

# AN IDEA WHOSE TIME HAS GONE: HOW AMORTIZATION IS UNCONSTITUTIONAL RETROACTIVE LEGISLATION IN TEXAS

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## I. INTRODUCTION

Amortization of nonconforming uses is a powerful but oppressive tool the government uses to remove properties that do not match the vision of city planners without having to pay any compensation to the property owner. Under this scheme, the government changes the zoning in an area in which a legal, conforming business sits and makes that business an illegal, nonconforming use. The government then gives the business a certain time frame to ostensibly earn back, or “amortize,” its investment in the property. At the end of this period, the business owner must bring the property into compliance (even if it is not suited for the new zoning rules) or cease operation—and the government does not need to pay any compensation to the property

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owner. Cities across the country and in Texas have used amortization as slow-motion eminent domain without any compensation, often to force a transfer of the property to more attractive private owners. Nonetheless, the courts have largely found amortization laws to be constitutional; although, a small number of courts have struck them down as takings without just compensation and a violation of due process.

Amortization is, at its core, retroactive legislation. Using amortization, cities take legal, preexisting uses and apply new restrictions that make the uses illegal. Amortization disrupts settled business expectations and, often times, destroys businesses and livelihoods, all because a city planner has determined—after the fact—that the property owner who is already there does not fit into the new zoning scheme for the area. The retroactive nature of amortization should make the system illegal in Texas. Most challenges to amortization, however, attempt to classify the use of the concept as an uncompensated taking. Although amortization does constitute an uncompensated taking, the more direct constitutional flaw in amortization is its retroactivity, that is, it unfairly changes the rules for property owners and imposes disabilities well after the fact.

Two developments in case law open up avenues of attack against amortization in Texas, but property owners in Texas have failed to use these arguments in challenges to the amortization of their property. First, the Texas Supreme Court has recently revitalized the Texas Constitution's prohibition on retroactive civil legislation.<sup>1</sup> Applying the court's standards for unconstitutional retroactive legislation will render the use of amortization unconstitutional, except in the most extreme circumstances. Second, in *Eastern Enterprises v. Apfel*,<sup>2</sup> Justice Kennedy's concurrence laid out a path for challenging retroactive laws as violating due process,<sup>3</sup> an approach shared by four other members of the Supreme Court and subsequently adopted by the Fifth Circuit.<sup>4</sup> Applying Justice Kennedy's approach will likely preclude a municipality's use of amortization to disrupt settled expectations.

This Article discusses what amortization is, why municipal governments use it, and how the courts of Texas and other states have treated the practice. Next, this Article argues that, while Texas courts have routinely approved amortization, many exercises of the power are likely unconstitutional under Texas's prohibition on retroactive civil legislation and that it violates due process. Lastly, this Article

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1. See generally *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126 (Tex. 2010).

2. 524 U.S. 498 (1998).

3. *Id.* at 547–50 (Kennedy, J., concurring).

4. *Id.* at 553–54 (Breyer, J., dissenting); see also *U.S. Fid. & Guar. Co. v. McKithen*, 226 F.3d 412, 416 (5th Cir. 2000).

concludes with a call for Texas courts to reexamine the constitutionality of this oppressive practice and do away with it once and for all.

## II. WHAT IS AMORTIZATION?

Amortization is a tool used by planners to eliminate nonconforming uses within a zoning district. A “nonconforming use” is a “building, structure or use of land that is in existence and lawful on the date when a zoning ordinance or amendment becomes effective prohibiting such use, but which, nevertheless, continues unaffected by such an ordinance or amendment thereto.”<sup>5</sup> The general theory among planners is that “nonconforming uses are injurious to a zoning scheme and should be eliminated as soon as is consistent with due process of law.”<sup>6</sup> Indeed, many planners see “the fundamental problem facing zoning [as] the inability to eliminate the non-conforming use.”<sup>7</sup>

In the past, municipalities typically allowed nonconforming uses “to continue for two basic reasons: (1) [b]ecause it was felt that zoning laws could not constitutionally be applied retroactively to deprive the owner of his nonconforming use, and (2) because zoning looks primarily to the future and seeks to stabilize, and protect and not to destroy.”<sup>8</sup> Many planners assumed that because the government discouraged their existence, nonconforming uses would eventually disappear. However, the consensus among planners now is that “[t]here is little indication . . . that non-conforming uses ever do disappear. The favorable, sometimes monopolistic, position accorded them, together with municipal requirements that all buildings meet certain standards of fitness, militates against their elimination.”<sup>9</sup> In response to this per-

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5. Joseph A. Katarincic, *Elimination of Non-Conforming Uses, Buildings, and Structures by Amortization—Concept Versus Law*, 2 DUQ. U. L. REV. 1, 2 (1963).

6. 1 KENNETH H. YOUNG, ANDERSON’S AMERICAN LAW OF ZONING § 6.69, at 695 (4th ed. 1996).

7. Note, *Amortization of Property Uses Not Conforming to Zoning Regulations*, 9 U. CHI. L. REV. 477, 479 (1942).

8. Samuel B. Hickman, Note, *Zoning: Elimination of Nonconforming Use by “Amortization”: Constitutionality of Municipal Ordinance: Harbison v. City of Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958), 44 CORNELL L. Q. 450, 451–52 (1959) (footnotes and internal quotation marks omitted); This is a broadly accepted concept, but there is usually little analysis to back up this conclusion. At least one pro-regulation academic has challenged the basis for this conclusion. See Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1224 (2009) (“The legal literature has largely assumed that existing uses are entitled to protection and has almost wholly failed to examine the basis for that assumption.”).

9. Note, *supra* note 7, at 479; see also Hickman, *supra* note 8, at 452 (“In the early stages of zoning, it was believed that prior nonconforming uses would eventually eliminate themselves over a period of years through abandonment, destruction and other normal changes. Contrary to these expectations, nonconforming uses still abound.”); This is a broadly accepted view as well, but there is no evidence that this is actually true, especially now that zoning has been in place for many decades in practically every American municipality. Even when zoning was in its toddler years, one zoning author had to admit that “there is little statistical data available” to suggest

ceived problem and the inability of the government to immediately terminate nonconforming uses, municipalities devised various methods for terminating such uses.

The first, and “most obvious,” method is eminent domain.<sup>10</sup> However, municipalities do not find this as an attractive alternative because of the cost.<sup>11</sup> Moreover, there has been some hesitancy among municipal governments to employ eminent domain because they fear courts would not consider the termination of a harmless, nonconforming use to be a public purpose.<sup>12</sup>

A second method for terminating nonconforming uses is abandonment—if the owner discontinued the nonconforming use, the government would consider this to be a permanent forfeiture.<sup>13</sup> This method requires the property owner to actually discontinue the nonconforming use, meaning that the planners do not decide when the nonconforming use ends. Planners, as the name suggests, want to plan and do not like to wait for a property owner to abandon a nonconforming use.

A third method is for the government to limit extensions or repairs of the property.<sup>14</sup> In addition to raising issues under state and federal prohibitions on uncompensated takings, this method actually forces property owners to let their property deteriorate, raising both aesthetic and safety concerns.

The fourth, and overwhelmingly popular, method is amortization. The basic idea behind amortization “is to determine the remaining normal useful life of a pre-existing use. The owner is then allowed to continue his use for this period and at the end must either conform or eliminate it.”<sup>15</sup> “These laws are based on the principle that the property owner should be given time to recoup his investment in land before being forced to discontinue the use without compensation.”<sup>16</sup> The idea is that the government chooses a time period in which the

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that nonconforming uses benefitted from monopoly status and that determining whether this is in fact true is “almost impossible.” See Note, *supra* note 7, at 479 & n.11.

10. See Note, *supra* note 7, at 480.

11. Katarincic, *supra* note 5, at 5.

12. *Id.*; see also YOUNG, *supra* note 6, § 6.77 at 722 (noting negative comments regarding an effort in Minnesota to use condemnation as a tool for zoning); In *Berman v. Parker*, the U.S. Supreme Court upheld the District of Columbia’s blight statute that permitted the District to condemn private property and transfer it to another private entity in order to eliminate “blighted areas.” 348 U.S. 26, 28–29, 33 (1954). This statute was premised on an assumption that the removal of blight would be accomplished by “the sound replanning and redevelopment of an obsolescent or obsolescing portion” of the District. *Id.* at 29. This suggests that the District wanted to do away with nonconforming uses.

13. Katarincic, *supra* note 5, at 5.

14. *Id.*

15. Hickman, *supra* note 8, at 453.

16. PATRICK J. ROHAN & ERIC D. KELLY, ZONING AND LAND USE CONTROLS, Ch. 41, Nonconforming Uses, § 41.04[1] (LexisNexis, Matthew Bender 2015).

owner of the nonconforming use should be able to earn enough money to cover the cost of the nonconforming use. Once this time period has concluded, the owner must terminate the use. Because the owner is presumed to have recovered his or her investment in the property during the amortization period, the government does not have to pay just compensation (or any compensation) to the owner. “These time periods range from a few months or years (as in the case of billboards) up to fifty or sixty years (for very substantial structures).”<sup>17</sup>

New Orleans enacted the first amortization law in the United States in 1929 and the idea slowly spread across the country.<sup>18</sup> Amortization laws can vary in scope. Some states and municipalities only apply amortization to aesthetically displeasing uses like billboards and junkyards.<sup>19</sup> Government planners also use amortization to target vice-related industries, such as strip clubs, adult bookstores, and saloons, where the use of more heavy-handed tools could raise First Amendment problems and generate litigation.<sup>20</sup> Still other government entities apply amortization to every kind of use, including apartment buildings and private homes.<sup>21</sup>

### III. AMORTIZATION IN THE COURTS

Below, the Author discusses how courts have treated constitutional challenges to amortization laws. It should be noted that, in addition to constitutional challenges, property owners often claim that amortization is *ultra vires*.<sup>22</sup> *Ultra vires* claims are entirely statutory and depend on the nature of the authority granted from the state legislature to municipal governments in a particular state. While these types of challenges are an important tool against municipal efforts to use amortization, this Article will focus entirely on constitutional challenges.

#### A. In General

“The technique of terminating nonconforming uses through amortization has been approved by a majority of courts in the United States,”<sup>23</sup> although, this view is not universal and the courts that have approved of the practice have often done so over vigorous dissents. The willingness of some courts to uphold amortization often stems from the fact that the U.S. Supreme Court upheld prospective zoning

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17. *Id.* § 41.04[2].

18. Note, *supra* note 7, at 480 & n.21.

19. *Id.* at 481.

20. See generally Mark McPherson, *Advanced Zoning: Cleaning up the SOB's in Dallas*, MCPHERSON L. FIRM, PC (May 28, 2014), <http://texasenvironmentallaw.com/enviropinions/category/zoning-2>.

21. Note, *supra* note 7, at 481.

22. *Id.* at 483.

23. ROHAN & KELLY, *supra* note 16, § 41.04[3].

in the 1926 *Euclid* case notwithstanding a number of arguments against amortization.<sup>24</sup> This willingness persists despite the fact that prospective zoning and amortization operate on two different sets of expectations and rights. For instance, in *Euclid*, the Court rejected the argument that prospective zoning was unconstitutional because it caused financial harm to property owners. Instead the Court held that the ordinance will be upheld so long as it does not “pass[ ] the bounds of reason.”<sup>25</sup> Thus, under *Euclid*, “the loss [to the property owner] must be borne without compensation when there is a reasonable relationship between the purpose of the zoning regulations and the public welfare.”<sup>26</sup> But the nature of zoning’s effects on preexisting rights was never discussed.

In any event, governments have relied on *Euclid* to argue that zoning regulations are acceptable both prospectively and as applied to existing uses. As one commenter put it, “The distinction between ordinances restricting future uses and those requiring the termination of present uses is merely one of degree, and constitutionality depends upon the relative importance to be given to the public gain and to the private loss.”<sup>27</sup>

This was the conclusion reached by the California Court of Appeal in the leading case of *City of Los Angeles v. Gage*.<sup>28</sup> The court began its analysis of Los Angeles’s amortization ordinance by noting that zoning laws are an exercise of the police power.<sup>29</sup> As such, they are presumptively valid and the challenger bears the burden of demonstrating unconstitutionality.<sup>30</sup> The court declared that it would strike down such laws “only where no reason exists to support the determination of the legislative body” and where the legislative decision is “clearly and palpably wrong.”<sup>31</sup> The court held the fact that a person was operating a business that was perfectly legal when it began “does not give the owner thereof a vested right to have the exception continued so as to entitle him, on that ground, to attack the validity of a later ordinance repealing the former.”<sup>32</sup> “The mere fact that some hardship is experienced” in the termination of the nonconforming use “is not material” because “[e]very exercise of the police power is apt to affect adversely the property interest of somebody.”<sup>33</sup> Thus, the court held,

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24. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388–89 (1926).

25. *Id.* at 389 (quotation marks omitted).

26. Note, *supra* note 7, at 483.

27. *Id.* at 485.

28. 274 P.2d 34 (Cal. Ct. App. 1954).

29. *Id.* at 38.

30. *Id.*

31. *Id.* at 39 (quotation marks omitted).

32. *Id.*

33. *Id.* at 40 (quotation marks omitted).

“[d]amage caused by the proper exercise of the police power is merely one of the prices an individual must pay as a member of society.”<sup>34</sup>

Turning to the method by which Los Angeles chose to terminate the preexisting use at issue, the court concluded that amortization was a constitutional means to achieve this end. The court held that “[i]f the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public.”<sup>35</sup> Thus, the court concluded, “[t]he elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose.”<sup>36</sup>

The California court thus concluded that amortization was constitutional and that it would uphold a particular application of amortization if the time period was reasonable. The state courts in many states have followed this line of reasoning, including, among others, New York, Maryland, Delaware, Washington, Indiana, and North Carolina, and, as discussed below, this is currently the prevailing view in Texas. In these states, and others that follow the *Gage* reasoning, the constitutional issue is not whether amortization is permitted, but whether the government is implementing it correctly.

However, California’s approach is not unanimous. The Missouri Supreme Court wrote the leading case among the minority of states that have found amortization to be unconstitutional.<sup>37</sup> While acknowledging the success of “zoning zealots” in their crusade to remove nonconforming uses, the court nonetheless specifically declined to follow *Gage* and other cases upholding amortization.

[A]lthough the holdings in other jurisdictions may, in some instances, be enlightening and persuasive, it is neither our duty nor our inclination to rule a question of first impression in this state simply by counting foreign cases and then falling off the judicial fence on the side on which more cases can be found. Rather, our concern should be and is to determine the basic constitutional right of the matter, as we see it.<sup>38</sup>

The court rejected the argument that because zoning harms property owners in the future, the government has the ability to harm

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34. *Id.*

35. *Id.*

36. *Id.* This conclusion badly misunderstands the purpose of the Takings Clause. The court seemed to conclude, without stating as much, that the provision of a reasonable amortization satisfied the Takings Clause. But government takings are supposed to result in the government compensating property owners, not property owners compensating themselves, regardless of how long an amortization period went on for. The Author is aware of no other area of Takings jurisprudence where a court has concluded that compensation need not come from the government in order to satisfy the Takings Clause.

37. See *Hoffman v. Kinealy*, 389 S.W.2d 745 (Mo. 1965) (en banc).

38. *Id.* at 752.

property owners now: “[W]e cannot embrace the doctrine . . . that there is no material distinction between regulating the future use of property and terminating pre-existing lawful nonconforming use.”<sup>39</sup> Because the Constitution did not permit the government to immediately terminate a nonconforming use, that action did not become acceptable by the passage of time. “[I]t would be a strange and novel doctrine indeed which would approve a municipality taking private property for public use without compensation if the property was not too valuable and the taking was not too soon . . . .”<sup>40</sup> The court then concluded that St. Louis’s amortization ordinance constituted a taking without compensation in violation of Article I, section 26 of the Missouri Constitution.<sup>41</sup>

The Pennsylvania Supreme Court followed Missouri’s *Hoffman* and similarly found that an amortization ordinance violated Pennsylvania’s takings clause in *PA Northwestern Distributors, Inc. v. Zoning Hearing Board of Township of Moon*.<sup>42</sup> Noting that the Pennsylvania Constitution “protects the right of a property owner to use his or her property in any lawful way that he or she so chooses,” the court concluded that “[i]f government desires to interfere with the owner’s use, where the use is lawful and is not a nuisance nor is it abandoned, it must compensate the owner for the resulting loss.”<sup>43</sup> Thus, the court held “that the amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the Pennsylvania Constitution.”<sup>44</sup>

The Indiana Supreme Court came to a similar conclusion in *Ailes v. Decatur County Area Planning Commission*.<sup>45</sup> There, the court concluded “that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power.”<sup>46</sup> However, the same court later reversed this decision (at least with regard to the constitutionality of amortization under the U.S. Constitution).<sup>47</sup>

*Hoffman*, *Northwest Distributors*, and *Ailes* are the only cases that have struck down amortization ordinances as per se unconstitutional; although, most cases upholding amortization laws feature vigorous dissents. The Pennsylvania and Missouri decisions both rested on in-

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39. *Id.* at 753.

40. *Id.*

41. *Id.* at 754–55.

42. 584 A.2d 1372 (Pa. 1991).

43. *Id.* at 1376.

44. *Id.*

45. 448 N.E.2d 1057 (Ind. 1983), *overruled by* Bd. of Zoning Appeals v. Leisz, 702 N.E.2d 1026 (Ind. 1998).

46. *Id.* at 1060.

47. Bd. of Zoning Appeals v. Leisz, 702 N.E.2d 1026, 1032 (Ind. 1998).



terpretations of state constitutions. In that regard, the U.S. Supreme Court has never considered the validity of an amortization provision, and there are relatively few federal appellate court decisions considering the issue. When the federal courts have considered amortization, they have applied *Gage* or reasoning very similar to the reasoning in *Gage*.<sup>48</sup>

### B. *The Texas Courts' Treatment of Amortization*

At one point, the Texas Supreme Court was full throated in its defense of private property.<sup>49</sup> Those days soon came to an end.

The Texas Legislature, through the local government code, has granted municipalities general zoning powers for an amalgamation of purposes.<sup>50</sup> In *City of University Park v. Benners*,<sup>51</sup> the Texas Supreme Court held that zoning ordinances requiring the termination of nonconforming uses passed pursuant to such zoning powers are generally within the scope of a municipality's police power and do not effectuate a taking.<sup>52</sup> Since *Benners*, appellate courts throughout Texas have upheld various forms of amortization as a valid technique of allowing property owners to recoup their investment in property that became nonconforming as a result of a city's exercise of its police powers.<sup>53</sup>

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48. See, e.g., *World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186, 1199–1200 (9th Cir. 2004); *Art Neon Co. v. City & Cty. of Denver*, 488 F.2d 118, 121 (10th Cir. 1973); Recently, one academic commentator has suggested that the cases upholding amortization provisions do not go far enough and that immediate termination of nonconforming uses is both constitutional and desirable. See Serkin, *supra* note 8, at 1249. This commentator bases his argument on a belief that the assumptions underlying amortization are incorrect and that the correct test to apply to amortization is not the *Euclid* “reasonableness” test, but the Supreme Court’s regulatory takings analysis from *Pennsylvania Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *Id.* at 1249–56. This author also argues that the courts employ the test from *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), to determine whether immediate termination violates due process. *Id.* at 1260–61. Under both tests, he concludes that the government may constitutionally order an otherwise harmless use to immediately cease operation and, in doing so, the government need not compensate the property owner. *Id.* at 1260.

49. See *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921) (“[The right to own property] is not a right . . . over which the police power is paramount. Like every other fundamental liberty, it is a right to which the police power is subordinate.”).

50. See TEX. LOC. GOV'T CODE ANN. § 211.001 (West 2015) (granting powers for purposes of “promoting public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance”).

51. 485 S.W.2d 773 (Tex. 1972).

52. See *id.* at 779.

53. See, e.g., *Bd. of Adjustment v. Patel*, 887 S.W.2d 90, 93 (Tex. App.—Texarkana 1994, writ denied) (holding that the period of amortization should be determined by the amount of investment at the time that the motel became nonconforming); *Bd. of Adjustment v. Winkles*, 832 S.W.2d 803, 806 (Tex. App.—Dallas 1992, writ denied) (holding that an increase in inventory after the business became nonconforming does not increase the period of amortization); *Bd. of Adjustment v. Winkles*, 832 S.W.2d 803, 806 (Tex. App.—Dallas 1992, writ denied) (holding that an increase in inventory

These cases uniformly relied on *Benners* in assuming the constitutionality of reasonable uses of amortization.<sup>54</sup> However, municipalities do not have complete discretion with regards to amortization.<sup>55</sup> The Texas Supreme Court has warned that the line between police power and takings is “illusory” and requires “a careful analysis of the facts . . . in each case of this kind.”<sup>56</sup> Thus, the prevailing analysis of amortization in Texas focuses on the reasonableness of any amortization period—a fact-intensive, ad hoc inquiry.<sup>57</sup> For example, in *Benners*, the Texas Supreme Court held that the property owner must be “afforded an opportunity to recover his investment in the structures theretofore placed on the property.”<sup>58</sup> In another case, a Texas appellate court held that the reasonableness standard only requires a reasonable opportunity for owners to recover their actual investment in the nonconforming structure, rather than the market value of the structure.<sup>59</sup>

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after the business became nonconforming does not increase the period of amortization); *Murmur Corp. v. Bd. of Adjustment*, 718 S.W.2d 790, 797–98 (Tex. App.—Dallas 1986, writ ref’d n.r.e.) (defining “full value” for recoupment purposes as owner’s actual investment in nonconforming use at the time of the zoning change); *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 945–46 (Tex. App.—Amarillo 1978, writ ref’d n.r.e.) (accepting amortizing as a valid method for recouping investment).

54. See, e.g., *Lubbock Poster Co.*, 569 S.W.2d at 938 (noting that the Texas Supreme Court, in *Benners*, joined the prevailing view of outside jurisdictions by recognizing amortization as a valid exercise of the municipal police power to terminate nonconforming property uses).

55. See, e.g., *Murmur Corp.*, 718 S.W.2d at 801–02 (allowing property owner to continue nonconforming use of land because the board’s order terminating such use was not supported by evidence that the owner had recovered his investment in the structure or value of use). It is unclear if amortization is constitutionally required in Texas and no case law says it is. In other words, the requirement of amortization seems to be more of a case of *noblesse oblige* than a constitutional requirement. In fact, a federal court in Texas upheld zoning changes that immediately halted a business’s operation. See generally *Laredo Rd. Co. v. Maverick Cty.*, 389 F.Supp.2d 729, 739–40 (W.D. Tex. 2005) (upholding an ordinance that shut down a sexually oriented business (“SOB”) that was 80% complete when the ordinance passed because “there are . . . plenty of other areas for the Plaintiff to set up its business”); but see *Ellwest Stereo Theaters, Inc. v. Byrd*, 472 F.Supp. 702, 706–07 (N.D. Tex. 1979) (striking down, on First Amendment grounds, an ordinance that caused a SOB to close immediately).

56. *City of Dallas v. Stewart*, 361 S.W.3d 562, 575 (Tex. 2012) (quoting *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984)).

57. See *City of Univ. Park v. Benners*, 485 S.W.2d 773, 780 (Tex. 1972). (“[T]he validity of the exercise of the police power in effecting zoning changes is not measured by an arbitrary lapse of time but by the reasonableness of the enactment and the fairness of its relationship to the objects sought to be attained.”).

58. *Id.* at 779.

59. *Murmur Corp.*, 718 S.W.2d at 794; see also *Lubbock Poster Co.*, 569 S.W.2d at 941–42 (listing the relevant criteria in determining reasonableness as the amount of actual investment in the structure, investment realization as of the effective date of the ordinance, the life expectancy of the investment, and the existence of lease obligations).

#### IV. NEW ROUTES TO CHALLENGE AMORTIZATION AS A RETROACTIVE LAW

##### A. *Traditional Means of Attacking Amortization*

Property owners usually challenge amortization provisions as a regulatory taking or as an inverse condemnation. Under the current standard for a regulatory taking, “there must be a complete deprivation of the owner’s economically viable use of the property.”<sup>60</sup> This is a difficult standard for many property owners to meet, as a rezone of their property will usually leave them with some, albeit paltry, economic use.<sup>61</sup> Likewise, an inverse condemnation claim is also a difficult claim for property owners to bring. To succeed in an inverse condemnation claim, a plaintiff must demonstrate: “(1) an intentional governmental act; (2) that resulted in [plaintiff’s] property being taken, damaged, or destroyed; (3) for public use.”<sup>62</sup> Thus, to succeed, a plaintiff must prove a regulatory taking first (to satisfy the second prong of the inverse condemnation test), and, as noted above, that is very difficult to do.

Moreover, under Texas law, both claims are preempted by the government’s police power.<sup>63</sup> For an exercise of the police power to be valid and not a taking, it must be: “(1) adopted to accomplish a legitimate goal and substantially related to public health, safety or general welfare; and (2) reasonable and not arbitrary.”<sup>64</sup> In *Pharr*, the court of appeals held that “[c]onsiderations of aesthetics as well as surrounding property values” are legitimate goals.<sup>65</sup> In any event, dispelling any doubt, in *Benners*, as discussed above, the Texas Supreme Court held that amortization is a valid exercise of the police power.<sup>66</sup>

So are there other avenues in Texas law to challenge amortization? The answer to that question is “yes,” but Texas property owners have not taken advantage of them. Specifically, there are two avenues of attack that focus entirely on the retroactive nature of amortization.

60. *Matagorda Cty. v. Russell Law*, 19 F.3d 215, 223 (5th Cir. 1994) (referencing *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 138, n.36 (1978)).

61. *See Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 125 (1978) (“Zoning laws generally do not affect existing uses of real property, but ‘taking’ challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm.”).

62. *City of Houston v. Mack*, 312 S.W.3d 855, 861 (Tex. App.—Houston[1st Dist.] 2009, no pet.) (citing *City of Dallas v. Blanton*, 200 S.W.3d 266, 271 (Tex. App.—Dallas 2006, no pet.)).

63. *City of Pharr v. Pena*, 853 S.W.2d 56, 60 (Tex. App.—Corpus Christi 1993, no pet.).

64. *Id.* (citing *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804–05 (Tex. 1984)).

65. *Id.*

66. *See City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972).

## B. *Amortization is Unconstitutional Because it is Retroactive*

What is a retroactive law? “A retroactive law literally means a law that acts on things which are past.”<sup>67</sup> A law is retroactive when a legislative body adopts a new substantive rule that alters the legal consequences of actions taken under a previously valid legal regime.<sup>68</sup> “[E]very statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed is a retrospective statute.”<sup>69</sup> In determining whether a law is retrospective, “familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.”<sup>70</sup>

Amortization certainly is retroactive—it takes a preexisting, legal use and converts it to a non-conforming, illegal use. It fundamentally changes the way a piece of property may be used, regardless of how long that property has been devoted to that use. Indeed, there are likely few kinds of legislation that better fit the definition of a retroactive law than ordinances creating an amortization period. This makes amortization especially vulnerable to attack in Texas.

### 1. Amortization Violates the Anti-Retroactivity Provision of the Texas Constitution

Unlike the U.S. Constitution, the Texas Constitution explicitly prohibits retroactive civil laws. Specifically, Article 1, section 16 of the Texas Constitution provides: “No . . . retroactive law . . . shall be made.”<sup>71</sup> Despite the clear language of the Constitution, however, Texas courts do not invalidate all laws that operate retroactively. For years, Texas courts applied conflicting, imprecise, and incomprehensible standards to the question of when a law was unconstitutionally retroactive. In *Robinson v. Crown Cork & Seal Co.*,<sup>72</sup> the Texas Supreme Court essentially tore up decades of conflicting case law about how to determine when a law is unconstitutionally retroactive and established a new, three-factor test.<sup>73</sup> This new, three-factor test could have enormous implications for Texas property owners facing amortization of their property.

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67. *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002) (citing *DeCordova v. City of Galveston*, 4 Tex. 470, 475 (1849)).

68. Hyeonjoon David Choi, *Robinson v. Crown: Formulation of a New Test for Unconstitutional Retroactivity or Mere Restatement of Century-Old Texas Precedents?*, 64 BAYLOR L. REV. 309, 312 (2012).

69. 16B Am. Jur. 2d *Constitutional Law* § 735 (2016); A retroactive law is “one which affects acts or rights accruing before it came into force.” *Cardenas v. State*, 683 S.W.2d 128, 131 (Tex. App.—San Antonio 1984, no writ).

70. *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994).

71. TEX. CONST. art. I, § 16.

72. 335 S.W.3d 126, 145 (Tex. 2010).

73. *Id.* at 140–45.

*Robinson*'s three factors are: (1) the nature and strength of the public interest served by the statute as evidenced by the government's factual findings; (2) the nature of the prior right impaired by the statute; and (3) the extent of the impairment.<sup>74</sup> The court further explained:

The perceived public advantage of a retroactive law is not simply to be balanced against its relatively small impact on private interests, or the prohibition would be deprived of most of its force. There must be a compelling public interest to overcome the heavy presumption against retroactive laws. To be sure, courts must be mindful that statutes are not to be set aside lightly . . . . But courts must also be careful to enforce the constitutional prohibition to safeguard its objectives.<sup>75</sup>

Shockingly, no plaintiff has ever challenged amortization in Texas using Article I, section 16. Though, this is perhaps not so shocking when one considers that, in the entire history of Texas prior to *Robinson*, the Texas Supreme Court had struck down legislation as unconstitutionally retroactive only three times.<sup>76</sup> Nonetheless, there is a strong argument that amortization of properties that are not dangerous, nuisances, or do not cause harmful secondary effects violates the prohibition on retrospective laws in Article I, section 16 of the Texas Constitution. Applying the reinvigorated prohibition on retroactivity to lawful, non-harmful properties would likely yield the following results:

*a. Nature and Strength of the Government Interest*

The government will almost always be able to argue that it has legitimate interests in countering noise, traffic, crime, decreased property values, and the ill effects of urbanization.<sup>77</sup> But saying a governmental interest is legitimate is not the same as saying that the interest is sufficient to justify a retroactive law. Given the court's strong presumption against the validity of retroactive laws as demonstrated in *Robinson*, and the court's description of the standard for the government's interest as compelling, it is not likely that the court would find a city's generalized justifications sufficient to overcome the constitutional prohibition. As the *Robinson* court explained, "an important reason for the constitutional prohibition against retroactive laws is to preempt this weighing of interests absent compelling reasons. Indeed, it is precisely because retroactive rectification of perceived injustice seems

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74. *Id.* at 145.

75. *Id.* at 145–46. Those objectives are to protect people's reasonable, settled expectations and to guard against abuses of governmental power. *Id.* at 145.

76. *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 708 (Tex. 2014).

77. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938–39 (Tex. App.—Dallas 1989, writ denied).

so reasonable and even necessary, especially when there are few to complain, that the constitution prohibits it.”<sup>78</sup>

*b. The Nature of the Right and the Extent of its Impairment*

In *Benness*, the Texas Supreme Court held that “property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made.”<sup>79</sup> However, this does not mean that a property owner has no vested rights in his or her property. While one may not have a vested property right in continuing a business, one has other valuable rights. In Texas, “[a] person’s property interests include actual ownership of real estate, chattels, and money. The term ‘property right’ refers to any type of right to specific property, including tangible, personal property. A right is ‘vested’ when it ‘has some definitive, rather than merely potential existence.’”<sup>80</sup> Moreover, “a statute harms vested property rights if it completely shuts down an otherwise lawful business.”<sup>81</sup>

Thus, a business owner facing amortization certainly has a vested property right in his or her real estate, chattels, and building. Moreover, many uses of amortization will result in forcing the property owner to shut down an otherwise lawful business. Therefore, amortization ordinances likely harm vested property rights.

*c. The Extent of the Impairment*

Amortization often targets businesses that city planners believe are unattractive and would purportedly interfere with development, such as auto repair shops, scrap metal dealers, and group homes. These businesses can find it difficult or even impossible to relocate because the attributes that made them unattractive to the bureaucrats who changed the zoning rules in the first place are also unattractive to bureaucrats in other areas. Thus, for many businesses, amortization creates a significant and irreversible impairment of rights.

Put together, these factors suggest that many uses of amortization violate Texas’s prohibition on retroactive civil laws. Moreover, because this prohibition involves a balancing test, the government could

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78. *Robinson*, 335 S.W.3d at 150.

79. *City of Univ. Park v. Benness*, 485 S.W.2d 773, 778 (Tex. 1972); *see also* *Brown v. Town of Corinth*, 515 S.W.2d 722, 725 (Tex. Civ. App.—Fort Worth 1974, no writ) (“[A]n individual’s loss of business, standing alone, does not constitute a constitutional ‘taking’ of property which gives rise to any right to receive compensation from the sovereign.”); *see* *State v. Hammer*, 550 P.2d 820, 826 (Alaska 1976) (holding that a business loss was compensable under the “damaging” provision of the Alaska Constitution and that “[t]o deny compensation for such damages would contravene the policy behind the constitutional provision, that the condemnee should not pay a higher price for a public improvement than do other members of the public”).

80. *Consumer Serv. All. of Tex., Inc. v. City of Dallas*, 433 S.W.3d 796, 805 (Tex. App.—Dallas 2014, no pet.) (citations omitted).

81. *Id.* at 806 (citing *Smith v. Decker*, 312 S.W.2d 632 (Tex. 1958)).

conceivably still amortize businesses that are associated with harmful secondary effects, like strip clubs, or properties that cause environmental problems. In such cases the governmental interest may be sufficiently strong to overcome the presumption against retroactive laws. In situations where the government has weaker interests—such as wanting to produce more tax revenue or to redevelop an area for aesthetic purposes—the property owner would have a much stronger argument. At the very least, a harmless business that is not a nuisance and does not produce harmful secondary effects will be far more secure than it is now.

## 2. Amortization Violates Substantive Due Process Because it is Retroactive

Even if the Texas Constitution's explicit ban on retroactive laws did not exist, amortization would still be on shaky legal ground because it is inherently unfair. Retroactivity is generally disfavored in the law "in accordance with fundamental notions of justice that have been recognized throughout history."<sup>82</sup> As the U.S. Supreme Court has noted, "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."<sup>83</sup>

In *Eastern Enterprises v. Apfel*, five members of the Supreme Court specifically viewed retroactive legislation as a problem of due process, not as an issue that raises takings concerns.<sup>84</sup> In that case, the plaintiff challenged a federal law that established a mechanism for funding health care benefits for coal industry retirees and their dependents.<sup>85</sup> Under the law, the government assigned Eastern the obligation to pay premiums for workers who had worked for the company prior to 1966.<sup>86</sup> Eastern sued, claiming that the law was a taking and that it violated substantive due process.<sup>87</sup> A plurality of the Court held that the law was a taking and declined to reach the issue of whether the statute violated substantive due process.<sup>88</sup> In particular, the plurality held that the legislation was unconstitutional as a taking because "it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."<sup>89</sup> To reach this conclusion, the plurality applied the *Penn Central* balancing

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82. *E. Enters. v. Apfel*, 524 U.S. 498, 532 (1998) (citation and internal quotation marks omitted).

83. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

84. *E. Enters.*, 524 U.S. at 524 (plurality opinion).

85. *Id.* at 498–99.

86. *Id.*

87. *Id.*

88. *Id.* at 537–38.

89. *Id.* at 528–29.

test—a regulatory takings analysis—without explicitly labeling it as such.<sup>90</sup>

Justice Kennedy concurred in the judgment and argued that Eastern’s claims were better analyzed under the Due Process Clause. Specifically, Justice Kennedy argued “the Government ought not to have the capacity to give itself immunity from a takings claim by the device of requiring the transfer of property from one private owner directly to another” (a description that aptly summarizes many uses of amortization).<sup>91</sup> Noting that the constitutionality of the statute turned on the legitimacy of the governmental action, “the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause.”<sup>92</sup> Applying those principles, Justice Kennedy stated that, while the Court has typically been deferential to laws affecting economic interests in due process cases, “the Court has given careful consideration to due process challenges to legislation with retroactive effects.”<sup>93</sup> After listing numerous cases, Justice Kennedy concluded,

If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity.<sup>94</sup>

Justice Breyer, writing for Justices Stevens, Souter, and Ginsburg, agreed with Justice Kennedy that Eastern’s claim was appropriately analyzed under the Due Process Clause and not the Takings Clause.<sup>95</sup> Justice Breyer concluded, “the Due Process Clause can offer protection against legislation that is unfairly retroactive at least as readily as the Takings Clause might, for as courts have sometimes suggested, a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary.”<sup>96</sup> Justice Breyer simply thought that the law was not “fundamentally unfair.”<sup>97</sup>

Notably for Texas property owners, the Fifth Circuit has since adopted Justice Kennedy’s approach to the takings-versus-due-process question for retroactive laws. In *Simi Investment Co. v. Harris County*,<sup>98</sup> the Fifth Circuit noted that a majority of Justices on the Supreme Court found the statute at issue in *Eastern* to raise due pro-

90. *Id.* at 532 (discussing the impact on Eastern’s “investment-backed expectations”).

91. *Id.* at 544 (Kennedy, J., concurring in judgment and dissenting in part).

92. *Id.* at 545.

93. *Id.* at 547.

94. *Id.* at 548–49.

95. *Id.* at 556–57 (Breyer, J., dissenting).

96. *Id.* at 556.

97. *Id.* at 553.

98. 256 F.3d 323 (5th Cir. 2001) (per curiam).



cess concerns and advised that, “[e]xcept in the rare cases of deprivations of property based on, for example, illegitimate and arbitrary governmental abuse, vague statutes, or retroactive statutes, the takings analysis established by the Supreme Court and this circuit should control constitutional violations involving property rights that have been infringed by governmental action.”<sup>99</sup>

Amortization creates a new obligation, imposes new duties, and attaches a new disability with respect to transactions or considerations already passed.<sup>100</sup> Many property owners subject to amortization established and operated businesses in a zoning environment that allowed such a use, only to have their city turn around decades later and tell them that they will not permit the business to continue at its current location. This is primarily a due process violation and a significant one. Because the ordinance is retroactive, the courts should view it with “great severity.”<sup>101</sup>

## V. CONCLUSION

In 2009, the people of the state of Texas amended the Texas Constitution to specifically forbid private takings with the passing of Proposition 11.<sup>102</sup> This amendment also included a provision that “‘public use’ does not include the taking of property under Subsection (a) of this section for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.”<sup>103</sup> Notably, Proposition 11 was a legislatively referred constitutional amendment.<sup>104</sup> The proposal passed out of the House by a vote of 144 yeas–0 nays and the Senate by a vote of 30 yeas–1 nay.<sup>105</sup> The voters passed it with 81% in favor and 19% opposed.<sup>106</sup> The measure was supported

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99. *Id.* at 323–24.

100. Professor Serkin, a strong proponent of amortization and the uncompensated destruction of existing uses, has described amortization as “weakly,” as opposed to “strongly,” retroactive. Serkin, *supra* note 8, at 1264; “[Strongly retroactive laws] change a legal status retroactively.” *Id.* at 1263–64. Amortization is “weakly retroactive,” in that it operates prospectively “but alter[s] the consequences of events that predated enactment.” *Id.* at 1264. Nonetheless, even if amortization is “weakly retroactive,” even a fan of amortization such as Professor Serkin recognizes that such laws are, in fact, retroactive. *Id.*

101. *See generally E. Enters.*, 524 U.S. at 549.

102. *See* TEX. CONST. art. I, § 17(a) (“No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . . and only if the taking, damage, or destruction is for: (1) the ownership, use, and enjoyment of the property . . . by: (A) the State, a political subdivision of the State, or the public at large; or (B) an entity granted the power of eminent domain under law; or (2) the elimination of urban blight on a particular parcel of property.”).

103. TEX. CONST. art. I, § 17(b).

104. H.R.J. Res. 14, 81st Leg., Reg. Sess. (Tex. 2009).

105. *Texas Eminent Domain, Proposition 11 (2009)*, BALLOTPEdia, [http://ballotpedia.org/Texas\\_Eminent\\_Domain\\_Proposition\\_11\\_\(2009\)](http://ballotpedia.org/Texas_Eminent_Domain_Proposition_11_(2009)) (last visited Mar. 17, 2016).

106. *Id.*

by the Governor, Lieutenant Governor, House Speaker, and U.S. Senator Hutchison. The measure was heavily promoted by the Texas Farm Bureau, which argued that the amendment would protect property owners in a state that “takes pride in property ownership.”<sup>107</sup> The National Taxpayers Union similarly argued that the amendment would protect property owners “from arbitrary or corrupt deals where governments take private property for business development.”<sup>108</sup> The “no” vote received precisely \$0 in contributions in opposition to Proposition 11.<sup>109</sup>

The Texas Supreme Court has also made clear that private property rights are paramount in Texas. The court stated:

economic dynamism—and more fundamentally—freedom itself—also demand strong protections for individual property rights. Locke deemed the preservation of property rights ‘[t]he great and chief end’ of government, a view this Court echoed almost 300 years later, calling it ‘one of the most important purposes of government.’ Indeed, our Constitution and laws enshrine landownership as a keystone right, rather than one ‘relegated to the status of a poor relation.’<sup>110</sup>

For the patient municipality and its developer allies, however, these restrictions mean nothing. If the municipality can wait out an amortization period, it can drive existing businesses out of business and force the property owner to sell to developers who are more in line with a planner’s “vision.” And the municipality can do all this without having

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107. *Id.*

108. *Id.*

109. *Id.*; Texans’ antipathy for depriving private entity A of their property to benefit private entity B is also reflected in Texas statutes. *See* TEX. GOV’T CODE ANN. § 2206.001 (West 2015) (limiting the taking of private property only for “public use[s]” and mirroring language in TEX. CONST. art. I, § 17).

110. *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 204 (Tex. 2012) (discussing the reasoning and effect of Proposition 11) (quoting JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, ch. IX, § 124 (1690); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977); *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)); In that regard, the Texas Supreme Court has been very vocal in its support of property rights in recent years. *See City of Houston v. Carlson*, 451 S.W.3d 828, 830–31 (Tex. 2015) (“The right to acquire and maintain private property is among our most cherished liberties. As Locke explained, the value of private property lies not only in its objective utility, but also in any personal investment therein . . . . This Court, in particular, has long recognized the undisturbed enjoyment of private property as a foundational liberty, not a contingent privilege.”) (citations and quotation marks omitted); *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532, 535 (Tex. 2013) (“We have described the right to own private property as fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even constitutions. One of the most important purposes of our government is to protect private property rights. The Texas Constitution resolves the tension between private property rights and the government’s ability to take private property by requiring takings to be for public use, with the government paying the landowner just compensation.”) (citations and internal quotation marks omitted).

to pay a single dime in compensation to the property owner.<sup>111</sup> Thus, even though the Texas Constitution; the peoples' recent amendment of that constitution to protect private property rights; Texas statutes; and Texas Supreme Court holdings strongly suggest that a government policy that drives private entity A out of business so that his or her property can be acquired on the cheap by private entity B is not furthering a legitimate governmental interest, so long as the municipality accomplishes this task using amortization, it need not worry that the courts or the law will stop it.

If Texans are serious about these principles, amortization must end in this state. Cities should stop using it; the Texas Legislature and the Governor should strip municipalities of the power to employ it; and, most importantly, Texas courts should recognize that it is unconstitutional and inequitable. In that regard, it has been decades since the courts in Texas and beyond have revisited the assumptions and conclusions upon which the cases upholding amortization relied. In light of the revolution in property rights jurisprudence that has occurred in recent decades, the time is ripe for Texas courts to undertake a serious constitutional examination of this practice and conclude that it violates a number of fundamental rights guaranteed by the Texas Constitution. Until this is done, unfortunately, Proposition 11 and proud proclamations about the supremacy of property rights in Texas amount to little more than words on paper. If property owners are to be secure in their places of business, then amortization must come to an end.

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111. Critics have rightly called amortization "simply a compensation-avoidance scheme." *HUD's Legislative Guidebook: Its Potential Impact on Property Rights and Small Businesses, Including Minority-Owned Businesses: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 29 (2002) (statement of R. James Claus, Ph.D., Principal, Claus Consulting).

