The Balance of Private and Public Interests in the Control of Non-conforming Uses

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Introduction

Seventy years ago, town planning was described as:

> ". . . the art of laying out towns with due care for the health and comfort of inhabitants, for industrial and commercial efficiency and for reasonable beauty of buildings."[1]

Modern cities brought these issues of health, comfort, economic efficiency and the urban environment increasingly into competition and conflict. Any rationalization inevitably demanded legislative intervention. This took the form of the statutory endorsement of the process of town planning. For the purposes of this commentary the position in Queensland and, in particular, Brisbane, will be considered.[2]

Central to town planning is the town plan itself and, in Queensland, the provisions requiring such a plan are found in s.33 sub.-ss.(2)-(6) and ss.4-7 of the Local Government Act 1936–1980 (L.G.A.) and the City of Brisbane Town Planning Act 1964–1980 (C.B.T.P.A.) respectively. Central to the town plan is the regulation of land use achieved by adopting a table of zones, each zone having as of right uses, uses permitted only upon consent and prohibited uses.[3]

The difficulty now considered would not arise if the town came to the plan. In reality, the plan comes to the town.[4] Unavoidably, there will be existing uses and buildings which are either prohibited or would not attract council consent under the applicable zoning. The problem, which also occurs upon the amendment of an existing town plan, is legislatively described as the existing non-conforming use.

This retrospective effect of zoning necessitates a consideration of the balancing of the public benefit in having a town plan and the private loss which would result upon an insistence on conformity with the plan.

The public may suffer an impairment of safety, health, aesthetic and environmental standards as a result of non-conforming uses. There may be a depressant effect on land values. The economy of a

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1. Haverfield, *Ancient Town Planning*, 1913, p. 11 (quoted in Wilcox, M.R., *The Law of Land Development in New South Wales*, Sydney, 1967, at 177).
2. Queensland's first town planning act was *The City of Mackay and Other Town-Planning Schemes Approval Act 1934*. Subsequently, the *Local Government Act 1936* (as amended) and, for Brisbane, the *City of Brisbane Town Planning Act 1964* (as amended) took over the control of town planning schemes.
3. Part II, City of Brisbane Town Plan.
4. But not always — Canberra being a notable Australian example where covenants in Crown leases (the Crown retaining the fee-simple in all the city) overcome the problem of non-conforming uses.

district may suffer generally where, for example, a use is incompatible with a local tourist trade. A valuable monopoly may be created for the user by the exclusion of competition in a district. Non-conforming uses may impinge upon the overall effectiveness of a plan designed to be uniform and may lead to a council consenting to uses on neighbouring land which it might not otherwise have done thus retarding or causing a decline in the development of an area.

The private loss may be the need to break established personal relationships where re-location is the only alternative coupled with the general inconvenience which follows upon removal. However, the private loss tends to become a question of the economic hardship which ensues from the loss of original investment moneys, the costs of removal and re-establishment and the lowering of the market value of land because of the loss of the use.[5]

Is the problem of existing non-conforming uses sufficiently important to warrant serious consideration of a means to establish a rather difficult balance amongst these interests?

It was originally expected by planners that such exceptions to zoning would fade away.[6] This expectation, described as "naive"[7] by one commentator, did not bear fruit:

> "Nonconforming uses have proven to be more durable than the original zoning advocates anticipated. Rather than withering away, many such uses have thrived because the establishment of zoning has bestowed on them a monopolistic position by preventing the establishment of competing enterprises within the zoned area . . . Some authorities have even singled out the nonconforming use as the fundamental problem of the zoning system."[8]

To see the non-conforming use as "the" fundamental problem of the zoning system does, indeed, seem to go too far. A more restrained view is taken by Wilcox who, in commenting on land development in New South Wales identified five problems facing the planner the first of which refers to "helplessness in dealing with non-conforming uses".[9]

Whether as "the" problem or as one of several, the problem exists and warrants consideration. How have the legislators approached the difficulty? The objective has been the ultimate elimination of the non-conforming use. For the purposes of this paper, four approaches have been identified for comment: immediate elimination, restrictive control, amortization and the American Model Land Development Code.

Shifting the problem to the private law of nuisance and the use of covenants is not discussed. Clearly, these alternatives are far too

5. No compensation is payable for losses derivative of zoning ordinances. See text associated with note 14, post.
6. Owing to the process of regulation which was most commonly adopted originally. See text associated with notes 22 and 23, post.
7. Fuller, T.S. *Amortization: A Constitutional Means to Eliminate Nonconforming Municipal Signs.* (1975) 54 Ore. L. Rev. 224 at 224.
8. Drumm, D.G., *Conforming the Nonconforming Use: Proposed Legislative Relief for a Zoning Dilemma.* (1979) 33 Sev. L.J. 855 at 863.
9. Wilcox, M.R., *The Law of Land Development in New South Wales*, Sydney 1967 at ix.

blunt as instruments to achieve the fine balancing of private and community interests which most often arise.[10]

Similarly, the use of rezoning is not discussed. Using rezoning to achieve not merely limited protection of a non-conforming use but to change its very nature to a conforming use is a possibility which has occurred to some landholders.[11] This has generally proved unsuccessful. Relying on the planning objective of elimination of non-conforming uses as embodied, for example, in Part III of the Brisbane Town Plan, courts have rejected such rezoning applications.[12] The rezoning of a non-conforming use could also be characterised as spot rezoning. Again, the planning objective of uniformity of uses within a zone has led to a judicial dislike of such an approach.[13]

Immediate Termination

Upon a town plan taking effect it could simply be provided that any non-conforming use be terminated immediately. This would be in conformity with the principles of good planning. Further, it would be economical as zoning takes the form of "(a) mere negative prohibition"[14] and has not attracted compensation where a landowner loses a use or uses of his land: it is regarded as regulation not acquisition. This being so, the balance of interests falls completely in favour of the public.

As elsewhere, a general policy of immediate termination has not been adopted in Queensland. Historically, a major reason was that in order to gain acceptance of the concept of town planning itself, it was considered that the inevitable antagonism which would result from such extreme retrospective zoning must be avoided.[15] A sense of fairness would also reject such a draconian approach but, more pragmatically today, the electoral storm which would ensue from such a general policy would prevent its adoption.

Nevertheless, there may well be cases in which a consideration of the balance of interests is so far in the public's favour that the use ought to be terminated. The payment of compensation is the alternative. A broad policy of payment of compensation to achieve the immediate termination of non-conforming uses would be financially unthinkable for any local authority. On a case to case basis it may be possible, but the financial restrictions are such that councils may not be able to indulge in the exercise even to that extent. In any event, the unfavourable political ramifications remain a deterrent.

Planning permission might attempt to secure the immediate termination of non-conforming uses. A council could, as part of the

10. However the use of covenants may be most successful in the context of leaseholds and total city plans. Supra n. 4.
11. *David Webster and Sons Pty. Ltd.* v. *B.C.C.* (1967) 13 L.G.R.A. 328; *Gillespie Brothers (Qld.) Pty. Ltd.* v. *B.C.C.* (1973) 2 Planner L.G.R. 14.
12. *Wright* v. *B.C.C.* Local Government Appeal Court, Appeal No. 91 of 1971. However there may be exceptions as in *Roof and Building Service Pty. Ltd.* v. *B.C.C.* (1968) 15 L.G.R.A. 237 where it was unlikely that the land could be used for its zoned use and the council agreed with the use proposed.
13. *Ponton* v. *B.C.C.* (1970) 25 L.G.R.A. 73.
14. *France Fenwick and Co. Ltd. v. R.* [1927] 1 K.B. 458 per Wright J. at 467.
15. E.g. supra n.8 at 859.

planning permission for the development of block A, make it a condition that an existing and otherwise protected non-conforming use on block B be terminated, both blocks being owned by the same person. The Privy Council rejected an analagous use of a discretionary power on the part of the Sydney City Council in *Municipal Council of Sydney* v. *Campbell* as being invalid on the ground of its use for an improper purpose.[16] However well intentioned a local authority may be such a scheme is not available as a means of balancing private and public interests.

In the public interest, the attraction of being able to adjust a private interest through trading the benefit to one block of land for a detriment to another owned by the same person remains. Section 30(1)(a) of the Town and Country Planning Act 1971 (U.K.) recognises this where the use of any land "whether or not it is land in respect of which the application was made" may be regulated upon an application for planning permission. The power is, however, limited by the requirement that such a regulation of use be "in connection with the development authorised by the permission."

When only one site is in issue the position may differ as occurred in *Petticoat Land Rentals Ltd.* v. *Secretary of State for the Environment.*[17] For many years, an undeveloped site in London had been used for street trading during the week and at the weekends. An application for planning permission for commercial premises was approved together with a consent to street trading on the site on Sundays. Was a subsequent continuation of weekday street trading supportable as an existing non-conforming use? The court held that this was a new development of the site and, as such, any former use was extinguished, the site starting with "a nil use".[18]

Further, when a part of a site is subject to a planning permission Burgess on the basis of *Prosser* v. *Minister of Housing and Local Government*[19] is of the opinion that an existing use may be extinguished on the undeveloped part of the site provided the permission contains an express condition to that effect.[20]

These two instances of planning permission extinguishing existing non-conforming uses, may, when appropriate, be a most effective means of elimination. A useful addition to these possibilities would be the incorporation of a provision similar to s.30(1)(a) of the Town and Country Planning Act 1971 (U.K.) in the Queensland legislation. However, the problem can hardly be regarded as being addressed as a whole. Where the landowner is made aware of the effect of such permissions it amounts to a discontinuance by consent, if he is unaware of the effect it becomes

16. [1925] A.C. 338. There, having been frustrated by way of injunction in resuming land under a power to acquire land for the extension of Martin Place, the council sought to resume it under another general power for remodelling or improving the city. See also *Pyx Granite Co. Ltd.* v. *Minister of Housing and Local Government* [1958] 1 Q.B. 554.
17. [1971] 2 All E.R. 793.
18. Ibid. at 796.
19. (1968) 17 L.G.R.A. 109.
20. This requirement of an express condition is not yet settled. For a more detailed exposition see Burgess R., *Existing Rights and Planning Permission* [1972] J.P.L. 5.

another trap for the unwary. The possibility of compensated termination does appear helpful in those cases where the public interest is so great as to demand immediate action. As stated, even with the best of intentions, this means must fail for want of funds.

Queensland legislation is not a threat to private interests in non-conforming uses by way of immediate termination. To this extent the balance of interests is entirely in favour of the landowner.

Restrictive control

Immediate termination is "the ultimate restriction".[21] There are positions of compromise. An existing non-conforming use may be accepted subject to a series of restrictions designed to bring the use to an end by a "process of natural atrophy".[22] This approach has been adopted in Queensland and for the purposes of this paper reference will be made to the Brisbane Town Plan.

A fundamental protection for "a lawful use made of land or of a building or other structure" is given by s.33(1A)(a) of the L.G.A. – a protection applying to the City of Brisbane under sub-section (c) of the same section. Three preliminary points may be made. First, despite somewhat obscure drafting it appears that the protection extends to uses affected by schemes both subsequent to and prior to the enactment of s.33(1A)(a).[23] This reference to prospectivity and retrospectivity is of assistance in clarifying s.33(1A)(b) where the protection is given to uses "for which the land so used may not or could not be used". "Could not" refers to existing prohibited uses, however, "may not" is open to being interpreted as referring to existing uses which have become consent uses under the new plan. Existing permissible uses are given protection without restrictive control by cl.8 of Part III of the Brisbane Town Plan. Accordingly, the prospective and retrospective application of s.31(1A) suggests that "may not" should be considered as referring to uses which may be prohibited under future plans. The result is that restrictive control of existing non-conforming uses is applied only to prohibited uses.

Secondly, a prohibited use may be protected in Queensland and escape restrictive control. This may occur by reason of s.20(1) of the Acts Interpretation Act 1954 (Qld) as amended which provides that "any right, interest, title, power, or privilege created, acquired, accrued, established, or exercisable, or any status or capacity existing, prior to . . ." the repeal or amendment of any Act shall not be affected by such repeal or amendment unless a contrary intention appears in the Act. Hence, a prohibited use which fails to fall within the definition of an existing non-conforming use and thus an expressed contrary intention as expressed in the restrictive controls of the town plan may be protected as a lawful use free of restrictive control.[24]

21. Supra n.7 at 228.
22. Supra n.8 at 859.
23. Section 33(1A)(a)(i) and (ii) respectively.
24. In *Re Di Marco* (1973) 29 L.G.R.A. and *Gillespie Bros. (Qld) Pty Ltd.* v. *B.C.C.* (1973) 2 Planner L.G.R. 14 the use in issue was prohibited, but was not 'existing' for the purposes of the town plan.

Third, a use is protected, not an existing building.[25] However, as buildings are an essential component of many uses, protections must be extended to them if the protection of the use is to be meaningful. Such protection is left to the individual schemes and in Brisbane are to be found under Division 2 of Part III of the town plan.

Prima facie, there is an extensive protection of an existing non-conforming use particularly as it applies "notwithstanding any provision of the scheme or amended scheme to the contrary".[26] The protection of the private interest is established, restrictions which are placed upon it are the legislative response to the demands of public interest: –

1. The use must be an existing use, one existing on the appointed date being the date of the publication in the Gazette of the Governor-in-Council's approval of the scheme or any amendment.[27]

2. In addition to being in existence, the use must have been lawful at the date of application of the relevant scheme. Clearly a previously unlawful use of land should not gain protection because of the happy accident of its being an existing prohibited use under a supervening town plan.

3. The use preserved is the particular existing use. In *O'Keefe* v. *Shire of Perth*[28] a pottery-making business was preserved not the right to indulge in any use permitted under the light industry category of zoning in which pottery-making would fall by way of the planning scheme definition. There is some flexibility permitted provided the use remains essentially the same as, for example, when a general grocery becomes a licensed grocery.[29]

4. The local authority has a discretion as to whether any repairs or extensions may be effected to the buildings associated with an existing use. In Brisbane, under clause 13 of Part III of the town plan, the council may consent to "repairs which constitute erection to any building or other structure" used for a non-conforming use as well as to alterations and additions to such a building. No guidelines are offered as to the basis of consent, but from the purpose of Part III – a removal of such uses – it would seem that the council should be concerned with elimination and not consent to repairs which would extend the life of the building beyond what normally would be expected. Unlike *R* v. *Shire of Ferntree Gully; Ex parte Hamley*[30] there is in Brisbane no right to effect such repairs in the absence of council consent. Further, there is no inclusion of the word "extension" in the Brisbane Town Plan as there was in that case, a word which, in conjunction with the absence of council discretion, gave the owner a most valuable right to erect separate buildings on his land to extend his non-conforming use.

25. Section 33(1) does marginally extend use to include "the carrying out of excavation work in or under land and the placing on land of any material or thing which is not a building or structure".
26. Section 33(1A)(a).
27. Section 4(1) C.B.T.P.A. and s.33(4)(f) L.G.A.
28. [1964] W.A.R. 89.
29. *Rankine* v. *Lane Cove Council* (1969) 18 L.G.R.A. 40.
30. [1946] V.L.R. 501.

The Brisbane provision is limited to, an "erection *to* any building" which should prevent any free standing extensions.

5. In the case of any premises used for non-conforming uses being destroyed or damaged beyond repair the council has a discretion as to whether or not to consent to the erection of a new building or repairs.[31]

6. Pursuant to clause 10 of Part III the council has a discretion to permit a non-conforming use to be changed to another non-conforming use. A proviso, however, is that the new non- conforming use must be less injurious to the amenity of the locality.

The definition of "change" of use becomes important. In *Norman v. Gosford S.C. and anor*[32] the High Court stated that a change in intensity is not a discontinuance of a use at a low intensity being replaced by a new highly intensive use. This most liberal attitude does not reflect the relevance of fact and degree in the context of change of use.

7. Clause 11 of Part III of the Brisbane Town Plan, following the L.G.A. s.33(1A)(ii), provides that the non-conforming use must cease if it has been discontinued for six months or more. This was originally an objective test for uses other than extractive industries; a clear example being the dismantling of a boilermaker's business with an attempt to start again after six months.[33] A subjective test of discontinuance was adopted for extractive industries in *R.* v. *City of Oakleigh*[34] where it was held acceptable to look at the subjective intent of the owner of a quarrying business (accepted as intermittent by nature) to see whether he intended to resume operations. Arguably, after the High Court decision in *Woollahra M.C.* v. *Banool Developments Pty. Ltd.*[35] where such an approach was applied in the context of a garage business the subjective test may now be applicable to non-extractive industry. However, the reason for the cessation in that case was the refusal of the council to grant a planning application for a particular garage business frustrating the continuance of the use. Unilateral discontinuance accompanied by a subjective intent to resume is distinguishable from cases of uses intermittent by nature or the continuance of a use being frustrated by a council decision.

Two final points may be made. First, Division 3 of the town plan makes provision for a register of non-conforming uses. Its raison d'être is merely evidentiary in that it is conclusive evidence of the existence of a non-conforming use. It is always open to an owner to prove by other means an existing non-conforming use.[36]

Secondly, there is no specific statutory right to appeal to the Local Government Court on the basis of local authority decisions (in particular the consent instances outlined in four, five and six above) in the area of non-conforming uses, except in so far as s.33(15A) L.G.A. and s.19A C.B.T.P.A. permit appeals on the

31. L.G.A. s.33(1A)(b)(i) and clause 12 of Part III of the town plan.
32. (1975) 31 L.G.R.A. 124.
33. *William McKenzie Pty. Ltd.* v. *Leichhardt Municipal Council* (1964) 10 L.G.R.A. 137.
34. [1963] V.R. 679.
35. (1973) 47 A.L.J.R. 714.
36. *Eric Caton Pty. Ltd.* v. *Toowoomba C.C. and anor* (1973) 28 L.G.R.A. 124.

issue of the registration of non-conforming uses. The appeal provisions in the L.G.A. and the C.B.T.P.A. would appear to relate to other planning decisions.[37] However, this point has never been taken by either the court or the local authorities.

Do these provisions successfully achieve a balance of public and private interests?

Considering the public interest, there is the overall purpose of the elimination of non-conforming uses despite initial preservation. The protected use is limited to the particular use existing and lawful at the time of the plan or amendment. Extensions to any necessary buildings are not permitted with repairs to and replacement of the buildings being at the council's discretion. Discontinuance for six months forfeits the protection and the provision for change of prohibited use requires less injurious replacement uses.

Considering the private interest, the existing use is preserved and the restrictions may be viewed as reasonable in that there is the expectation of being able to continue a use even although the broad freedoms of expansion and change found in as of right zoning are absent.

Fuller's test of a fair balance, "the resultant imperfect satisfaction of both the public and private interests",[38] seems to be achieved.

In practice the balance has been almost entirely in favour of the private interest. The decision in *Norman's case* allows intensification without its becoming a change of use with the *Woollahra Municipal Council case* suggesting, albeit of possibly limited application, a subjective test of discontinuance.

Financial and political pressures have left councils unwilling to exercise available discretions in such a way as to directly encourage discontinuance. Unless a problem becomes so acute that immediate neighbours have a clearly justifiable complaint which cannot be ignored, little is done.

When the restrictions do operate, their application may be quite arbitrary. It is the unwary owner who falls foul of the change of use or of the discontinuance provisions as Mr. Stubberfield discovered when he changed from one non-conforming use to another which, it was accepted, did not injure amenity to any greater extent. Only upon an application to extend his premises did he discover that he had lost not only his original non-conforming use through the application of the six month time bar, but had to immediately discontinue his present use.[39]

Such haphazard results can hardly be viewed as the successful use of a policy of restrictive controls to eliminate non-conforming uses.

However, the fundamental flaw in restrictive control is the absence of a fixed date of discontinuance. Most often, the use does not require expansion nor does it have a limited life. It is a viable and continuing proposition when it becomes a non-conforming use.

The hope of existing non-conforming uses withering on the vine of the town plan has proved a vain one. On the contrary, restrictive

37. Sections 33(15) and (16A) L.G.A. and ss.19 and 20A C.B.T.P.A.
38. Supra n.7 at 235.
39. (1969) 24 L.G.R.A. 286.

controls have resulted in the entrenchment of such uses to the detriment of good planning.

Amortization

If the ultimate restriction or termination were to be combined with restrictive controls the result would be akin to a possible alternative to either of its elements – amortization. The concept is simple to state:

> "Under an amortization ordinance, the nonconforming user is given a certain period of time over which he is entitled to continue his use. At the end of this period, the nonconforming use must cease. The theory of amortization is that the use is allowed to continue for no longer than the useful economic life of the nonconforming use that during this period of grace, the owner will recoup his investment."[40]

This system has received greatest acceptance in America despite formidable arguments against it based on the Fifth Amendment's prohibition on exercising the eminent domain power without compensation and questions of the extent of each state's police power to act only for public health, safety and morals. Understandably much of the American literature concerns itself with this constitutional problem.[41] In those cases where the amortization ordinances have been upheld there has been an opportunity to assess the merits of the system itself.

The method bears no resemblance to an accountant's understanding of amortization, it is closer to depreciation. In Chicago, an amortization ordinance requires the following:[42]

Nonconforming Use	Amortization Period
Buildings of less than $2,000 value	5 years
Buildings between $2,000–$5,000	10 years
Residential Buildings in a Residential Zone (depending on use)	8–10 years
Business Buildings used for Commercial or Industrial Purposes	15 years
Land without Buildings	5 years

Amortization has one important advantage over restrictive controls. The non-conforming use has a set date of termination. The private interest is to be taken into account by the length of the period specified – sufficient time to exhaust the economic life of the asset (assuming a tangible asset is in question), time to re-coup an investment and time to plan for re-location. The amortization period itself may be seen as a form of compensation with a high income earned during the period of what may be effective monopoly.

40. Klemin, L.R., *Zoning and the Amortization of Nonconforming Uses*, 54 N.D.L.R. 231 at 235.
41. An excellent summary of various state attitudes is to be found in Klemin's article, supra. Sixteen states have approved the system including Washington, New York, Texas and California. Five have disapproved.
42. Delafons, J. *Land-Use Controls in the United States* (1969) 2nd Ed., The M.I.T. Press, at 63.

As against these advantages to the private interest may be set the disadvantages of the future values and economic life spans of many uses being a matter of guess-work. In some cases the life span, as in the case of a use not requiring buildings, may be indefinite and when ultimately terminated will result in a private loss not compensated for by any monopoly income or mere recouping of an initial investment. This difficulty may be exacerbated by too inflexible a categorization for amortization purposes. Even if the categorization is more specific,[43] problems may arise in that the periods specified for termination may vary considerably from one local authority area to another. There is a variation of from 2 to 5 years for sign ordinances as amongst eight Oregon cities.[44] Such variation does nothing to convince the individual landowner that he is being treated fairly when he can identify more lenient provisions elsewhere.

Another difficulty arises where a council adopts a practice of giving land a holding zoning. In fact the council has no planning policy for the area and relies on specific development applications which require a re-zoning as a first step. Thus a use may be non-conforming initially, but subsequently become conforming. The amortization procedure would, however, have already commenced and may be irreversibly advanced or completed at a later rezoning date. This is not the fault of amortization, but is an indictment of council planning policies.[45]

The public interest, whilst advantaged by a set date of termination, may find this largely illusory where the investment is large and the use resilient to the passage of time resulting in an amortization period so long as to be comparable with a protected non-conforming use. Indeed, the period may be so long that the original planning rationale may have been frustrated or ceased to be relevant. Further, a building owner, aware of a limited commercial existence, may permit the building to deteriorate creating an eyesore. Even if local council by-laws are enforced to maintain reasonable standards, a problem has arisen in that the owner continues the use, ignoring the amortization period, and the local authority is faced with a problem akin to immediate termination at the end of the period with the accompanying problems already discussed.[46]

As a mechanism for balancing private and public interests, the most persuasive arguments against it are, for the private interest, the uncertainty of values and amortization periods and, for the public interest, many non-conforming uses would require so extensive an amortization period that the use would not be eliminated. It would appear from the American experience that amortization has

43. Not all amortization ordinances are so broad. The elimination of advertising signs has attracted this form of ordinance and provisions have been referable to such characteristics as height, size, location, illumination and animation. See Rigs, B., *Zoning – Termination of Pre-Existing Nonconforming Uses,* 32 A.R.K. L. REV 798 at 798.
44. Supra n.7.
45. This has occurred in Brisbane where outer suburban land was zoned non-urban, awaiting development applications. See also, Supra n.8 at 873 where a similar experience has been documented in America.
46. This has been the experience of the city of Eugene, Oregon. Supra n.7 at 226.

been most effective for small improvements[47] or for investments with little remaining economic life. It has been ineffective where there is a large investment amortized over a long period.

If amortization is used in the limited field identified and the necessary systematic research is applied in determining values and economic life then it would seem that there is evidence to support the view that amortization is an improvement on existing laws in Queensland.

In saying that it is an improvement, it must remain an improvement only in the limited sense outlined.

Each of the methods of dealing with existing non-conforming uses canvassed has distinct advantages and distinct disadvantages. The next step must be to ask whether it is possible to amalgamate the approaches.

The American Model Land Development Code

In 1970 it was stated in the Iowa Law Review:

> "The problem of dealing with the nonconforming use is likely to be complex and sometimes emotional. It seems reasonable that the best approach will make use of all available techniques. Different situations will call for the use of eminent domain, nuisance, abandonment, or the multi-faceted 'restrictive approach'. Since these techniques are independently inadequate, these should supplement a general scheme of amortization. The determination of a truly fair, yet effective, amortization system will not be easy. There will be a danger that such a plan will be administered in a rigid, stereo-typed manner with little effort to determine the truly relevant factors. With proper guidelines such a plan can be made to work."[48]

The American Law Institute undertook to improve and rationalize land-use controls in America. The object was to produce model planning acts which it was hoped would find favour with the responsible legislatures leading to adoption and thus improve and unify such planning law in America.[49]

In 1975 a Proposed Official Draft of the Model Land Development Code was produced after nearly ten years' work. Article 4 of the Code concerns non-conforming uses.[50]

The Code states that the responsible authority *shall* issue an enforcement notice requiring immediate discontinuance of non-conforming uses.[51] An owner has two weeks within which to appeal. If he does not appeal then the authority must order immediate discontinuance of the use.

If an appeal is sought the owner may seek three basic remedies.

First, he may establish that he should be permitted to continue the non-conforming use. No specific restrictions would be placed on extension, repair, etc., these matters should be left to be dealt

47. Removal of offensive advertising signs has been particularly amenable to amortization. See Supra n.7 and n.4.
48. (1970) 55 Iowa Law Review 998 at 998-999.
49. Supra n.40 at 235-236.
50. For a full discussion of Article 4 see Drumm's article supra n.8.
51. The need for discontinuance must be based on a carefully considered plan. Supra n.8 at 875.

with under general building regulations, each case being considered on its merits. Of course, the owner may also establish that his is a permitted use, not a non-conforming use.

Secondly, he may establish that he should be given reasonable time to discontinue the use.

Thirdly, if the reasonable time is in excess of three years, the local government is given an option to acquire the land upon payment of compensation so as to eliminate particularly undesirable uses.

These three possibilities are parallel to immediate termination, amortization and acquisition upon payment of compensation.

The system overcomes the problem of local authorities ignoring existing uses by making it mandatory to issue immediate discontinuance notices. The first of the remedies available to the owner permits acceptable non-conforming uses to continue by, in essence, making it a consent use. The largely ineffectual mechanism of restrictive controls has been removed as building restrictions may be imposed without the need to make them a means for the indirect control of non-conforming uses.

The other two remedies recognise the use as undesirable and provide for a specific termination date.

The system provides a deal of discretion with each case being treated on its merits. This overcomes the adoption of one control with the attendant hardships or shortcomings of its inability to be applied generally. Further, such a case by case approach with a determination on the merits is consistent with other land use controls such as building and development controls.

The financial constraints remain a difficulty with the compensation alternative. Despite there being no discretion to avoid issuing a discontinuance notice in the first instance, the system does not guarantee the elimination of non-conforming uses. A local authority may be tempted to be lax in zoning so as to prevent an electoral backlash brought on by a flood of appeals.

Conclusion

The Queensland system of restrictive controls does not successfully achieve a balance of private and public interests in the case of existing non-conforming uses. Whilst amortization is a useful device, mere adoption of that system would carry with it its own identified shortcomings. No one has seriously suggested general adoption of immediate termination, however, it undoubtedly has public benefit attractions, but at the cost of compensation.

Non-conforming uses are a serious problem in town planning and the crux of the problem is the balancing of two equally supportable interests. The solution has to be compromise and flexibility of approach seems indispensible. The American Model Land Development Code recognises the complexity of the problem and the need for flexibility. Given funds, it offers alternatives which may well encourage a council to an active policy of the elimination of non-conforming uses. Although not without practical difficulties, the Code offers a most persuasive compromise.