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Comments

CONTROL OF OUTDOOR ADVERTISING State Implementation of Federal Law and Standards*

LeRoy Powers**

For many years, the motoring public has been confronted with thousands of billboards, signs, and other advertising paraphernalia while traveling the American highway. While such advertising has become a part of the American highway scene in every State, it may never appear upon or along the Interstate Highway System. In 1958, Congress supplemented the Interstate Highway Act of 1956, providing that the Federal government should pay an extra one-half of one per cent of Interstate Highway costs in Federal-Aid to those states which regulate and control advertising along the Interstate System. This new advertising control plan may or may not mean the end of outdoor advertising along the Interstate System, since State control is utilized, but it will raise many legal problems in States desiring to pass new laws in order to acquire the extra Federal funds. It is this problem that the author examines, presenting an interesting commentary on a modern highway legal problem.

The Editors.

I. INTRODUCTION

In 1958, after many hearings on the subject, Congress included in the Federal-Aid Highway Act provisions designed to encourage and assist the states in the control of outdoor advertising on the National System of Interstate and Defense Highways. In the Act, Congress announced that it is in the public interest to encourage and assist the states in controlling the erection and maintenance of outdoor advertising signs and declared it to be a national policy to regulate billboards within 660 feet of the edge of the right-of-way and visible to the main-

* This article presents the substance of an address given by the author before the American Association of State Highway Officials at San Francisco, California in December, 1958.

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traveled part of the Interstate Highway System.¹ Congress used the words "control" and "regulate," thus implying something less than prohibition, but the language of the section indicates that Congress had in mind a rigid regulation almost tantamount to the prohibition of outdoor advertising as we generally think of it.

Presented with this mandate by Congress, what are the several states obliged to do, and how shall it be done? First, the states, although legally obliged to do nothing, may receive a $\frac{1}{2}$ of 1% bonus in their applicable Federal-Aid allotments on projects on which advertising is controlled in accordance with the national standards; and, since Congress has announced a national policy on the matter, it would seem that the states should make an effort toward arriving at a uniform type of regulation. But again that is up to the states themselves.

The question of how to accomplish the regulation is, of course, the problem. First, each state should analyze its existing laws and court decisions to determine the amount of control which may now be exercised; however, it appears that most states, if outdoor advertising is to be regulated in accordance with the national standards, will need to enact new laws.² Efforts along

¹ 72 Stat. 95, § 12 (1958). See the discussion of this law by Mr. David Levin, *supra*, p. 390.

² Editors Note: The present Nebraska law upon this subject is contained within Neb. Rev. Stat. §§ 39-714.01 and 39-714.02 (Supp. 1957), and is based upon the police power of the state. Though the statute provides that no advertising signs shall be placed "... along or upon any public road ...", without a written permit, this language has never been construed by the Department of Roads as authorizing advertising control off the actual right-of-way. Therefore, if Nebraska is to control advertising signs along the Interstate Highway, a new statute will apparently be required.

The Nebraska Legislature has, however, recognized the need for new legislation. The 1959 Legislature has passed the following resolution:

... BE IT RESOLVED BY THE MEMBERS OF THE NEBRASKA LEGISLATURE IN SIXTY-NINTH SESSION ASSEMBLED: 1. That the Legislative Council appoint a committee to make a study of the use of advertising devices along, near, or adjacent to highways, the effects of the use of such advertising devices, the effect of the restriction of highway advertising on businesses adjacent to highways which are dependent on highway traffic, and any and all other problems relating to the use of advertising devices, near or adjacent to such highways for the purpose of future regulation and legislation, and report its findings to the next regular session of the Nebraska State Legislature.

See: Neb. Leg. Jour., Leg. Res. 14, p. 375 (1959).

these lines will be met with vigorous opposition from the outdoor advertising industry. On the other hand, support of such regulation will likely be forthcoming from groups interested in safety and in preservation of the landscape in its natural state. It would be foolish to attempt to predict here what the different state legislative bodies will do, or if they pass such laws, what type they will pass and what the court will eventually say about them.

The biggest problem confronting state highway authorities and state legislative bodies is whether outdoor advertising can and should be regulated through the exercise of the state's police powers or whether it should or must be regulated through the exercise of the power of eminent domain. The principal difference is that under regulations imposed through the state's police power no compensation is paid, even though property may be damaged or even taken by reason of the regulation or restriction placed upon the use of private property, while on the other hand, when eminent domain procedures are resorted to, compensation is paid for property taken and, in many states, for property damaged (without regard to whether any is taken), when the taking or damaging is for a public use.

II. POLICE POWER

It is a universal rule that the state may impose reasonable regulations upon the use of private property, or may take private property without compensation, so long as the regulation bears a reasonable relationship to the protection and preservation of the public health, safety, morals and general welfare. Several years ago the Oklahoma Legislature passed a law which, among other things, prohibited opticians from advertising over radio, television or in newspapers. An attack was made upon the constitutionality of the act. The statute was upheld. The reasoning of the United States Supreme Court was to the effect that the subject involved bore such a relationship to the protection of the public health that it became a matter which the State Legislature could properly regulate, and that whether the regulation was unwise, improvident, or out of harmony with a particular school of thought was not a matter for the courts to determine, their only concern being whether the public health, safety and morals were sufficiently involved to justify the State in taking some action.³

³ Lee Optical Co. v. Williamson, 348 U.S. 483 (1955).

Thus, if the regulation of outdoor advertising can be said to be in the interest of the public health, safety and morals, it is a proper subject for regulation. In this connection, zoning and licensing ordinances passed by municipalities and states have been upheld for many years.

It is universally held that a municipality, under its police power delegated to it by the State by general or specific charter provisions, may regulate by ordinance all types of outdoor advertising, being limited only by State and Federal constitutional provisions, and a requirement that the regulation be not unreasonable, in the sense that they must bear substantial relation to the health, morals, safety, and welfare of the community. Aesthetic considerations alone have in most cases been held insufficient to enable a municipality to interfere with private property rights in the regulation of outdoor advertising, but the fact that they have entered into the decisions of the municipal authorities in enacting otherwise reasonable regulations will not be prejudicial.⁴

The fact that changing times and changing conditions has much to do with the attitude of the courts toward the exercise of the police power is indicated by a recent New York case, wherein the Court stated:

What was deemed wrong in the past is looked upon very often today as eminently proper. What was looked upon as unreasonable in the past is very often considered perfectly reasonable today. Among the changes which have come in the viewpoint of the public is the idea that our cities and villages should be beautiful and that the creation of such beauty tends to the happiness, contentment, comfort, prosperity and general welfare of our citizens.⁵

The problem, however, is not quite as simple as it may appear because most of the reported cases deal with the right to regulate advertising in cities and towns, or in specific instances and under peculiar conditions. The courts in upholding these ordinances have for the most part upheld the regulations on the grounds that advertising signs located close to streets or sidewalks are subject to being blown over by storms and may possibly injure people, that trash collects around the bottom of such signs causing them to be unsightly and a fire hazard as well, that they often provide a shelter or a refuge for persons engaged in crime or immoral activities, and on the further proposition that city planning by dividing a city into industrial, commercial and residential areas and providing for the orderly expansion of those areas has a stabilizing effect upon the well-

⁴ 72 A.L.R. 466.

⁵ Preferred Tires v. Village of Hempstead, 19 N.Y.S.2d 374, 377 (1940).

being and prosperity of the community generally and results in a benefit to all.

Generally, in the earlier cases, pure aesthetic considerations have been held insufficient to justify the regulation of outdoor advertising, and numerous ordinances which simply attempted to prohibit outdoor advertising have been held invalid because advertising is not per se dangerous or damaging to the public health, safety and morals.⁶

The Missouri Supreme Court in 1911 upheld an ordinance regulating outdoor advertising, but held that aesthetic considerations were not proper standards for these reasons:

If the necessity of reasonableness of such an ordinance should be tested by such a standard, then the standard itself would be hard to establish for the reason that all do not have the same tastes or ideas of beauty; what would please one might not please another. In fact, tastes and ideas of beauty are as varied as the leaves upon the tree, no two are alike, and thousands are dissimilar⁷

On the other hand, more recent cases indicate that aesthetic considerations are becoming more and more a factor which may be considered:

Although a search has disclosed no decisions sustaining the validity of outdoor advertising ordinances solely upon the grounds of aesthetic considerations, a number of courts have indicated that if it were necessary to base such a determination upon that ground alone, they would not hesitate to do so.⁸

The New York Court of Appeals waxed rather eloquent on the subject by saying:

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 wind of safety, morality, or decency.⁹

In any event, as some of the text writers indicate, the law on the extent to which private property may be regulated solely for

⁶ *Bryan v. Chester*, 212 Pa. 259, 61 Atl. 894 (1905); *Anderson v. Shackelford*, 74 Fla. 36, 76 So. 343 (1917); *Chicago v. Gunning System*, 214 Ill. 628, 73 N.E. 1035 (1905); *St. Louis Gunning Adv. Co. v. St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911); 231 U.S. 761 (1913). See also: 3 *McQuillen*, *Mun. Corp.*, pp. 80-83, 220-221 (2nd ed.); 43 C.J. 228; *Anno*. 72 A.L.R. 465.

⁷ *St. Louis Gunning Adv. Co. v. St. Louis*, 235 Mo. 99, 137 S.W. 929, 961 (1911).

⁸ See *Anno*., 156 A.L.R. 586.

⁹ *Perlmutter v. Green*, 259 N.Y. 332, 182 N.E. 5, 6 (1932). Also, 81 A.L.R. 1543.

aesthetic considerations is undergoing development and cannot be said to be conclusively settled.¹⁰

There is no question about the right to regulate and even prohibit billboards which interfere with sight distance or with types or locations of billboards which would interfere with public safety, but every billboard cannot be said to be a traffic hazard. Also, there are vast expanses of rural areas along which Congress has said it is a national policy to regulate and control outdoor advertising. It would seem that places of historical interest and places recognized for their particular scenic beauty could properly be regulated, particularly in view of cases involving the French Quarter in New Orleans¹¹ and similar areas, but thousands of miles of the Interstate System will consist of long stretches of rural areas farm lands, prairies, and land that has no other apparent purpose except to hold the world together. There is considerable doubt as to whether in these areas the control of outdoor advertising would bear any reasonable relationship to the public health, safety and morals. It therefore appears that any law which is based purely upon the police power will have to take into consideration many factors, including the density of population, the nature of the surrounding area and all the conditions prevailing, and, based upon these considerations, provide for a permit system with the reasonable regulation of advertising rather than its outright prohibition.

One of the most serious problems so far as the police power is concerned, is that the courts have consistently held that what is reasonable in one place may not be reasonable somewhere else. In other words, the courts have based their decisions upon particular types of regulation with particular circumstances and conditions existing in the place subject to the regulation. The problem with which we are confronted here, if we attempt to regulate outdoor advertising on some 41,000 miles of Interstate Highways, is that we will be attempting to apply one set of regulations to many different types of areas, conditions and circumstances.

¹⁰ Dillion, Mun. Corp., § 695. Also see: *Welch v. Swasey*, 214 U.S. 91 (1909), which affirmed 193 Mass. 364, 79 N.E. 745 (1907); *Murphy v. Westport*, 131 Conn. 292, 40 A.2d 177, 156 A.L.R. 568 (1944).

¹¹ *New Orleans v. Pergament*, 198 La. 852, 5 So.2d 129 (1941). Also see: *State ex rel Civello v. New Orleans*, 154 La. 271, 97 So. 440 (1923); *General Outdoor Adv. Co. v. City of Indianapolis*, 202 Ind. 85, 172 N.E. 309 (1930); *Swisher v. Johnson*, 149 Fla. 132, 5 So.2d 441 (1942); *Hava-a-Tampa Cigar Co. v. Johnson*, 149 Fla. 148, 5 So.2d 433 (1942); *Perlmutter v. Green*, 259 N.Y. 322, 182 N.E. 5 (1932).

III. EMINENT DOMAIN

The next question with which we are presented is with reference to the acquisition of advertising rights through the power of eminent domain, and we may well wind up doing it that way in some cases whether we want to or not because some courts have held that any time a restriction is placed on private property for a particular public improvement, as distinguished from a regulation based upon public health, safety or morals, the restriction amounts to the taking of an easement and requires the payment of compensation. In Wisconsin, an act was passed by the legislature limiting the height of buildings in an area surrounding the state capitol for the stated purpose of diminishing the fire hazard to the capitol building. The Supreme Court of Wisconsin held that the limiting of the height of other buildings in this particular area amounted to a taking of the property above the height named for which compensation must be paid and, since the act did not provide for compensation, held the act invalid.¹² At the next session of the Legislature a general act was passed applying to the entire City and setting a higher height limit, and the Court held this one valid. The Missouri Supreme Court also has held that the placing of restrictions on private property for a particular public improvement is a taking of an easement and not a regulation and requires the payment of compensation.¹³

The restrictions contemplated by the 1958 Federal-Aid Highway Act may well be held in some jurisdictions to be for, or in connection with, the highway improvement projects. In other words, it is quite unlike a zoning ordinance which is not associated with any particular public improvement.

If we desire to acquire by eminent domain the right to restrict advertising, partially or wholly, on private property, we are first confronted with the general proposition of law that the sovereign in the taking of private property for public purposes can take only so much property and only such an interest therein as is necessary for the public purpose to be accomplished.¹⁴ Can it be said clearly and unequivocally that the control of outdoor advertising is a reasonable and necessary public use in the contemplation of the law? There may be some doubt about the

¹² *Piper v. Ekern*, 180 Wis. 586, 194 N.W. 159, 34 A.L.R. 32 (1923).

¹³ *In re Kansas City Ordinance 39946*, 298 Mo. 569, — S.W.2d — (1957).

¹⁴ See 18 Am. Jur. 736 et seq; 68 A.L.R. 837.

matter, but the later authorities seem to hold that a "public use" is not necessarily limited to and does not require the actual occupancy of the land by the public. The Missouri Supreme Court has had this to say on the subject:

Taking for a public use when applied to land is not limited to actual occupation by the public, but any regulation which imposes a restriction upon the use of the property by the owner, and any neighboring public improvement which tends to impair the enjoyment of the property by affecting some right or easement appurtenant thereto may be a public use within the meaning of the constitution.¹⁵

There are also a number of cases to support the following editorial comment.

In order to constitute public use it is not necessary that the whole community or any large part of it should actually use or be benefitted by a contemplated improvement. Benefit to any considerable number is sufficient.¹⁶

Although it is necessary that a public necessity exist to acquire property or interests therein by eminent domain, it is probable that the courts would be much more likely to uphold statutes authorizing the taking of restrictive easements upon the payment of compensation therefor. The right to control access, light, air and view has been generally upheld, and by the same reasoning there would seem to be no legal objection to a law which, in the interest of public safety and welfare, authorized the payment of compensation for the placing on private property of a prohibition or restriction against advertising. There are, in fact, many similar types of negative easements, and regardless of whatever else it might be called it is still an easement appurtenant to the land. Ordinarily an easement is a burden placed upon land in the nature of a use, the only difference being that in the case of a negative easement the burden is a restriction or a covenant to refrain from performing some act on the land.

One of the most recent appellate court decisions upon an attempt to control advertising through eminent domain is the Ohio Turnpike case.¹⁷ There the Turnpike Authority had only the general statutory authority to acquire lands, property rights, easements and interests therein necessary to carry out the Act. In

¹⁵ *In re Kansas City ordinance 39946*, 298 Mo. 569, — S.W.2d — (1957); Also see: 2 Nichols, *Eminent Domain*, p. 443; 18 Am. Jur. 660.

¹⁶ 4 Words and Phrases 2d 44.

¹⁷ *Ellis v. Ohio Turnpike Comm.*, 162 Ohio St. 86, 120 N.E.2d 719 (1954).

its resolution to appropriate certain lands it included this language:

. . . all rights to erect on any of the aforesaid remaining lands any billboard, sign, notice, poster, or other advertising device which would be visible from the travel-way of Ohio Turnpike Project No. 1, and which is not now upon said lands.¹⁸

The Court said this might be desirable but that existing legislative authority was lacking, and even conceding that existing authority was sufficient, the resolution was too indefinite. The Court further "supposed" that legislative authority might be forthcoming and, if so, that there would be further problems and litigation. A special concurring opinion in this case, however, stated that the authority was sufficient but the necessity must be clearly shown and the regulation confined to reasonable and definite territorial limits, and the advertising media to be eliminated must not include that which would not ordinarily distract a driver.

This case clearly points out the need for legislative authority if advertising is to be controlled by restrictive easements under eminent domain. The right of eminent domain, being an attribute of the sovereign, is limited by both constitutional and statutory provisions, but the legislature may enlarge the power, within constitutional limits, as the public necessity requires.

Another but perhaps more costly way in which the same result might be obtained would be through the acquisition of marginal areas for future highway development in the nature of highway development rights or options under which the state could prevent advertising or the placing of permanent buildings or structures on the land in the easement area for a period of years. This would accomplish the purpose, in addition to regulating advertising, of maintaining the adjacent land in the same condition for future highway expansion. Some consideration also has been given to the question of whether in those cases where the rights of light, air and view have been obtained the state might already have the right to prohibit advertising. Although there is room for argument along these lines, the better-reasoned view would be that light, air and view acquired in connection with an easement for highway purposes is only the right to obstruct it to whatever extent it might be obstructed by the public improvement or by any subsequent reconstruction thereof. Certainly, the owner could not complain if a high fill or a deep cut makes

¹⁸ Ibid, at p. 723.

his property unsuitable or useless for advertising purposes, but in the absence of specific language including advertising rights in the easement or condemnation petition, the taking of the rights of light, air and view would probably not include the right to restrict outdoor advertising.

IV. POSSIBLE STATE LEGISLATION

There are several different types of laws which the states may enact to implement the Federal law and standards on outdoor advertising:

(1) An act based upon safety and aesthetic considerations which simply prohibits the erection of advertising material upon the Interstate System;

(2) An act which utilizes the zoning laws; creating zoning authorities which have the power to regulate advertising, and which supplement existing county and city zoning authorities;

(3) A billboard regulation act providing for the application of permits and defining the standards for granting or rejecting such permits;¹⁹

(4) An amendment of existing eminent domain law by the insertion of language permitting the state the right to acquire restrictive easements for the control or prevention of outdoor advertising; such amendments to express the legislative policy and intent in considering such easements as a necessary "public use";

(5) A combination act which utilizes both the police power and the law of eminent domain.²⁰

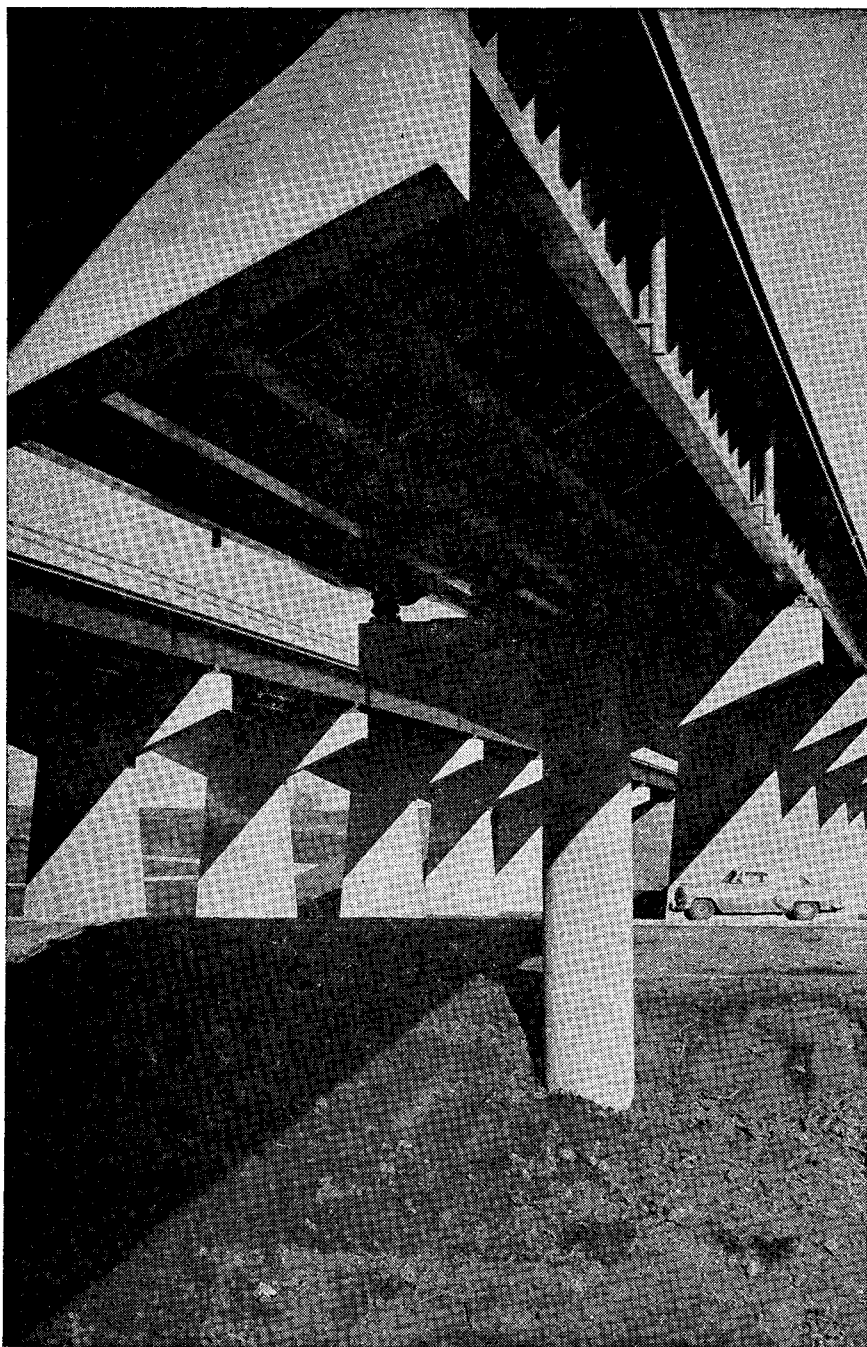
¹⁹ Such an act would be more forceful if a declaration of legislative intent were included and, further, that the granting or rejection of permits shall be based upon: (1) factors of population; (2) the nature of the surrounding community; (3) the preservation of the natural scenic beauty of the areas; (4) the promotion of maximum safety of the traveling public; and (5) other similar factors which the courts could say bear a reasonable relationship to the public health, safety, morals, and general welfare.

Editors Note: While Nebraska presently requires that advertisers upon the right-of-way obtain permits from the Department of Roads, the statute does not require that the permit shall be granted or rejected upon any of the above mentioned factors. Neb. Rev. Stat. § 39-714.02 (2) (Supp. 1957).

²⁰ The use of a statute combining both powers may well be the most effective generally, for while the use of police power alone may be upheld in some states, it may not be upheld in others.

V. CONCLUSION

In conclusion, it should be pointed out that not only is the case law on this subject in a transitional stage, but Congress will likely consider many proposed amendments to the Federal Act during the coming session. The outdoor advertising industry also may submit proposed legislation, both to Congress and to some of the State Legislatures. On the other hand state highway administrators and legislative bodies must consider both the desirability and the cost of compliance with the national standards. If control is accomplished through the acquisition of easements, the appraisal problem in itself is a major one. The further complicating factor is that highway administrators and legislative bodies, in considering the public interest, must necessarily consider all of the public, which includes the effect of the proposed regulations on legitimate business having a well-established place in the economy of every state. If the several states intend to implement the Federal law, and procure the federal-aid, it will be necessary that the various legislatures consider all these problems so that a satisfactory balance between the public interest and the rights of advertisers may be accomplished.



Concrete Supports Carry Interstate Over a State Highway