus, *Keystone* makes no suggestion that amortization statutes would be *per se* unconstitutional. To the contrary, it suggests that a case by case analysis based upon the terms of the statute involved would be appropriate. This is exactly what the law was before *Keystone*.

Nollan and *First English* shed no light on the question of amortization at all. The principal holding in *Nollan* is that the governmental interest advanced by a land use regulation must reasonably relate to the land use restriction being imposed. *Nollan* put the issue in terms of requiring a reasonable nexus between the government interest and the land use constraint.

Nexus and amortization are not mutually exclusive concepts. A case such as *Nollan*, which arguably tightens the requirement to relate a specific governmental purpose to the land use restraint being imposed, does not change the law on how valid land use restraints may be implemented. Further, nexus is not a new idea in land use law. Although *Penn Central*, *supra*, began its analysis of a taking allegation by examining whether a use restriction was "reasonably necessary to the effectuation of a substantial government purpose," 98 S. Ct. at 2660, in *Nollan*, the Court used a strict interpretation to examine the fit between the challenged regulation and the claimed State interest. It required that the regulation "substantially advance a legitimate state interest." See also *McNulty v. Town of Indialantic*, 727 F. Supp. 604 (M.D. Fla. 1989), in which the district court focused on this point in explicitly applying *Nollan*.

As to *First English*, that case deals with the issue of temporary takings. Its holding is that if a particular ordinance would effect a taking if imposed permanently, it could also result in a taking even if it were imposed for a limited period of time. The Supreme Court avoided applying its holding in that case to permanent land use controls or

restrictions. Thus, nothing in *First English* changes the law with respect to a permanent prohibition of signs which have associated with it an amortization period requiring removal after a period of years.

Hodel presents a clear "taking" matter and holds that extinguishment of certain fractional interests in Indian allotments and the abolition of devise and descent interests without reimbursement resulted in an unconstitutional taking. Again, this holding has nothing to do with amortization-based land use constraints, which have been upheld precisely because they do not extinguish proprietary interests precipitously.

There has been a series of recent Federal district and circuit court cases involving outdoor advertising signs that deal directly with the amortization versus just compensation issue. These cases were decided in full awareness of the above-mentioned Supreme Court decisions, which underscores the view that the Supreme Court cases did not change the law on amortization.

In *Georgia Outdoor Advertising v. City of Waynesville*, 900 F.2d 783, 786, 789 (4th Cir. 1990), the court said:

Not only does the presence of an amortization provision fail to validate automatically a land use ordinance, the absence of a provision for compensation does not invariably render such an ordinance an unconstitutional taking.

* * *

In summary, because we concluded in *Waynesville I* [833 F.2d 43 (4th Cir. 1987)] that this ordinance advances a legitimate State interest, we vacate the district court's orders holding the ordinance unconstitutional on its face and enjoining enforcement of the same.

Relying on *Keystone* and *Penn Central*, the court in *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988), properly framed the analysis under the second prong of *Keystone*. First, one must designate "the appropriate unit of . . . [property] affected by the ordinance." Second, one must determine whether the ordinance denies the landowner economically viable use of the appropriate unit of its property by considering the following factors identified in *Penn Central*: (1) the "economic impact of the regulation on the claimant," (2) the "extent to which the regulation has interfered with distinct investment backed expectations," (3) the "character of the governmental action." *Durham* went on to enumerate several factors that the district court should consider in applying the *Penn Central* criteria:

The court should make findings pertaining to every aspect of Naegele's business that will be affected by the ordinance, including the number of billboards that can be economically used for noncommercial advertising, the number that are economically useless, the terms of Naegele's leases for billboard locations, the land Naegele owns for locations and whether it has any other economic use, the cost of billboards that cannot be used, the depreciation taken on the billboards and their actual life expectancy, the income during the grace period, the salvage value of billboards that cannot be used, the loss of sharing revenue, the percentage of affected signs compared to the remaining signs in Naegele's business unit, the relative value of affected and remaining signs, whether the amortization period is reasonable, and any other evidence presented by the parties that the court deems relevant. 844 F.2d at 178.

It is clear that *Durham* and *Waynesville* clearly support the continued vitality of a "reasonable" amortization period.

In *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), cert. denied, 479 U.S. 1102 (1987), a case cited in our 1986 opinion, the court affirmed the district court's decision that a sign ordinance with a 5 1/2 year amortization period was not a taking where the period permitted recoupment of sign owner's investment. Recently, the Fourth Circuit reaffirmed this decision, ruling in *Major Media of the Southeast v. City of Raleigh*, 920 F.2d 23 (4th Cir. April 9, 1991), that the district court correctly found that neither the facts nor the law had sufficiently changed "to warrant relief from the 1985 judgment." The court also noted that *Durham* had "clarified the test for regulatory takings, primarily by requiring detailed findings on whether the amortization period is reasonable."

It is important to note that the Fourth Circuit's analysis of *Nollan*, *First English* and *Hodel* exactly parallels our own analysis of these decisions. As for the effect of *Nollan*, *Hodel* and *First English*, it is clear that the Supreme Court's focus in these cases was not on amortization or the reasonableness thereof in dealing with the issue of "takings." As the court said in *Durham*, 844 F.2d at 177 (citations omitted):

Contrary to Naegele's suggestion, *First English Evangelical Lutheran Church v. County of Los Angeles*, *Hodel v. Irving*, and *Nollan v. California Coastal Commission* are distinguishable because they address significantly different taking issues. *First English* holds that a temporary regulatory taking that has already denied an owner all use of its property requires just compensation for the period during which the taking

was effective. See 107 S. Ct. at 2389. *Hodel* held a statute unconstitutional because it escheated all of claimants' fractional interest in Indian allotments, abolishing devise and descent of the interests, without compensation. 107 S.Ct. at 2084. It is apparent, however, that the Durham ordinance does not deny Naegele all use of its property. Instead, like the statute upheld in *Keystone*, 107 S.Ct. 1232, it directly affects only a part of the property. In *Nollan* the Court invalidated a requirement that the owner of beachfront property grant a public easement in order to obtain a permit to rebuild a dwelling on his lot. The condition requiring an easement violated the taking clause because it did not serve a governmental purpose related to the permit to rebuild. 107 S. Ct. at 3146-50. Here, in contrast, the prohibition of certain billboard advertising is directly related to the city's interest in aesthetics.

Thus, *Nollan*, *First English*, and *Hodel* all deal with the scope and propriety of governmental regulation of property in general. They simply do not relate to the constitutionality of a particular zoning ordinance. They are entirely silent about the propriety of an amortization plan associated with a proper billboard or other land use control ordinance.

As we have indicated earlier, and as our 1986 opinion noted, a large number of decisions from a variety of jurisdictions support the proposition that amortization provisions are valid if they are reasonable.

Reported case law in the following 17 States supports amortization as an appropriate means of eliminating nonconforming uses in local zoning matters: California, Colorado, Florida, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Nebraska, Nevada, New Hampshire, New York, North Carolina, South Carolina, Texas, and Washington. 22 A.L.R. 3d 1134 (1968 and 1990 Supp.) Most of these cases were duly noted in the 1986 opinion of General Counsel, and they remain valid today.

The attached report of the General Accounting Office, dated February 6, 1991, documented several additional States as allowing amortization as part of local zoning: Arkansas, Connecticut, Delaware, New Mexico, Minnesota, Kentucky, and Tennessee. As noted in *LaChapelle v. Goffstown*, 107 N.H. 485, 225 A.2d 624 (1967):

A blanket rule against amortization provisions should be rejected because such a rule has a debilitating effect on effective zoning, unnecessarily restricts a state's police power, and prevents the operation of a reasonable and flexible method of eliminating nonconforming uses in the public interest.

On the other hand, two recent State court cases hold that amortization is *per se* unconstitutional as a means of removing any lawful nonconforming uses under local zoning. *PA Northwestern Distributors, Inc. v. The Township of Moon*, 584 A. 2d 1372 (Pa. 1990). The case involved restricting locations of adult book stores, but the principle involved could be applicable to any nonconforming use, including nonconforming signs. The court said, at 585 A.2d 1375:

A lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain.

See also, *Lamar Advertising of South Georgia, Inc., et al., v. City of Albany*, 389 S.E.2d 216 (Ga.1990).

Pennsylvania and Georgia are among seven States in the nation whose courts have for many years taken the position that provisions for the amortization of nonconforming uses are necessarily invalid under their State Constitutions. The others are Indiana, Michigan, Missouri, New Jersey, and Ohio.

In sum, this review of recent Federal and State case law shows that little has changed since our review in 1986. As a matter of Federal law, amortization remains a constitutional way of extinguishing nonconforming land uses, including nonconforming billboards. The principal basis for challenging an amortization ordinance is to attack it as setting an unreasonably short amortization period or that its underlying purpose does not advance a legitimate state interest. That was the law in 1986 and remains the law now.

It is true that the 1987 Supreme Court's decisions in *Nollan*, *First English*, *Keystone*, and, to a lesser extent, *Hodel*, generated enormous interest and considerable litigation regarding a whole array of land use issues. However, this activity has not changed basic legal principles with respect to amortization. At most, a few courts have begun to examine the specifics of certain amortization laws more critically without questioning their constitutionality *per se*. This assessment is true both at the Federal level and in the vast majority of the States.

Date:

May 21, 1991

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Attachment