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THE STATE AND FEDERAL QUANDARY OVER BILLBOARD CONTROLS

CONSTITUTIONAL LAW—LAND USE CONTROL: A New York law regulating outdoor advertising on private property in the Catskill and Adirondack Parks held to be constitutional. *Modjeska Sign Studios v. Berle*, 373 N.E.2d 255 (1977), *cert. denied*, ____ U.S. ____ (1978).

Were the Man from Mars to swoop over the cratered battlefield of land use, what he might need most to appreciate the struggle is not legal acuity, but a strong sense of irony. . . . The void in which (these regulatory schemes) swirl is perhaps American land use law's most characteristic feature; it is certainly its most self-defeating one.¹

In deciding *Modjeska Sign Studios v. Berle*,² the New York Court of Appeals reaffirmed that private property may be regulated, pursuant to the state's police power, for aesthetic purposes alone.³ More notable than the holding was the court's attempt to establish a comprehensive framework for testing the validity of billboard regulations specifically, and land use controls in general. In effect, the court mandated a closer scrutiny of constitutional issues; it struck at the weakness of earlier cases in which due process questions had been glossed over with undue deference for the far reaches of the police powers. That the case was appealed to the United States Supreme Court attests to the tenacious will of property owners to resist land use restrictions, irrespective of judicial checks. That certiorari was denied attests to the Supreme Court's continued unwillingness to become ensnared in an area of law that has been termed "a welter of confusing and apparently incompatible results."⁴ With this responsibility left to the state courts, it is helpful to consider the New York approach. This note also examines recent Congressional actions that

1. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1045 (1975).

2. 373 N.E.2d 255 (1977), *cert. denied*, ____ U.S. ____ (1978).

3. In 1932, Chief Judge Pond wrote: "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." *Perlmelter v. Green*, 259 N.Y. 327, 332, 182 N.E. 56 (1932). However, it was not until 1967 that the New York Court of Appeals ruled that aesthetics alone would justify exercises of the police power in land use affairs. *Cromwell v. Ferrier*, 19 N.Y.2d 263, 255 N.E.2d 749 (1967).

4. Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 37 (1964).

limit the Modjeska ruling and may ultimately herald an end to the law which has epitomized billboard control: the Federal Highway Beautification Act.

THE NEW YORK SETTING

To ensure the natural beauty of the Catskill and Adirondack Parks, the New York legislature passed the state's Environmental Conservation Law.⁵ This measure prohibits advertising signs and structures for which a permit is not obtained, except for accessory signs located within the limits of an incorporated village. Any non-conforming signs erected prior to 1969 were required to be removed by January 1, 1976. Only two weeks before the deadline, Modjeska Sign Studios, which owned approximately 96 nonconforming billboards, sought to enjoin the removal of its signs. The suit, brought before the New York Supreme Court, also asked that the law be declared unconstitutional because it effected a taking of property without compensation. These motions were denied and summary judgment was entered against Modjeska.⁶ The ruling was unanimously affirmed by the Appellate Division.⁷ Modjeska then appealed to the state's highest court, the New York Court of Appeals.

The case presented an opportunity for the appeals court to clarify the state's law on noncompensatory regulation. Like most states, New York has relied increasingly upon the police power to effectuate a growing list of land use controls. Regulations now extend to nuisance abatement, business and commercial entities, landmark preservation, conservation and eradication of eyesores. This "lopsided" expansion of the police power has stirred considerable controversy.⁸ In other words, implicit in the police power is the principle that incidental injury to an individual will not prevent its operation, once it is shown to be exercised for a valid public purpose. And most courts, appreciative of government's limited coffers, rule that compensation is required only for "takings" of property and not for losses occasioned by mere regulation. But this is not to say that courts are comfortable in sustaining such restrictions. In fact, most courts have found that drawing the "hairline distinction" between permissible regulation and compensable taking is a difficult task indeed.⁹

In 1967, the New York Court of Appeals warned that police

5. N.Y. ENVIRONMENTAL CONSERVATION LAW § 9-0305 (McKinney 1954).

6. 87 Misc.2d 600, 386 N.Y.S.2d 765 (1976).

7. 55 App. Div.2d 340, 390 N.Y.S.2d 945 (1977).

8. *Supra* note 1, at 1048.

9. *See*, Art Neon Co. v. City and County of Denver, 488 F.2d 118 (10th Cir. 1974).

power regulations should not extend "to every artistic conformity or nonconformity" but only to those which bear substantially on the economic, social and cultural patterns of a community or district.¹⁰ A more precise definition was left for later cases, a shortcoming that New York courts have wrestled with for the past decade. Often, land use restrictions were sustained with little or no analysis. In *Modjeska*, both the trial and appellate courts concluded, as a matter of law, that the New York legislature could constitutionally require the removal of billboards, pursuant to the police power, without compensating affected property owners. As a result, the reasonableness of the law's practical application, as a question of fact, was never addressed by either the state or *Modjeska Studios*. Nor was *Modjeska* the only billboard case in which lower courts had glossed over important factual determinations.¹¹ The New York Court of Appeals, in a subtle approach, ruled that henceforth a regulation must not only be constitutional on its face, but its validity must also depend upon its constitutional reasonableness as administered. The court then proceeded with a prototype of the proper analysis.

Looking first to the letter of the law, the court sought to avoid the conceptual pitfall of classifying the billboard control as either a non-compensable regulation or a compensable taking.¹² To focus the issue too narrowly was to ignore that the state's power over private property spans a wide spectrum. Indeed, the court evoked the notion of a continuum in which private property interests must yield to the public good, depending more or less upon overall reasonableness and the importance of the public good to be achieved. To illustrate its point, the court postulated several variants of the problem at hand. It conceded that a regulation requiring the immediate removal of billboards would be unconstitutional in most instances. The obvious exception is where removal is ordered to protect the public safety. The court was emphatic that where health and safety interests are at stake, the police power may be exercised swiftly and without any form of compensation. But, explained the court, environmental interests do not usually rise to such lofty levels of justification. While

10. *Cromwell v. Ferrier*, 19 N.Y.2d 263, 255 N.E.2d 749 (1967).

11. *Suffolk Outdoor Adv. Co. v. Hulse*, 43 N.Y.2d 483, 373 N.E.2d 267 (1977), decided on the same day as *Modjeska*.

12. Most courts have treated the police and eminent domain powers as correlatives whereby regulatory measures exceeding the police power's ambit are ipso facto exercises of the eminent domain power. And what cannot be done under the police power has to be done under the eminent domain power or not at all. Referring to the inadequacy of this approach, Costonis argues that "Deadlock is the inexorable outcome of the taking issue so portrayed because the legitimate interests of government and of private landowners cannot both be accommodated within this taut framework. *Supra* note 1, at 1022.

aesthetics in itself constitutes a valid base for exercising the police power, just as safety does, the public benefit gained by aesthetic objectives is not as compelling. For this reason, the Environmental Conservation Law provided a seemingly generous amortization period in which sign owners could ameliorate their losses.

The court concluded that since any restriction upon property is a deprivation, having the potential of reducing market value, the characterization of governmental control "turns usually on a difference of degree and only occasionally on a difference in kind."¹³ It is only where regulations render the land unsuitable for any reasonable uses, completely destroying its economic value, that the action rises to the level of a compensable taking. This is the critical inquiry.¹⁴ The court noted that the billboard law did not impose an affirmative burden that the land be used exclusively for a public purpose. Instead, it merely contained a "particular negative restriction—that billboards alone may not be maintained upon specified property."¹⁵ Such a restriction is reasonable, and because it can hardly be said to destroy the land's economic value, it does not rise to the level of an unconstitutional taking.

Having found the law to be reasonable on its face, the court next turned to the validity of its application. It examined the law's six-and-one-half-year amortization scheme. New York was among the first jurisdictions to sustain the constitutionality of amortization.¹⁶ By allowing property owners a reasonable time in which to recoup their investments, amortization aims to minimize private losses to within permissible limits of due process. But the doctrine is more easily stated than applied, and courts have grappled with defining its limits. There has been sharp disagreement on whether amortization affords just compensation for a formal taking, as in eminent domain, or whether it merely serves to achieve the reasonableness that is requisite to an exercise of the police power.¹⁷ The answer to this important question obviously determines that factors must be weighed in testing a provision's constitutionality.

Amortization based upon eminent domain requires a recoupment period based upon the structure's useful life or highest market value.

13. 373 N.E.2d at 258.

14. This principle was enunciated in *U.S. v. Central Eureks Mining Co.* 357 U.S. 155 (1958). Costonis refers to it as "the only generalization that can be confidently extrapolated from the welter of confiscation precedents, *supra* note 1, at 1051.

15. 373 N.E.2d at 260.

16. See *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42 (1958) and *Anderson, Amortization of Nonconforming Uses—A Preliminary Appraisal of Harbison v. City of Buffalo*, 10 SYRACUSE L. REV. 44 (1958).

17. *Supra* note 1, at 1058.

A police power scheme requires only that which is reasonable. Not surprisingly, New York follows the latter approach. The court in *Modjeska* stated: "While an owner need not be given that period of time necessary to permit him to recoup his investment entirely, the amortization period should not be so short as to result in a substantial loss of his investment."¹⁸ Under this approach, a provision's constitutionality turns primarily upon the degree of economic injury imposed. In determining what constitutes a substantial loss, the court suggested an examination of several factors: the nature of the non-conforming activity; initial capital investment and investment realization to date; life expectancy of the structure; and the existence or nonexistence of a lease obligation.

The court concluded that most billboard removal regulations should "pass constitutional muster."¹⁹ But it cautioned that the reasonableness of any amortization period is a question of fact that must be determined from the circumstances of each particular case. Because the issue had not been addressed in the *Modjeska* case, it was remanded and the sign studio was given an opportunity to challenge the amortization period. Instead, the studio chose to make its unsuccessful appeal to the United States Supreme Court.

THE IMPACT OF RECENT CONGRESSIONAL ACTIONS

The *Modjeska* case is a reaffirmation of one state's desire to regulate land use for the public benefit. But the decision stands atop shaky ground at a time when federal leadership is backsliding and the Federal Highway Beautification Act (Beautification Act) has been doomed to failure. When the late President Lyndon Johnson signed the Act in 1965, he predicted that it would "bring the wonders of nature back into our daily lives."²⁰ The ambitious goal of the Beautification Act was to remove unsightly billboards and junkyards from along all highways built in part with federal funding. But today the program is widely considered a failure. And Congress, caught between budgetary restraints and pressure from the billboard lobby, has stripped away the Beautification Act's effectiveness. So complete and far-reaching is this reversal, that it appears as if the *Modjeska* case would be decided differently today.

Last November, Congress passed the Federal Aid to Highway Act of 1978 (Highway Act).²¹ The Highway Act is a four-year funding

18. 373 N.E.2d at 262.

19. *Id.*

20. 23 U.S.C. §131 (1976), as amended by Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, §122, 92 Stat. 2689 (1978).

21. *Id.* (Also known as the Surface Transportation Act).

and construction authorization for highways, transportation safety and mass transit—the largest and most comprehensive transportation program in United States history.²² Included in the Highway Act is an amendment that bolsters the compensation requirement of the Beautification Act.²³ In fact, it prohibits states from denying “just” compensation for the removal of any nonconforming sign from along federally-aided highways. Henceforth, states must pay compensation, even where the signs are removed pursuant to state and local ordinances and have been up long enough to repay the owner’s initial investment. A report of the Public Works and Transportation Committee expresses Congressional displeasure over attempts to usurp its mandates:

The employment of State or local general zoning laws or ordinances to remove lawfully erected signs that are nonconforming under the Highway Beautification Act, without the payment of just compensation, is an obvious circumvention of the compensation requirements of the Federal law.²⁴

Indeed, the lawmakers rejected a Senate version allowing states to impose regulations stricter than the federal law, in which case, the compensation requirement would not have applied.²⁵

New York was among the states which Congress felt were attempting to circumvent the federal law. The issue was raised in *Modjeska*, but was summarily dismissed by the New York courts.²⁶ The sign studio had argued that provisions of the New York Highway Law, enacted to implement the Beautification Act, require that compensation be paid for all signs removed in accordance with the federal law.²⁷ But the New York courts held that the Environmental Conservation Law, enacted at a later date, evidenced a legislative intent to provide an amortization period in lieu of paying compensation. The courts also ruled that the New York legislature, by passing the compensation provision of the New York Highway Law, had not relinquished its right to act in the same area pursuant to its police powers. Obviously, this is precisely the kind of ruling that the new law now prohibits. The irony is that congressional action came too

22. H.R. REP. NO. 1485, 95th Cong., 2d Sess. reprinted in [1979] U.S. CODE CONG. & AD. NEWS 7295, 7297.

23. *Id.* at 7311; Pub. L. No. 95-599, §122, 92 Stat. 2689 (1978).

24. *Id.*

25. H. CONFERENCE REP. NO. 1795, 95th Cong., 2d Sess. reprinted in [1979] U.S. CODE CONG. & AD. NEWS 7413, 7425.

26. 373 N.E.2d at 263.

27. *Id.*

late to help Modjeska Studios. Had the amendment been enacted earlier, Modjeska stood to win a sizable award—virtually all of its signs were located along federally-aided highways.^{2 8}

CONCLUSION

While it is clear that compensation must now be paid when signs are removed from along federally funded highways, it is less clear where the money will come from. The Beautification Act provides that 75 percent of such compensation shall be provided by the federal government and the remainder paid by the states. However, federal funding has been erratic at best.^{2 9} In the fourteen years that the Beautification Act has been law, only 88,000 billboards have been removed; as many as 450,000 offending signs remain along an approximate million miles of interstate, primary and secondary highways.^{3 0} While the Federal Highway Administration places the cost of removing these signs at 1.3 billion dollars, the current budget provides only 13 million dollars for the removal program. Next year there may be no money available for the removal program. President Carter has eliminated all sign removal funding from his proposed 1980 budget, pending the outcome of a Transportation Department study of whether the program is even worth maintaining.^{3 1}

Thus, although Congress is adamant that compensation must be paid, neither Congress nor the Administration shows any inclination to allocate the necessary funding. And because the money is not forthcoming, the Beautification Act is rendered ineffective. The Beautification Act itself provides that no signs shall be required to be removed if the federal share of compensation is not available.^{3 2} The result is an intolerable impasse. Environmentalists have withdrawn their support of the program, while billboard-trade organizations now favor it.^{3 3} Senator Robert Stafford (R. Vermont) believes it is time to admit that the Beautification Act is a failure and should be

28. *Id.*

29. 23 U.S.C. §131(g) (1976). Federal funding for the removal program has ranged from \$75.5 million in 1967 to \$10 million in 1971.

30. NEWSWEEK, March 5, 1979, at 18. At the current level of funding, it would take 110 years to tear down all the billboards.

31. *Id.*

32. 23 U.S.C. §131(n) (1976). Nevertheless, states may perceive themselves as being in a Catch-22 situation. Although compliance with the Beautification Act is not mandatory, §131(b) provides that if a state does not make legislative provision for such removal and payment, it shall lose ten percent of its share of federal highway funds.

33. *Supra* note 29.

repealed. He has introduced a bill that would allow states and cities to enact their own beautification programs.³⁴

These recent actions have not only brought the sign removal effort to a virtual halt, but they also threaten to reverse the trend—more signs will begin springing up. Indeed, Congress already has created something of a loophole in the present law. In 1976, it passed a little-noticed amendment to the Beautification Act. This change allowed state governments to request exemption for billboards if, after “rigorous economic analysis,” they can prove that an economic hardship would result from their removal.³⁵ Thus far, New Mexico is the only state to seek exemption status. In 1977, the New Mexico legislature passed a bill authorizing local governments to take such steps as necessary for qualifying their locales as exempted hardship areas.³⁶ Although other states have not yet taken advantage of the loophole, an official in New Mexico marvels that, “people from all over the country, New York and California have been calling us up to find out what we did.”³⁷

It is apparent then that both Congress and state legislatures are willing to take a second look at the economic consequences of otherwise desirable land use programs. The issue of noncompensatory regulation refuses to fade away, but instead resurges with greater intensity. And the lasting impact of police power regulations is threatened by the inevitable political backlash they generate among such formidable powers as the real estate and advertising communities, not to mention thousands of aggrieved property owners. Yet, it is also apparent that the public supports, and indeed demands, effective land use control. The obvious challenge is to accommodate both the public need and the legitimate concerns of property owners—not an easy task in these times of rising inflation and budgetary restraint. The answer apparently lies in devising new, intermediate compensation formats: for example, regulations that would not displace either the police or eminent domain powers, but which would provide alternative measures of fair compensation, secured

34. S. 344, 96th Cong., 1st Sess., 125 CONG. REC. S. 1124 (1979). In introducing the bill, Stafford said his personal preference would be to eliminate the myriad loopholes in the existing law, “but the public sentiment for more beautiful roads on the national level seems too weak to stand up against a strong, organized industry lobby.”

35. 23 U.S.C. §131(o) (1976). During the debate over the 1978 highway act, House and Senate conferees emphasized that the Secretary of Transportation should fully assist those states wanting to take advantage of the provision; they warned that Congress would not tolerate any effort to undermine the exemption. H. CONFERENCE REP. NO. 1795, 95th Cong., 2d Sess. reprinted in [1979] U.S. CODE CONG. & AD. NEWS 7413, 7425.

36. N.M. STAT. ANN. §67-14-1 (1978).

37. The Albuquerque Journal, November 23, 1978, §D, at 1.

either by money or fair market exchanges and trade-offs. Only then will the inexorable deadlock now plaguing land use affairs be broken. It is a development that could well reach to the very definition of property itself.

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