# EMINENT DOMAIN v. ZONING FOR SCENIC CORRIDORS

Ann Louise Strong
Acting Director, Institute of Legal Research
University of Pennsylvania Law School

The topic I was assigned was "Eminent Domain vs. Zoning For Scenic Corridors". I would not phrase the topic in this way, because I believe that these approaches are conjunctive, not disjunctive. I think we must be interested in both zoning and eminent domain, including easement acquisition and fee acquisition. Each is appropriate under different circumstances for the protection of scenic corridors.

I assume that in defining scenic corridors our principal interest lies in what Professor Lewis has just been describing -- preservation of a vista, with the scale and character of the vista dependent upon the type of topography, planting, and degree of urbanization in the area. In rural areas, the scale may be adjusted to take advantage of the distant view. In urban areas, the scale will be smaller, as illustrated by the Taconic Parkway coming into New York where a buffer is provided between existing and future development and the highway. The kinds of restrictions which may be used to achieve scenic corridors include those which buffer development and those which control signs -- probably restricting advertising so that it relates principally to services offered along the scenic highway, giving both directions and advertising the facilities available.

In putting restrictions on property in the area adjoining the highway, whether one acts through zoning or easement acquisition or fee acquisition the effect of the restrictions is to deprive the private property owner of a certain degree of his rights in property in return for the achievement of what has been determined to be a public purpose. Although we include safety as a purpose, beauty is really the major purpose in the design of scenic corridors. So, first one has to assume that there has been a public determination by either the federal, state, or local legislative bodies that achieving beauty is a public purpose which warrants some form of restriction on use. In choosing the mechanism, whether it is zoning or acquisition or some intermediate alternative, the public body that is taking the action has to consider whether the loss in property values that will occur is going to be small or whether it is going to be great; whether it is going to occur as soon as the restriction is placed on the land, or whether it can be anticipated to occur in the near future or the

distant future; whether the loss relates only to the restricted land, or whether it relates to adjoining portions of the same tract. For example, if you restrict a farmer from any development of a 350 foot strip, as along the Great River Road in Wisconsin, what does this do to his ability to sell the remaining portion of his farm for some kind of development?

In the really rural areas, I believe there is so little development value that virtually no loss will occur as a result of the kind of restriction I have been discussing; here zoning alone will suffice. I am quite critical of the new Federal billboard control legislation which chooses to depend upon one form of control and rejects others. Under it, we may find ourselves paying when we should not, when we have not caused any loss to the landowners. This is likely to occur in very rural areas where far and away the most extensive mileage to be controlled for scenic highways is located.

Of course, in a presently rural area where one can anticipate development occurring in the near future, and where the land already bears a development value, placing restrictions on the land which limit development and advertising obviously will impose a loss on the land. At this point the public will have to begin to pay for its restrictions. Probably in these circumstances an easement will be adequate, although if the anticipated development value is for industrial use, a major interchange, or something such as this where the land value is enormous, then probably the loss imposed by the restrictions will be so considerable that the fee value should be acquired.

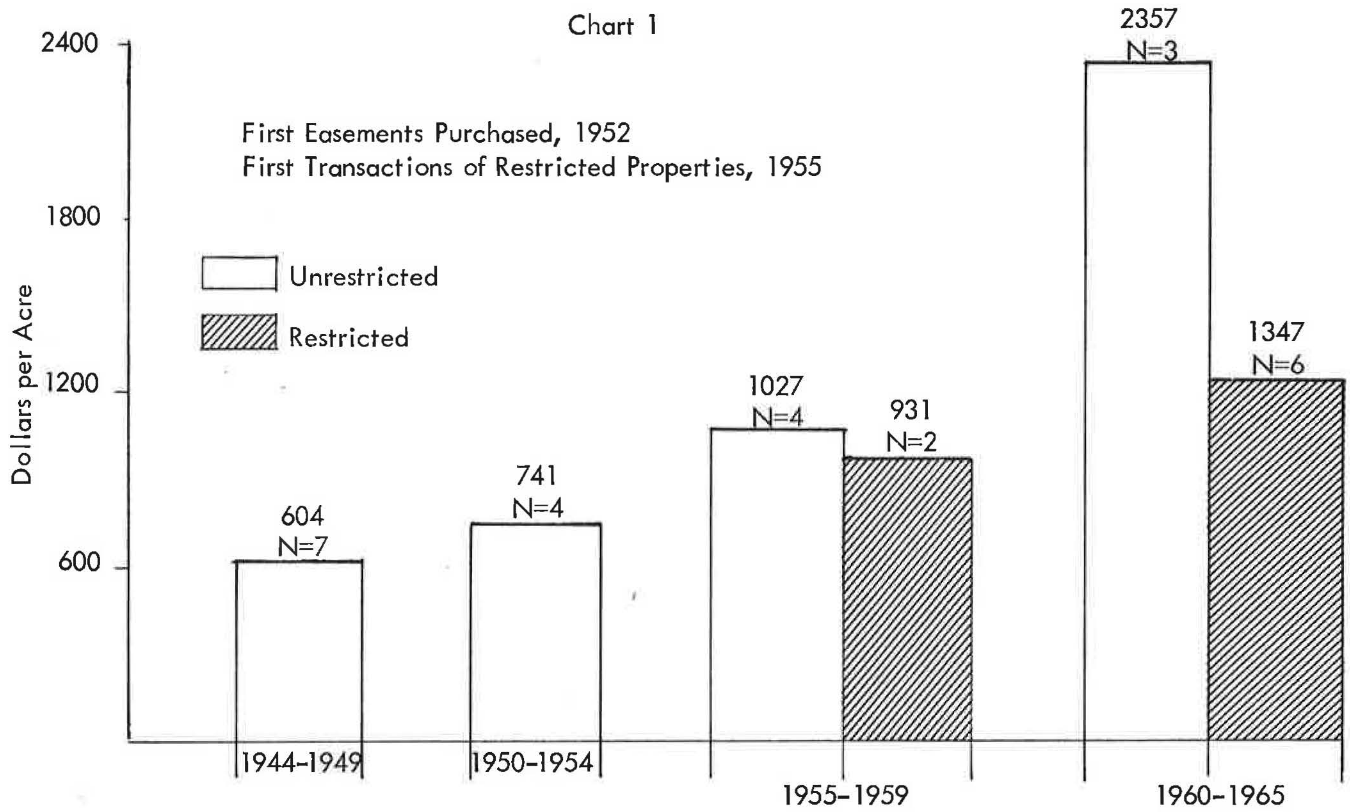
In urban areas where a scenic corridor is to be protected, there is likely to be a severe loss in property value, in which case fee acquisition would seem to be the only answer. This would not always hold true; if for instance a scenic corridor passes through an entirely residential area which has low density development; then the loss may not be great. I can cite an example in Philadelphia: the Mill Creek area in Lower Merion Township directly adjoining the city. Here is a scenic corridor which has been preserved on a voluntary basis by property owners through restrictive covenants which they have entered with the township. Because of the low density development of the area, over a 25 year period there has been only a slight loss in value as a result of the restriction.

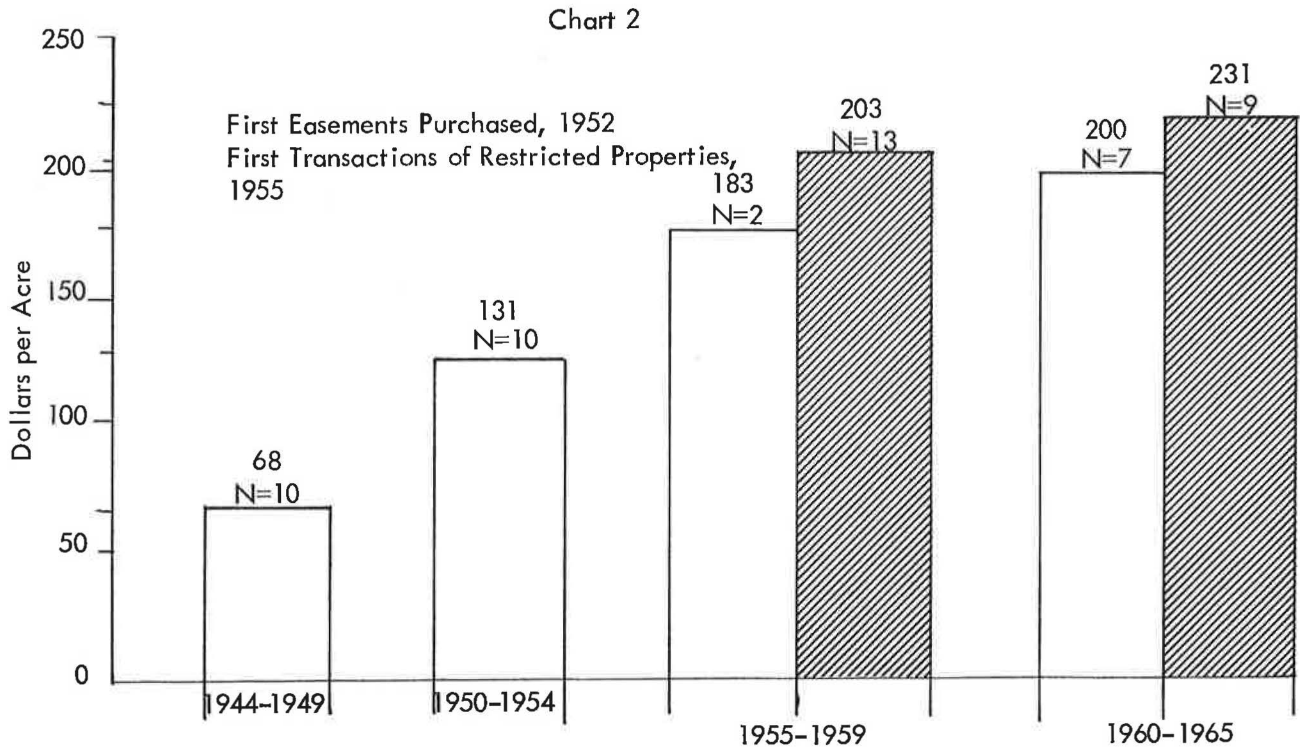
Up to the present time, one of our major problems in choosing which to use -- zoning, easements or fee acquisition -- in a particular case is that we do not have sufficient guidelines as to how much loss actually is going to occur once we place controls on the land. This

past summer, William Matuszeski, a law student working for me, investigated some experiences with easements, trying to determine what had happened to land values in the years since the easements had been obtained. I do have some results from his work analyzing property sales along Great River Road in Wisconsin. This is the road along the Mississippi River on which Wisconsin started acquiring scenic easements back in 1952. The portion of Great River Road studied was near LaCrosse, a city of about 70,000 people. The terms of the easements prohibit signs and dumping, restrict tree cutting, and fix a 300 foot minimum lot frontage. The easement extends to a depth of 350 feet. In effect, the easement imposes a 2 acre lot for residential purposes.

In the area studied this summer, the easement cost ran from 5 to 30 percent of the fee cost. Eighty sales of property subject to these easements or in a control area were analyzed to show what had happened to the value of the land subject to the easement as compared to similar land in the control area. Two categories are shown on Chart 1 -- land subject and not subject to scenic easements. All land included consists of lots three acres or less in size located quite near the city of LaCrosse (see Chart 1). This is land that has immediate value for development. The fact that it is already subdivided in three acre or smaller lots indicates that development pressure is present. On this chart, the unshaded columns are the control area, subdivided by time of sale as follows: 1944-1949, 1949-1954, 1955-1959, and 1960-1965. The sale prices in this control group start at $500 and rise almost to $2,400. With respect to the land restricted by the easements, (the shaded columns) the first sales did not occur until 1955, but in the period 1960-1965, there is a considerable divergence between the sales prices for these parcels and for the parcels not restricted by the easements. This is far too small a sample to claim statistical reliability, but it is all that was available at this time.

Chart 2 compares sales of parcels three acres or greater in size. Most of the parcels, both those subject to the easements and those in the control area, were located in rural areas where there was very little development pressure. Here the pattern is entirely different. Values for the control range from $70 up to $230, and the land subject to the scenic easements, remarkably, has a slightly higher average sale price per acre than the unrestricted land. I suspect that if the sample were larger, one might find that it just about evens out. Again this seems to bear out the earlier assumption that in an area




Great River Road
LaCrosse and Vernon Counties, Wisconsin
Price Paid Per Acre, Transactions of Vacant Land Up to 3 Acres, 1944-1965

such as this one, which is far from development pressure, it really was not necessary to pay at all for the restrictions since they had no effect on market value.

I therefore conclude that all of you ought to consider a range of legal devices, and relate your choice among them to what you anticipate will be the loss caused by your restriction.

## LANDSCAPING AND SCENIC ENHANCEMENT

Joseph D. Buscher
Special Assistant Attorney General
Maryland State Roads Commission

My subject assignment for this panel is Title 3 of the Highway Beautification Act of 1965 which title has to do with Landscaping and Scenic Enhancement. I could say to you very truthfully I do not have the solution to your problems or know the answers to your questions, and thank you and sit down.

However, I shall attempt in a few minutes to demonstrate how little I know about the subject even though I attempted to get clarification and guidelines as late as the day before yesterday from the Office of the Bureau of Public Roads here in Washington.

Section 319 (a) of the Federal Aid Highway Act has been on the books since, I believe, the inception of the Interstate System. Under the provisions of this section the states were permitted to include as part of construction the cost of certain landscaping and roadside development. The language of this section has, under the 1965 Act, been broadened. If Section 319 (a) is used for landscaping and scenic enhancement purposes, it is on an applicable matching fund basis -- 90-10 on the interstate, 50-50 on the federal aid primary.

Also as part of the Highway Beautification Act of 1965 Section 319 (b) was added. Under the provisions of this section there is allocated to the States an amount equivalent to 3% of the federal aid