

CONSTITUTIONAL LAW:
ZONING:
SCENIC RIVERS:

1. It is within the police power for the state to enact zoning laws restricting the use of property when reasonably necessary for the promotion of public health, safety, morals and general welfare.

2. That if such law is necessary for the promotion of the public health, safety, morals and general welfare, it does not constitute the taking of private property without due process of law in violation of Article 1, Sections 10, 26, 27 and 28 of the Constitution. 3. Whether the proposed act creating the Missouri Scenic Rivers System is reasonable and necessary for the promotion of the public health, safety, morals and general welfare depends upon the facts and evidence -- which will have to be determined by a court.

OPINION NO. 238

April 7, 1970

Honorable Ted Salveter
State Representative
142nd District
1005 Woodruff Building
Springfield, Missouri 65806



Dear Representative Salveter:

This is in response to your request for an opinion from this office as follows:

"Attached to this letter is a copy of the proposed 'Missouri Scenic Rivers Act'. I am sure that you are familiar with this movement and with some of the controversy surrounding it. I am not concerned with the wisdom, philosophy or logic of this proposed law, but I am concerned with the Constitutionality of portions of it.

"Section 3. proposes restrictions upon the use of land bordering certain rivers in the nature of Zoning regulations. Its basic purpose is to forbid the building

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of any new structures upon this land, to preserve its natural beauty. Most of the land involved is probably farm land and will not be affected by this. However, some of the land has been purchased at a high cost for the express purpose of building and developing. If this were not allowed, it would involve a considerable economic loss to the landowner. There seems to be no specific section allowing for compensation to the landowner in such a situation.

"I would appreciate it if you would give me an opinion concerning whether the proposed law would violate Sections 10, 26, 27 and 28 of the Constitution of the State of Missouri or any other Constitutional provision or law."

Sections 10, 26, 27 and 28 of the Constitution to which you refer are found in Article 1 of the Constitution of Missouri, 1945. They relate to due process of law and acquiring property by eminent domain.

You enclose a copy of an Initiative Petition which you state is now being circulated for the purpose of obtaining signatures to be submitted to the vote of the people for establishment of a Missouri Scenic Rivers System.

Section 1 states that this act may be cited as the "Missouri Scenic Rivers Act".

Section 2 states its purpose as:

"The system, as defined in Section 4 of this act, shall be administered for the purpose of preserving certain scenic rivers or segments thereof in a free-flowing and unpolluted state, with their adjoining natural shore environment, for the permanent enjoyment of primitive type outdoor recreation, as distinguished from mass recreational development; and for the purpose of preserving the wildlife, outstanding scenic, recreational, ecological, geological and other natural features along these Ozark rivers or segments thereof, all for the health, morals, education, and general welfare

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of this generation and all succeeding generations; however, it is not the intent of this act to require the acquisition of lands within the boundaries of the system."

Section 4 of the act describes the area that is to be within the Missouri Scenic River System, designates the rivers or segments of the rivers included in the system and which includes 300 horizontal feet of the bank on each side of each river with access points which the administrator may acquire.

Section 3 (2) provides:

"'Zoned for scenic preservation': zoned as follows: (a) no new structure, sign, billboard, or trailer may hereafter be built or placed there, but normal repair or maintenance of existing structures is permissible; (b) except as explicitly authorized herein, no use may be made of any such lands other than cropping or pasturing of existing open lands, using recognized and generally accepted good agricultural practices, or management of timber stands, including timber harvest, through application of good forest management practices, in accordance with sections 254.010 to 254.300, R.S. Mo., and regulations thereunder; (c) specifically, there shall be no dumping, littering, or excavation, and no clear-cutting of timber; (d) overhead utility lines or other public uses may be introduced only when specifically approved in writing by the administrator; (e) an existing non-conforming use may be continued, subject to the following limitations:

- (1) It may not be enlarged or expanded in any way;
- (11) No dumping, littering, refuse burning, salvage or disposal operation may continue. Any unsightly remains of any such use shall be removed as soon as practicable by or under the direction of the administrator, who shall have the right to enter or cross any lands or waters for such

purpose at any reasonable time.

(f) In any area owned by the State Park Board and operated as a State park of the effective date of this act, the State Park Board may continue to exercise such powers as it has on that date. Any component of the system which shall become a part of any state park, wildlife refuge, or similar area shall be subject to the provisions of this act and the laws under which the other areas may be administered and in the case of conflict between the provisions of these laws the more restrictive provisions shall apply.

(3) 'Scenic easement': a voluntary agreement between the administrator and the owner or occupant, concerning the use of the land, the purpose being to maintain and enhance the natural beauty and appearance of the landscape. A scenic easement may not permit any use prohibited by this act. A scenic easement shall not create any right of public access or use without the express consent of the parties. A scenic easement may exceed the boundaries of the system."

Section 8(1) provides in part that "no landowner shall be forced to give up title to landholdings or easement interest by reason of this act."

The first question to be considered is the effect of Article 1, Sections 10, 26, 27 and 28 of the Constitution of Missouri, 1945. These sections deal with the due process of law and the taking of private property by eminent domain without compensation.

The principles of law that apply to the law of Zoning and Planning must be applied to the proposed act, since it involves the authority of the state to enact zoning laws.

Zoning laws and regulations must satisfy the due process requirements of the Constitution. In 101 C.J.S. §27, Zoning it is stated:

"Zoning laws and regulations, in order to be valid, must meet the constitutional demands of due process. Generally speaking, these demands are met if such laws or regulations bear a substantial relation to public health, safety, morals, or

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general welfare, and are not arbitrary or unreasonable. Conversely, laws or regulations of this nature are unconstitutional, either generally or as applied to particular property, if they bear no substantial relation to public health, safety, morals, or general welfare, or are arbitrary and unreasonable."

Zoning laws and regulations must also comply with the constitutional provision regarding the taking of private property without compensation. The rule is stated in 101 C.J.S. §29, Zoning as follows:

"Building or zoning laws and regulations must meet the demands of the constitutional prohibition against the taking of private property for public use without just compensation, and restrictions which are arbitrary or unreasonable or lacking in any substantial relation to the public health, safety, morals, or general welfare come within the constitutional inhibition, as where a regulation permanently so restricts the use of property that it cannot be used for any reasonable purpose.

"The protection accorded by this constitutional prohibition is, however, qualified by the police power, and reasonable restrictions, bearing a substantial relation to the public health, safety, morals, or general welfare, imposed in the exercise of the police power, do not fall within the constitutional ban. Where premises located in a certain zone can be used for a certain purpose if permission is obtained therefor, the validity of the regulation may not be challenged on the theory that there is a prohibition against using the property for that purpose, thus constituting a taking of property without compensation." (Emphasis supplied)

It is seen from these constitutional provisions that if the zoning law is reasonable and comes within the police power of the state, it does not violate the constitutional provisions providing

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the taking of property without just compensation or due process of law.

The distinction between eminent domain and the police power of the state is stated in 29 C.J.S. §6 as follows:

"It has been said to be difficult to distinguish consistently between the right of eminent domain and the police power, so that they have sometimes been confused; however, they are quite distinct, although analogous. Briefly, eminent domain takes property because it is useful to the public, while the police power regulates the use of property or impairs rights in property because the free exercise of these rights is detrimental to public interest; and the police power, although it may take property does not, as a general rule, appropriate it to another use, but destroys the property, while by eminent domain property is taken from the owner and transferred to a public agency to be enjoyed by the latter as its own. More fully, many statements of the distinction agree to the effect that in the exercise of eminent domain private property is taken for public use and the owner is invariably entitled to compensation, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare, and in neither case is the owner entitled to any compensation for any injury which he may sustain, for the law considers that either the injury is *damnum absque injuria* or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power.

"Regulations enacted under the inherent power of the state to protect the lives and secure the safety, peace, and welfare of the people are enacted under the police power and do not constitute a taking under the power of eminent do-

main, although they may interfere with private rights without providing for compensation. Constitutional provisions against the taking of private property for public use without just compensation impose no barrier to the proper exercise of the police power; uncompensated obedience to a regulation enacted in the exercise of police powers for purposes of public safety or welfare does not constitute taking or damaging property without just compensation, and damage, loss, or injury from a valid exercise of the police power gives rise to no right to recover compensation.

"There is no set formula to determine where regulation ends and taking begins; so, the question depends on the particular facts and the necessities of each case, and the court must consider the extent of the public interest to be protected and the extent of regulation essential to protect that interest. Thus, police regulations must be reasonable, and the legislature cannot, under the guise of the police power, impose unreasonable or arbitrary regulations which go beyond that power, and in effect deprive a person of his property within the purview of the law of eminent domain, as by depriving the owner of all profitable use of the property not per se injurious or pernicious, restricting the lawful uses to which the property can be put and destroying its value, permanently so restricting the use of the property that it cannot be used for any reasonable purpose, or completely destroying the beneficial interest of the owner.

"The legislature may, under the police power, within the limitations stated, and without infringing constitutional inhibitions against the taking of property without compensation, authorize the abatement of a nuisance or the destruction of property constituting it, or both, the seizure or destruction of property having an unlawful existence,

or the condemnation or forfeiture of property used in the violation of law, and make other reasonable regulations to promote the public health and the general welfare of the community. So, it has been held to be an exercise of the police power, rather than of the right of eminent domain, to forbid the use of property in a manner hurtful to the health and comfort of the community."

The general rule is that reasonable zoning especially where it is comprehensive is constitutional and valid as a public police power of the state. *Taylor v. Schlemmer*, 353 Mo. 687, 183 S.W.2d 913. *State v. Loesch*, 169 S.W.2d 675. We find these principles of law are to be applied to zoning laws and regulations and that if it is a proper zoning law it does not violate the provisions of Article 1, Sections 10, 26, 27 and 28 of the Constitution, if it is found that such laws are necessary for the promotion of public health, safety, morals or general welfare of the people.

In *Deimeke v. State Highway Commission*, 444 S.W.2d 480, the Supreme Court considered the constitutionality of a statute enacted by the legislature providing for the licensing and operation of junk yards within 1000 feet of certain state highways. In discussing the question of the authority to enact zoning laws under the police power the court states l.c. 482:

"[3] It now is well established that the state, in the exercise of its police power, may restrict the use of property when reasonably necessary for the promotion of the public health, safety, morals or welfare, 'the reason and basis underlying such decisions being that the personal and property rights of the individual are subservient and subordinate to the general welfare of society, and of the community at large, and that a statute or ordinance which is fairly referable to the police power has for its object the "greatest good of the greatest number."' *Bellerive Inv. Co. v. Kansas City*, 321 Mo. 969, 13 S.W.2d 628, 634. This is the basis upon which zoning laws are upheld. *State ex rel. Oliver Cadillac Co. v. Christopher*, 317 Mo. 1179, 298 S.W. 720. Missouri also has upheld billboard regulations on this ground. *St. Louis Gunning Advertising Co. v. City of St.*

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Louis, 235 Mo. 99, 137 S.W. 929; University City v. Diveley Auto Body Co., Mo., 417 S.W.2d 107. The same is true with respect to action by the City of St. Louis in zoning against establishment of a junkyard. City of St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475. However, the courts have protected existing nonconforming uses where they did not constitute a nuisance. Hoffman v. Kinealy, Mo., 389 S.W.2d 745."

The court in this case held that it is within the police power of the state to license and regulate junk yards under the general welfare of the state.

Whether a zoning law is reasonable and constitutional or arbitrary and unreasonable depends on careful examination of the evidence and the circumstances in each case. City of Richmond Heights v. Richmond Hts. M. P. B. Ass'n 213 S.W.2d 47, 358 Mo. 70. Women's Christian Ass'n of Kansas City v. Brown, 190 S.W.2d 900.

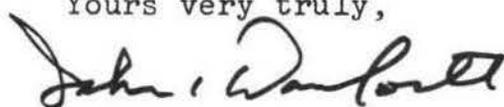
CONCLUSION

It is the opinion of this office that:

1. It is within the police power for the state to enact zoning laws restricting the use of property when reasonably necessary for the promotion of public health, safety, morals and general welfare.
2. That if such law is necessary for the promotion of the public health, safety, morals and general welfare, it does not constitute the taking of private property without due process of law in violation of Article 1, Sections 10, 26, 27 and 28 of the Constitution.
3. Whether the proposed act creating the Missouri Scenic Rivers System is reasonable and necessary for the promotion of the public health, safety, morals and general welfare depends upon the facts and evidence -- which will have to be determined by a court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General