Valuation of Advertising Rights

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"ADJACENT to the heath, and facing a certain road, is a public house called the Princess of Wales; and on the heath and close to the public house, and on the opposite side of the road, is a signpost fixed into the soil of the heath, with the sign and name of the public house or other inscription relating to the public house."[1]

The signpost had stood for many years but blew down one night, and Mrs. Hoare, the innkeeper, started to erect a new one. The Metropolitan Board brought an action against Mrs. Hoare for violating the Metropolitan Commons Act of 1866 regarding encroachments on the heath. The Act also provided that no estate or right of a profitable or beneficial nature could be taken without consent unless compensation was paid.

The Court found that Mrs. Hoare was not guilty of violating the Act because, as Justice Blackburn said, "The question is, whether the right to erect and repair the signpost is an estate, interest or right in, over or affecting the heath. It is difficult to see why it is not. It is a right which the lord of soil could grant."[2]

Because Mrs. Hoare's sign was a valuable property right, compensation must be paid for its proscription.

This case may not be the wellspring of our troubles, but it was the earliest one I could find which held the placing of a sign to be a valuable property right.

How do we regulate and control these judicially pronounced rights but legislatively determined eyesores?

Two tools resorted to are eminent domain and police power.

"The effectiveness of eminent domain is restricted by the necessity that the purchase must be for public use, by the complexity of administrative precedures [sic] and by the high cost of reimbursing property owners,"[3] but "police power is not restricted to the suppression of nuisances. It includes the regulation of the use of property to the end that the health, morals, safety and general welfare may not be impaired or endangered."[4]

The use of police power to eliminate what have come to be regarded as property rights has been closely scrutinized by the courts, all of which seem to need at least one of the magic ingredients of health, welfare or morals present, in varying degrees, before the remedy of police power is considered constitutional. Anything that falls short is a deprivation of property without compensation.

Holmes admonished in 1922 that, "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[5]

Fortunately, the courts are rapidly retreating from the bellwether New Jersey case regarding the control of advertising based in part on aesthetics, in which the Court said, "we think the control attempted to be exercised is in excess of that essential to effect the security of the public. It is probable that the enactment... of the ordinance was due rather to aesthetic considerations than the considerations of the public safety," and held the ordinance invalid.[6]

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[1] Hoare v. The Metropolitan Board of Works, LR. 9 QB 296 (1874).
[2] Id. at 300.
[3] Grant v. Mayor and City Council of Baltimore, 212 Md. 301; 129 A. 2d 363, 365-66.
[4] City of Los Angeles v. Gage, 274 P. 2d 34, 38 (1954).
[5] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).
[6] City of Passaic v. Paterson etc., 72 NJL 285, 6 Atl. 267, 268 (1905).

Although the courts have not adopted a rule whereby the aesthetic is the sole factor in a valid exercise of police power, most courts confronted with the problem have wed the aesthetic to a suitable mate—safety or morals—to form an acceptable union. In most instances these are shotgun weddings, and an oft-quoted adage points this out succinctly: "Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency."[7] Berman v. Parker, however, gives an indication of what the United States Supreme Court might do if cases are brought before it where aesthetics alone is the basis for the exercise of police power.[8] And the Kentucky Supreme Court has gone so far as to say with respect to the billboard industry's efforts to show that signs along the highway are not inimical to traffic safety, that even if it "chipped a stone [it] could not destroy the mosaic of public welfare."[9]

The 1958 Highway Act spawned much litigation, but the attacks on legislation regulating outdoor advertising adjacent to the Interstate Highways were generally parried by the argument that "the safety, well-being and legitimate enjoyment of the public in the use of the highways is the paramount consideration of the bill."[10]

In retrospect, it now seems so simple when all we had to do was to regulate advertising along a highway that was not yet built, when the "valuable right" was worth little or nothing. Now we are called on to control and remove signs presently in existence. How will the courts view the use of police power or condemnation for the elimination of these signs?

We have seen where the control of outdoor advertising adjacent to an Interstate was an important public gain. Is that gain less because it is to be derived from beautiful and safe primary highways rather than from beautiful and safe Interstate highways? Maryland's highest court seems to think this makes no difference.

> The distinction between an ordinance that restricts future uses of land and one that requires existing uses to stop after a reasonable time, is not a difference in kind but one of degree, and in each case, constitutionality depends on overall reasonableness, on the importance of public gain in relation to the private loss.[11]

The United States Supreme Court has said that "police power is the least limitable of the powers of government. . . and extends to all the great public needs."[12] We must operate on the assumption that the same public needs are present for primary highways as many of today's courts have held those needs present for Interstate highways.

"The earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interest to all concerned."[13] Nonconforming uses were allowed so as not to antagonize the owners of the very things the zoning laws sought to eliminate. It was expected that they would be few and would quickly disappear. Because there is a greater value in

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[7] Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5, 6 (1932). See also New York State Thruway Authority v. Ashley Motor Court, Inc. 10 N.Y. 2d 151, 176 N.E. 2d 566 (1961) (any showing of considerations such as "maximum safety," the prevention of "unreasonable distraction" or "confusion" coupled with aesthetics is a valid exercise of police power), and In Re Opinion of Justices, 103 N.H. 268, 169 A. 2d 762 (1961).

[8] "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it," 348 U.S. at 32.

[9] Moore v. Ward (Ky.) 377 S.W. 2d 881, 884.

[10] In Re Opinion of Justices, 103 N.H. 268; 169 A. 2d 762 (1961).

[11] Grant v. Mayor and City Council of Baltimore, 212 Md. 301;129 A. 2d 363, 369.

[12] People v. Nebbia, 26 N.Y. 259, 270; 183 N.E. 694, 699: Affd. 291 U.S. 502.

[13] Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A. 2d 363, 365.

having a monopolistic nonconforming use, as highway lawyers know from condemnation experience, and because of the many abuses by zoning boards granting variances, these nonconforming but lawful uses have not vanished.

Pre-existing lawful nonconforming uses have not faded out or eliminated themselves as quickly as has been anticipated, so "zoning zealots" have been casting about for other methods or techniques to hasten the elimination of nonconforming uses. In this process, the eminent domain power has been used only on rare occasions, primarily because of the expense of compensating damaged property owners. At the same time, however, increasing emphasis has been placed on the "amortization" or "tolerance" technique which conveniently bypasses the troublesome element of compensation. The "amortization" technique the Missouri court referred to in a recent case is nothing more than this: the cessation of the extraneous use after a certain period of time based on the normal useful remaining life of the use.[14] Judge Van Vorhees in his dissent in Harbison v. City of Buffalo (4 N. Y. 2d 553; 152 N. E. 2d 42) called the term an "empty shibboleth" because it was not based on an amortization theory, and does not have the same meaning in zoning that it has in law or accounting. It is true that the zoning meaning is different from the accounting meaning, but it is proving to be an increasingly useful concept in land-use control. Amortization in zoning could be called the legislated limits of a person's patience.

One California Court has said, "it would seem to be the logical and reasonable method of approach to place a time limit upon the continuance of existing nonconforming uses, commensurate with the investment involved and based on the nature of the use; and in cases of nonconforming structures, on their character, age and other relevant factors."[15] The use of the amortization method of eliminating nonconforming uses has been sustained in many instances.[16] Other courts, although not ruling on the validity of the amortization theory directly, have indicated that it would be sustained in a proper case.[17]

"Aesthetic considerations are of sufficient potency for the legislature to find a public necessity for this type of legislation," the Kentucky court has declared. "We have recently considered that question and have accepted the aesthetic considerations as justifying the exercise of police power."[18]

> One of the most important and far-reaching developments in Kentucky within recent years has been the construction and improvement of its major highways. Many concepts of twenty years ago are obsolete. Concepts today may be obsolete twenty years from now. This is where the legislature

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[14] Hoffman v. Kineally, 389 S.W. 2d 745, 750 (1965). While the Special Judge A.P. Stone in writing for the Court (Hyde dissenting) uses language generally found in a sour grapes dissent, he does recognize the problem of getting that famous "pig" out of the parlor and back in the barnyard (Euclid v. Ambler Realty Co. 272 U.S. 365), but he conveniently harks back to the body of law which has grown up since the "zoning zealots" first let a nonconforming use stay, and closes his eyes on the laudable purpose of zoning.

[15] City of Los Angeles v. Gage, 274 P. 2d 34.

[16] Standard Oil Co. v. City of Tallahassee, 183 F. 2d 410, cert. den. 340 U.S. 892; Livingston Rock etc. Co. v. County of Los Angeles, 483 Cal. 2d 121, 272 P. 2d 4.; City of Los Angeles v. Gage, 274 P. 2d 34; State ex rel. Dema Realty Co. v. MacDonald 168 La. 172, 121 So. 613 (1921); State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752. 123 So. 314 (1921); Grant v. Mayor and City Council of Baltimore, 212 Md. 313, 129 A. 2d 363; Harbison v. City of Buffalo 4 N.Y. 2d 553, 152 N. E. 2d 42.

[17] Village of Oak Park v. Gordon, 32 Ill. 2d 295, 205 N.E. 2d 464; Stoner McCray System v. Des Moines, 247 Iowa 1313, 78 N. W. 2d 843, 58 ALR 2d 1304.

[18] Jasper v. Commonwealth, 375 S. W. 2d 709, 711 (Ky.). Here the Court held "the obvious purpose of this act is to enhance the scenic beauty of our roadways by prohibiting the maintenance of unsightly vehicle graveyards within the view of travel thereon. While there may be a public safety interest promoted, the principle objective is based upon aesthetic consideration. Though it has been held that such considerations are not sufficient to warrant the invocation of police power, in our opinion the public welfare is not so limited."

> plays its part in the social order. Automobile traffic and highways play a bigger role in public life everyday. The extent or method of their regulation must be left to the legislature if the means bear reasonable relationship to a legitimate end.[19]

The Kentucky statutes under consideration in the Moore case regulate outdoor advertising within 660 feet of the right-of-way of an interstate or limited-access highway, and the statues were upheld.[20] Could the Kentucky court take an opposite view of the state's police power when the question of regulation of signs adjacent to primary highways comes under consideration? I do not see how it could consistently do so, nor could the other states which have pronouncements on this question. Kentucky, in its billboard act, used a five-year tolerance or amorization period; on the expiration of that time, existing signs erected prior to the act must be removed. In this respect the state of Kentucky did what the city of Baltimore did in its municipal ordinance in the Grant case, where the city sought the removal of lawful nonconforming billboards in a residential area, and set five years as the amortization period. The Maryland court held that this was a valid exercise of police power.

Most cases upholding the amortization method involve municipalities, but this fact does not weaken the parallel between the two types of regulations.

> A municipality has no inherent power to enact a zoning ordinance. The power to do so results from statutory or constitutional authorization. The governmental authority known as the police power is inherently an attribute of state sovereignty that belongs to the subordinate governmental division when and as conferred by the state either through its constitution or valid legislation.[21]

Some courts which are hesitant to allow the control of outdoor advertising by police power have no difficulty where the exercise of eminent domain is used for the same purpose. Where eminent domain is used, it appears that aesthetics alone will be sufficient to show public necessity for the taking.

The Missouri court demonstrates this in two recent cases.[22,23] The Hoffman case refused to allow the city of St. Louis to use the amortization method in eliminating a nonconforming use; but in 1923 the court allowed Kansas City to acquire a strip of land by condemnation adjacent to a street to prohibit any use of the property except as a greensward, saying:

> [T]here is not a single argument or reason advanced in favor of the constitutionality of an act or ordinance providing for a public park, or for a parkway along the street between the city block and the driveway, over which the public cannot travel, which does not apply to the ordinance in this case.
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> The parkway along the street is not traveled; it is not taken in possession by the public in the sense that the public occupies it; it is merely ornamental, that tends to enhance the attractiveness of the street and the value of the property upon the street; it has an educational value that promotes the physical enjoyment of the people who travel the street.[24]

The U. S. Supreme Court has said:

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[19] Moore v. Ward, Ky., 377 S.W. 2d 881, 884.

[20] KRS 177.830-177.990 (1960).

[21] Peterson v. Vasak, 162 Neb. 498, 76 N.W. 2d 420, 422. See also Schloss v. Jamison, 136 S.E. 2d 691, 695.

[22] Hoffman v. Kineally, 389 S.W. 2d 745 (1965).

[23] In Re Kansas City Ordinance No. 39946, 298 Mo. 169, 252 S.W. 404, 28 ALR 295 (1923).

[24] Id. at 409.

> It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.... Once the object is within the authority of Congress the right to realize it through eminent domain is clear.[25]

An earlier statement on the same subject can be found in the case of Commonwealth v. Boston Advertising Co.,[26] which held:

> [T]hat the promotion of the pleasure of the people is a public purpose for which money may be used and taxes laid even if the pleasure is secured merely by delighting one of the senses.... The question here is not the power of the state to expend money or to lay taxes to promote aesthetic ends, or to regulate the use of property with a few to promote such ends. It is the right of the state by such regulation to deprive the owner of property of a natural use of that property without giving compensation for the resulting loss to the owner.

Also the Minnesota Supreme Court, in upholding condemnation for purely aesthetic purposes where no land was actually taken but the use of the land restricted, has said, "It is time for the courts to recognize the aesthetic as a factor in life."[27]

The definitive treatise on municipal corporations states as a general proposition "that the use of the power of eminent domain to effect zoning may be essential to cause the removal of existing structures which are entitled to constitutional protection against removal under police power. The use of condemnation to zone occurred in some instances before complete recognition was given by the courts to the full power of zoning under the police power."[28]

In the vast majority of the states, eminent domain is predicated solely as an attribute of sovereignty and no constitutional provision is needed for its exercise, but it exists in absolute and unlimited form.[29] As with zoning, the power of eminent domain has to be delegated to lesser subdivisions to cloak them with the authority to condemn property for public uses.[30]

No court in deciding the constitutionality of a zoning act which gives the state agency the power to zone adjacent to highways throughout the entire state could hold that a state has less power in this respect than its municipalities. The state must have at least as much power as it can delegate. This must hold true for a state's acquisition of advertising rights by eminent domain function.

Since 1959 North Dakota has acquired all advertising rights 660 feet on either side of the Interstate right-of-way limits. Fifty dollars per mile for each side of the Interstate has been the amount used in the state's appraisals, and the state highway department has been successful in having this accepted by the landowners. Naturally, if the landowner goes to court, his damages for the loss of advertising rights trebles, but the landowners and their appraisers have not been persuasive in convincing the jury of their loss.

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[25] Berman v. Parker, 348 U.S. at 33.

[26] 188 Mass. 348; 74 N.E. 601; 69 LRA 817; 108 Am. St. Rep. 3 (1905). Massachusetts mellowed sufficiently by 1935 to hold a statewide use of police power to prohibit signs which interferred with natural beauty or historic sites valid saying: "It is, in our opinion, within the reasonable scope of the police power to preserve from destruction the scenic beauties bestowed upon the Commonwealth by nature in conjunction with the promotion of safety or travel on the public ways and the protection of travelers from the intrusion of unwelcome advertising." General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149 193 N.E. 799, 816 (1935).

[27] State ex rel Twin City etc. v. Houghton, 144 Minn. 1, 176 N.W. 159, 162.

[28] 8 McQuillen, Municipal Corporations, Sec. 25.33 (1965 rev. vol.).

[29] 1 Nichols, Eminent Domain, Sec. 1.14 (2) 3d ed.

[30] Spencer v. Village of Wallace, 153 Neb. 536, 45 N.W. 2d 473, 478; Emmanuel v. Twinsburg Tp. 94 Ohio App., 114 N.E. 2d 620; Richardson v. Cameron County (Texas) 275 S.W. 2d 709.

North Dakota, like Kentucky, has the power to control billboards only adjacent to Interstate and limited-access highways.[31] The use of highway funds for the purchase of advertising rights has been challenged on antidiversion grounds and the Supreme Court in the case Newman v. Hjelle upheld the constitutionality of such acquisitions.[32]

To control advertising on the primary highway system North Dakota will have to have appropriate legislation as, undoubtedly, will most other states. North Dakota needs both police power legislation and eminent domain legislation to deal effectively with the primary highway system. It needs police power legislation to designate the highway commissioner to be the zoning authority for the whole state highway system to implement an amortization basis for existing structures. But, more importantly, our eminent domain statute needs to be amended to include acquisition of advertising rights along primary highways as well as the Interstates. It is felt that North Dakota, apart from being able to control advertising adjacent to Interstates, has the authority to prohibit signs from being erected adjacent to the primary system now that the Commissioner has exercised what police power he has.

On December 3, 1965, the Commissioner acting pursuant to Section 24-04-01 NDCC[33] promulgated an order under the Administrative Agencies Practices Act (the order has the stamp of legality by the Attorney General), prohibiting the erection of billboards after that date from an area within 660 feet of the nearest edge of the right-of-way along both the primary and Interstate system, unless his permission is obtained. A companion order was also issued prohibiting the establishment of junkyards within the 1,000 feet prescribed by the Highway Beautification Act.

Manipulation of the statute relied upon by the Commissioner's authority to control the erection of billboards subsequent to the promulgation of the order was held to be a valid type in the case of Brown v. McMorran 257 N. Y. S. 2d 74 where the court said:

> [I]n our opinion, Sec. 85 of the Highway Law directs the Superintendent of Public Works to do all acts necessary to comply with the Federal Aid Highway Acts (23 U.S. Code, Sec. 101 et seq.) and the rules and regulations promulgated thereunder. The state statute (Highway Law, Sec. 85) evinced the clear intent of the state legislature to secure all the funds allotted to the state by the Federal Government for construction of roads in the Interstate system. Therefore, unless the State Superintendent of Public Works complied with the conditions imposed by the Federal Highway Administrator and secured the latter's approval, the intention of the legislature would be defeated.

The outdoor advertising industry in North Dakota has abided by the highway department's ruling on this matter. But this does not include billboards in existence before the issuance of the Commissioner's order, for he feels he should have a clear statute granting him that power.

Naturally, if this legislation is passed in 1967 the state can purchase advertising rights on every mile of primary highways, and the Commissioner will be able to set a five-year amortization basis on all signs. However, inasmuch as this legislation will be enacted in 1967 the five-year amortization period will bring us into 1972, or a few years beyond the date set by the Beautification Act for the accomplishment of its purpose. To obviate the loss of any income by the states' failure to live up to the

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[31] NDRC 24-01-32.

[32] 133 N.W. 2d 549 (1964).

[33] Assent to Federal aid given.—The legislative assent required by section 1 of the act of Congress approved July 11, 1916, Public Law No. 156, entitled "An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," is hereby given. The commissioner is authorized and empowered to make all contracts and to do all things necessary to co-operate with the United States government in the construction of roads under the provisions of the said act or other act of Congress that hereafter may be enacted, including the Federal-Aid Highway Act of 1950 regarding secondary roads.

Beautification Act, our new legislation will be created for one purpose: to merge police power and eminent domain for the cheapest and most effective removal of nonconforming signs. The five-year amortization period will be placed on existing structures and eminent domain will be used to acquire the remaining years of the amortized signs rather than purchasing the remaining economic life of the advertising devices. Hopefully, North Dakota will be able to purchase only the amortized remaining life which will be anywhere from 0 to 5 years, and this will cut the cost of acquisition considerably.

Based on one example of a new, well-constructed sign, the following table shows the difference between acquisition costs for the remaining economic life without an amortization period and acquisition of the sign whose life is fixed at five years by police power:

Estimated net income per annum	$100.00		
Estimated economic life of sign	20 years		
Age of sign	2 years		
Cost of ground lease per annum	35.00		
Cost of sign	500.00		
	18 Years Remaining	5-Yr Life Amortized	2 Years of 5-Yr Life Expired
$100 per annum income capitalized at 12%	$725.00	$360.50	$240.00
Ground lease of $35.00 capitalized at 7%	352.06	143.50	91.84
Less salvage value	(15.00)	(25.00)	(25.00)
Estimated market value for acquisition of advertising rights	1,062.06	479.00	307.04
$100 per annum income capitalized at 20%	481.20	299.00	210.60
Ground lease of $35.00 capitalized at 7%	352.06	143.50	91.84
Less salvage value	(15.00)	(25.00)	(25.00)
	$818.26	$417.50	$277.44

This is what the North Dakota highway department expects to do with the sign companies, and as far as the landowner is concerned the state will treat his claims on the "before and after" basis which was held valid in the rehearing of Fulmer v. State Department of Roads,[34] where the Court rules

> [A]lthough there was evidence to the contrary, the state produced evidence that there was no difference in the value of the land before and after the taking of the easement; that the use of the land for advertising purposes would interfere with its use for agricultural purposes to some extent; and that the income produced from advertising use would be so small in comparison to the income received from agricultural use that in the negotiation

[34] 134 N.W. 2d 798 (Neb., 1965).

> of the sale of the land the income from advertising use would be disregarded. This evidence supports the finding that the landowner was not damaged by the taking of the easement and is sufficient to sustain the verdict and judgment.

If North Dakota seems excessively parsimonious in its approach to removal of advertising signs, it is because the Federal law threatens the state with loss of highway funds if national standards for control are not put into operation. Apart from the practical inducement, however, the state believes what was said 30 years ago in the great Massachusetts billboard case:

> [T]he only real value of a sign or billboard lies in its proximity to the public thoroughfare within a public view.... The object of outdoor advertising in the nature of things is to proclaim to those who travel on highways and who resort to public reservations that which is on the advertising device, and to constrain such persons to see and comprehend the advertisement.... In this respect the plaintiffs are not exercising a natural right,...they are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways.... The right asserted is not to own and use land or property, to live, to work or to trade. While it may comprehend some of these fundamental liberties, its main feature is to use the superadded claim to use private land as a vantage ground from which to obtrude upon all the public traveling upon highways, whether indifferent, reluctant, hostile or interested, an unescapable propaganda concerning private business with the ultimated design of promoting patronage of those advertising. Without this superadded claim, the other rights would have no utility in the matter.[35]

Additionally the much heralded words of the early Philippine Island Court provides an epilogue: "We can see that the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the uses of the streets and other public thoroughfares."[36]

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[35] General Outdoor Advertising v. Department of Public Works, 298 Mass. 149, 193 N.E. 799, 808.
[36] Churchill and Tait v. Rafferty, 31 P.I. 580. 609, appeal dismissed 248 U.S. 591.