THE SCENIC RIVER ACTS

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I. Introduction

The Nation's free-flowing rivers and scenic watercourses are in jeopardy. Natural waterfront landscape constantly falls under the developer's bulldozer for the purposes of power, industry, housing and recreation.[1] The gradual disappearance of natural scenic river areas makes it apparent that a program of preservation is necessary. Concerned by this necessity, Justice William O. Douglas in A Wilderness Bill of Rights (1965) wrote:

> We need a new legal framework within which to manage and preserve free-flowing rivers. The two main categories to which we are accustomed are national forests and national parks. But they do not fit the precise requirements of a sanctuary built around a free-flowing river. Such a sanctuary ideally is a long narrow corridor which roads reach but do not penetrate. For the purpose of the corridor is merely to protect the river from civilization. (p. 143)

Efforts to effectuate such a "legal framework" securing scenic "corridors" are embodied in the scenic river acts designed to regulate and control development of land adjacent to rivers and watercourses. This recent legislative activity is unique because of its preoccupation with aesthetics and scenic landscape. Four legislative enactments will be analyzed in light of the common law's historic disapproval of aesthetic considerations in land use regulation.

II. A Synopsis of Aesthetics and the Law

Nuisance

In common law, the general rule was that there were no private or public remedies to be found for unsightly conditions. Nuisance law was one of the earliest methods of regulating private land use. However, the remedies contained in the law of nuisance would only be granted when there was judicial determination of a substantial interference with the particular interest involved.[2] Historically, the interests to be protected were based upon economic or personal security considerations.[3] Courts were reluctant to find that an ugly use of land was a substantial interference with any interest. The philosophy was that the law should not trouble itself with the petty annoyances resulting from an industrialized way of life.[4]

Victor Zey v. Town of Long Beach is an example of a judicial

denial of a request to restrict a distasteful use of land as a nuisance.[5] There, the plaintiff sought to enjoin construction of the city's "comfort station" adjacent to his property. The court followed the traditional line of legal thought, stating that although the aesthetic sense is offended by the comfort station, such an interference is not a nuisance justifying relief. Even though dicta in other cases suggests the need for a private and public aesthetic nuisance remedy,[6] the common law concepts of nuisance conventionally exclude aesthetic considerations in the regulation of another's use of property.

Police Power

The legislative enactments dealing with land use before zoning came of age adopted the principles of common law nuisance.[7] Accordingly, the courts extended the common law disregard of the sensitivity to beauty when dealing with public regulation of land use. Recent authors point out that the judicial position, when construing land use legislation, was "that which is not a nuisance cannot be made one by legislative fiat."[8]

The courts eventually departed from the common law nuisance framework and began to rely upon general welfare concepts of the police power doctrine.[9] With Euclid v. Ambler[10] came the judicial acceptance of police power zoning of inconsistent land uses. However, even after zoning and public welfare concepts were recognized, the courts continued to analyze land use legislation in a manner closely analogous to the judicial analysis of nuisance law.[11] That is, those objectives or interests which would be promoted through nuisance law would be promoted through public land regulation. Therefore, when a community would attempt to use its police power to accomplish purely aesthetic objectives, the traditional action taken by the courts was to strike down the community's effort.[12]

The principle difficulty encountered by the courts was reconciling interests in beauty with "general welfare" concepts of police power in the regulation of private land use. It was stated by an Ohio court that:

> We are remitted to the proposition that the police power is based upon public necessity and that the public health, morals, or safety, and not merely aesthetic interests must be in danger in order to justify its use. There must be an essential public need for the exercise of the power in order to justify its use. This is the reason why mere aesthetic considerations cannot justify the use of the police power.[13]

Also grappling with this difficulty, the New York Court of Appeals stated:

> Public welfare is a concept which in recent years has been widened to include many matters which in other terms regarded as outside the limits of government concern. As yet, at least, no judicial

definition has been formulated which is wide enough to include purely aesthetic considerations.[14]

Even though there are conceptual problems posed by the application of the general welfare doctrine to interests involving natural beauty, in the years following Euclid there has been a cautious judicial recognition of aesthetic considerations in zoning. The majority of courts will now support incidental scenic interests when other valid general welfare objectives are met with the ordinance or statute.[15] Nevertheless, despite this changing judicial attitude, the traditional reluctance to base the exercise of the police power solely on beautification continues to exist in most jurisdictions.

There is a minority of courts which will sustain beauty as the predominate purpose of the exercise of the police power. The Supreme Court's opinion in Berman v. Parker, 348 U.S. 26 (1954), is often cited as the leading authority for this proposition.[16] The Court's dicta in that case emphasized that the concept of general welfare in police power regulation was "broad and conclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthful."[17] The concept is that natural scenery or beauty is a valid public interest justifying legislation solely for that purpose.

Recent judicial decisions demonstrate that the number of courts supporting the minority position is growing.[18] The New York Court of Appeals in People v. Stover,[19] stated that "once it is conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power." Thus, the law is changing with society's attitudes toward the appearance of its environment. There is a greater awareness of the need to implement the police power to preserve those areas which are visually pleasing.

Eminent Domain

In contrast to the application of the police power, the courts traditionally have been less reluctant to allow public "takings" for improvement of the community's surroundings. The courts have recognized, in the area of eminent domain at least, that the community's interest in its beauty and appearance is a legitimate end of government.[20] The reason for this disparity in judicial treatment of police power and eminent domain is not readily apparent. Possibly the courts may feel that the local bodies promulgating zoning ordinances do not represent the will of the entire community in such matters. The more likely rationale is that the courts feel that if the community wants it bad enough, it can have such regulation of land use as long as it pays for it.

The Supreme Court's decision in Berman is relied upon by most courts as extending the exercise of government's

power to the public taking of private land for "uses" and "purposes" which are essentially scenic.[21] Reflecting this majority view, Wisconsin, an early pioneer of the "scenic easement," readily accepted picturesque considerations in the "public use" or "purpose" doctrine of eminent domain. In upholding the constitutionality of the "taking" of scenic easements along the State's highways facing the Mississippi River, the Supreme Court of Wisconsin stated: "The enjoyment of the scenic beauty by the public which passes along the highway seems to us to be a direct use by the public of the rights in land which have been taken in the form of a scenic easement."[22] Therefore, Wisconsin's acquisition of land rights for mere visual considerations was held to be a valid public use and purpose for an eminent domain taking. Due to the increasing legislative[23] and judicial[24] acceptance of the preservation of scenic beauty as a "public purpose" or "use" justifying the power of eminent domain, it is very likely that any future efforts to "take" or greatly regulate private land for aesthetic reasons will be permitted.

III. The Wild and Scenic Rivers Act of 1968

Demonstrating the national concern for the preservation of natural and scenic landscape, Congress passed the Wild and Scenic Rivers Act of 1968, 16 U.S.C. section 1271 et seq. (1968), which established the National Wild and Scenic Rivers System. In section 1271, the Congress declared its policy as follows:

> It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreationsl, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.

A river could be included in this Congressional scheme solely on the basis of its aesthetic or scenic characteristics. This is stressed in section 1273(b): "A wild, scenic or recreational river area eligible to be included in the system is a free-flowing stream . . . that possesses one or more of the values referred to in the section 1271 of this title."

The Act recognizes and classifies three types of rivers for the national system: wild river areas (inaccessible and primitive); scenic river areas (undeveloped); and recreational (accessible and developed).[25] Additions to the river system are either by Congressional action based on study, or through the Secretary of the Interior's approval of a state request for a river's admission to the national system.[26] Further, when a state requests it, a joint state-federal study of a river corridor and its environment for inclusion in the system must be made.[27]

The acquisition and management of the lands adjacent to a designated river is controlled by section 6 of the Act.

The government is authorized by the Act to take fee simple title or scenic easements in the land adjacent to those rivers designated.[28] As noted in the discussion concerning eminent domain and taking for beautification purposes, the effectiveness of these sections which authorize the acquisition of land rights will probably not be hindered by the courts. However, there are significant portions of the Act which must be considered in light of the historic disapproval of visually pleasing interests in land use regulation.

Though the Act provides for extensive condemnation power, such power is restricted when the land adjacent to designated rivers is within the limits of a municipality. In such a case, the power of eminent domain may only be applied when that municipality has a "valid" zoning ordinance which conforms to the purpose of the Act.[29] Unfortunately, this critical portion of the Statute is vague. Possibly Congress intends that if a municipality can not enact a valid ordinance exercising the police power for aesthetic purposes, the federal government may then condemn. Although the Act does not expressly authorize the condemnation of land within a municipality having no conforming ordinances, some authorities support that proposition as the actual Congressional intent for this portion of the Statute in question.[30] If that interpretation is correct, then the United States government may secure, by condemnation, land adjacent to designated rivers despite the reluctance or inability of municipalities to enact conforming zoning ordinances. However, since the Act does not expressly permit it, some courts may refuse to allow the government to condemn land adjacent to designated watercourses within limits of a municipality. If this is the case, the general intent of the Act, that is, to preserve entire rivers and their immediate environments, may be frustrated by municipalities within those jurisdictions which preclude zoning for scenic purposes. Though no courts have had the opportunity to consider this aspect of the Act, it is conceivable that the traditional disapproval of aesthetic considerations in land regulation may hinder the effectiveness of this federal enactment.

IV. State Scenic River Enactments

Michigan

Michigan was one of the first states to establish a system of wild, scenic and recreational rivers through its Natural River Act of 1970.[31] The Natural Resources Commission is authorized to administer and designate natural rivers within the State:

> The Commission may designate a river as a natural river area for the purpose of preserving and enhancing its values for water conservation, its free flowing condition and its fish, wildlife, boating, scenic, aesthetic, flood plain, ecologic, historic and recreational values and uses.[32]

The law qualifies a river for its system if it possesses "1 or more of the natural or outstanding existing values"

listed above.[33] Thus, like the Federal Statute dealing with natural rivers, a river may be designated for the Michigan Natural River System due to its aesthetic and scenic characteristics alone.

The Michigan Act allows the Commission to acquire lands and interests in lands adjacent to the designated watercourses providing the Commission has the consent of the owner.[34] Therefore, the Act does not contemplate the exercise of eminent domain to effectuate its purposes. However, the Act does allow the Commission to promulgate zoning ordinances restricting land use on the lands adjacent to the selected rivers.[35] This zoning power is authorized to be exercised over adjacent lands in incorporated and unincorporated areas.[36] By this power, the State fully intends to preempt the municipal ability to exercise the police power within local boundaries. This again raises the problem of whether zoning ordinances based on pastoral considerations can or will be upheld.

The Michigan Supreme Court, in Wolverine Sign Works v. Bloomfield Hills,[37] supported the view that aesthetics can only be an incidental factor in the exercise of the police power. Recent Michigan cases show that the courts still stand by this traditional view as Michigan does not permit scenic beauty to be a moving factor in the exercise of the police power.[38] Therefore, if the Commission designates a river for inclusion in the natural river system solely on the basis of its scenic values, courts may be compelled to strike down any ensuing zoning ordinances restricting land use for such purposes.

Although the Michigan Act does not contemplate the exercise of eminent domain, condemnation proceedings should not be completely ruled out. The Act allows a component of its river system to become a part of the National Wild and Scenic River System under the Federal Wild and Scenic Rivers Act.[39] As mentioned above, the Federal System does allow condemnation of lands adjacent to designated rivers. However, as also noted above, the courts have had no difficulty in accepting the exercise of eminent domain for aesthetic purposes.

Iowa

Iowa, as another state which has enacted a scenic rivers act, authorizes the State Conservation Commission to designate any river environment to its scenic river system which possesses "outstanding water conservation, scenic, fish, wildlife, historic, or recreational values."[40] The Act also provides that the river area need only possess one of the above values to be designated and administered as a component of the scenic river system.[41] Thus, as with the Michigan and Federal scenic river acts, Iowa's Statute would permit designation solely on the basis of the river's aesthetic value.

The Statute does not expressly authorize the exercise of eminent domain to meet the purposes of the enactment. However, as with the Michigan Statute, eminent domain may be possible since the Act does include a provision allowing

parts of the State's Scenic River System to be included in the National Wild and Scenic River System.[42] Also, the Act in authorizing the State Commission to "preserve and manage"[43] designated areas may imply the power of condemnation. This aspect of the Statute, however, has not been construed by the courts of Iowa.

The Act also does not empower the State Commission to zone and restrict land use of the lands adjacent to included rivercourses. Rather, it allows the Commission to encourage and aid political sub-divisions to enact zoning ordinances and other controls to preserve the values of the designated rivers.[44] Thus, the power and the authority to restrict land use adjacent to selected rivers is delegated to local governmental units and the overall effectiveness of the Act seems to lose much due to this lack of state-wide control.

Iowa goes along with the traditional view that aesthetic considerations in the exercise of the police power for zoning purposes are merely auxiliary; and that a zoning ordinance will only be sustained on the basis of a valid relation to the health, safety and general welfare of a community.[45] With the passage of the Scenic Rivers Act, and the inclusion of a river for mere aesthetic values, the recent Statute and past Iowa case law are in direct conflict. The decisional law has not kept abreast of the Iowa Legislature's recognition of the value and importance of restricting land use for scenic purposes.

Tennessee

Tennessee enacted the earliest state natural river act with the Tennessee Scenic River Act of 1968.[46] The Act classifies qualified river environments as natural river areas; pastoral river areas; and partially developed river areas.[47] The Commissioner of Conservation studies and proposes additions to the State River System,[48] as well as administering and managing those areas designated for the System.[49] In its administration of these areas, the Commission is to consider the "esthetic, scenic, historic, archaeologic, and scientific features of the area."[50]

The Act allows the Commissioner to acquire land adjacent to selected areas by outright purchase in fee title, or to acquire interests in land such as scenic easements.[51] Such land interests may also be "taken" by the Commissioner by exercising the power of eminent domain.[52] The Commissioner is not empowered to enact zoning ordinances restricting the land uses of the land within the designated river areas. However, the Statute specifically restricts the land uses permitted within the limits of the classified scenic river areas.[53] In effect, the Act is a state-wide zoning ordinance restricting land use in all of those areas selected to be a component of the Scenic River System.

As with the other state and federal scenic river acts, the Tennessee enactment is ahead of decisional law in allowing land use restrictions for aesthetic purposes. No courts have construed the Tennessee Scenic River Act, however, the Tennessee courts traditionally have not permitted scenic considerations alone to justify the exercise of the police power in land use regulation.[54] The new natural river

acts are directly incompatible with the long-established common law principles excluding pastoral considerations in land use regulation.

V. Conclusion

The recently enacted scenic river acts are attempts to manage and preserve scenic, free-flowing rivers. They rely essentially on regulatory land use devices such as zoning and scenic easements. Unfortunately there are conceptual and historical difficulties in authorizing the use of the police power for express aesthetic purposes. It is conceivable that courts could frustrate the purposes of these enactments by refusing to permit such an exercise of the police power. At this time there have been no cases construing these statutes to resolve these issues. Notwithstanding the conceptual conflict for many courts, there is a growing minority of jurisdictions which will permit authorization of the police power for purposes solely aesthetic.

Free-flowing rivers must be considered natural resources to be preserved and conserved. The courts should realize that community needs and attitudes have changed to accept this view. It should be understood by the courts that scenic river acts are to save portions of our national heritage before they are lost to man's encompassing development of the land. In this respect such enactments involve more than mere aesthetics, even though statutory language may suggest aesthetics as the ultimate and sole consideration. The courts should look beyond the statutory language. The scenic river acts should be upheld by the courts despite any conceptual or historical conflict which may exist.

Footnotes

1. Samuel Mines, The Last Days of Mankind: Ecological Survival or Extinction 27-48 (1971).

2. Prosser, Law of Torts 598 (3rd ed. 1964).

3. Id.

4. Leighton Leighty, Aesthetics As a Legal Basis for Environmental Control, 17 Wayne L. Rev. 1347, 1349 (Nov.-Dec., 1971); Prosser, Id. at 599.

5. 144 Wash. 582, 258 P. 492 (1927).

6. See e.g., Parkerburg Builders Material Co. v. Barrack, 118 W. Va. 608, 191 S.E. 368, 192 S.E. 291 (1937) (Concurring opinion).

7. Heyman and Gilhool, The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions, 73 Yale L. J. 1119, 1122 (1964).

8. N. Marus and M. Graves, The New Zoning 73 (1970).

9. Heyman and Gilhool, supra, at 1123.

10. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114 (1926).

11. John Cribbet, Changing Concepts in the Law of Land Use, 50 Iowa L. Rev. 245, 257 (1965).

12. J. Dukeminier, Jr., Zoning for Aesthetic Objectives: A Reappraisal, 20 Law & Contemp. Prob. 218, 219 (1955).

13. Youngstown v. Kahn Bros. Bld. Co., 112 Ohio St. 654, 148 N.E. 842 (1925).

14. Dowsey v. Village of Kensington, 257 N.Y. 221, 231, 117 N.E. 427, 430, 245 N.Y.S. 819 (1931).

15. L. Masotti and B. Selfon, Aesthetic Zoning and the Police Power, 46 J. Urban L. 724, 774 (1969); E. Yokley, Zoning Law and Practice 30 (3rd ed. 1965); Ira Yellin, Visual Pollution and Aesthetic Regulation, 12 The Mun. Atty. 186 (1971).

16. See e.g. State ex. rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 272, 69 N.W. 2d 217, 222, cert. denied, 350 U.S. 841, 76 S.Ct. 81 (1955).

17. 348 U.S. at 33 (1954).

18. Oregon City v. Hartke, 240 Ore. 35, 400 P. 2d 255 (1965); Cromwell v. Ferrier, 19 N.Y. 2d 263, 279 N.Y.S. 2d 22, 225 N.E. 2d 749 (1967).

19. 12 N.Y. 2d 426, 467, 240 N.Y.S. 2d 734, 738, 191 N.E. 2d 272, 275 (1963).

20. Anderson, American Law of Zoning 501 (1968).

21. Id.

22. 31 Wis. 2d 256, 265, 142 N.W. 2d 793, 797 (1965).

23. E.g., Wisc. Stat. 15.60(b)(K)(1965); Highway Beautification Act of 1965, 23 U.S.C. Sections 131, 136, 319 (1965).

24. See discussion, Roger A. Cunningham, Scenic Easements in the Highway Beautification Program, 45 Denver L.J. 168 (1968).

25. 16 U.S.C. Section 1273(b) (1968).

26. 16 U.S.C. Sections 1273(a), 1275(a), 1276(b) (1968).

27. 16 U.S.C. Section 1276(c).

28. 16 U.S.C. Sections 1274, 1277(a).

29. 16 U.S.C. Section 1277(c).

30. A. Dan. Tarlock and R. Tippy, The Wild and Scenic Rivers Act of 1968, 55 Cornell L. Rev. 707, 719 (1970).

31. M.C.L. Section 281.761 (Supp. 1971).

32. M.C.L. Section 281.763.

33. M.C.L . Section 281.764.

34. M.C.L. Section 281.765.

35. M.C.L. Section 281.768; 281.773.

36. Id.

37. 279 Mich. 205, 271 N.W. 823 (1937).

38. E.G., Sun Oil Co. v. Madison Heights, 41 Mich. App. 47, 199 N.W. 2d 525 (1972); Central Advertising Co. v. City of Ann Arbor, 42 Mich. App. 59, 201 N.W. 2d 365 (1972).

39. M.C.L. Section 281.774.

40. Iowa Code Ann. Section 108 A.2 (Supp. 1971).

41. Iowa Code Ann. Section 108 A.3.

42. Iowa Code Ann. Section 108 A.7.

43. Iowa Code Ann. Section 108 A.3.

44. Iowa Code Ann. Section 108 A.6.

45. Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W. 2d 842 (1956).

46. Tenn. Code Ann. Sections 11-1401 et seq. (1973).

47. Tenn. Code Ann. Section 11-1403.

48. Tenn. Code Ann. Section 11-1405.

49. Tenn. Code Ann. Section 11-1406.

50. Id.

51. Tenn. Code Ann. Section 11-1409.

52. Tenn. Code Ann. Section 11-1410.

53. Tenn. Code Ann. Section 11-1411.

54. Norris v. Bradford, 204 Tenn. 319, 321 S.W. 2d 543 (1959); Hagaman v. Slaughter, ____ Tenn. ____, 354 S.W. 2d 818 (1962).