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Kentucky Law Survey: Environmental Law

Carolyn S. Bratt
University of Kentucky

Carolyn M. Brown
University of Kentucky

Environmental Law

BY CAROLYN S. BRATT* AND CAROLYN M. BROWN**

INTRODUCTION

Under the rubric of environmental law, this Survey addresses three separate topics: air quality control, water conservation and development, and zoning.[1] In the exploration of these three topics, relevant decisions from the Kentucky courts and the Kentucky Department for Natural Resources and Environmental Protection, as well as opinions from the Kentucky Attorney General,[2] are analyzed.

I. AIR QUALITY CONTROL

A. *Introduction*

After a number of attempts to encourage the states to combat air pollution,[3] Congress in 1970 enacted a series of amendments

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* Associate Professor of Law, University of Kentucky. J.D. 1974, Syracuse University.

** J.D. 1982, University of Kentucky. The authors give special recognition for her invaluable editorial assistance to Ann K. Benfield, J.D. 1983, University of Kentucky.

[1] Hazardous waste is not covered in this Survey because no judicial nor administrative decisions have been handed down since the Kentucky General Assembly enacted a series of bills in 1980 to comply with the requirements imposed on the states by the Federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1976). Kentucky's hazardous waste program was only recently approved by the Environmental Protection Agency (EPA) (on April 1, 1981). 46 Fed. Reg. 19,819 (1981). This explains the lack of case law on the subject.

For a detailed analysis of the Kentucky and federal programs dealing with hazardous waste, see the excellent article by Stephens, *Commencing the Decade with Environmental Reform: The 1980 Kentucky General Assembly Implements the Resource Conservation and Recovery Act of 1976*, 69 KY. L.J. 227 (1980-81).

[2] The Attorney General of Kentucky issues "opinions," not authoritative decisions.

[3] In 1955 Congress authorized the Surgeon General to study the problem of air pollution, to support research and demonstration projects, and to provide technical assistance to state attempts to control air pollution. Air Pollution Control Act, Pub. L. No. 84-159, 69 Stat. 322 (1955). In 1960 Congress directed the Surgeon General to investigate health hazards from motor vehicle exhaust. Pub. L. No. 86-493, 74 Stat. 162 (1960). In 1963 Congress adopted the Clean Air Act which authorizes federal agencies to increase research

to the Clean Air Act of 1963[4] to compel state action. Under these amendments, although the states retain primary responsibility for air quality, each state must submit an implementation plan specifying how national air quality standards will be met and must attain those standards as expeditiously as possible, but not later than three years after approval of the implementation plan.[5] Serving as the touchstone for these implementation plans are the guidelines formulated by the Federal Environmental Protection Agency (EPA) which promulgate national standards[6] for "ambient air."[7] These regulations establish "primary" standards to protect the public health[8] and "secondary" standards to protect the public welfare from known or anticipated adverse effects associated with air pollutants in the ambient air.[9]

Kentucky's implementation plan received final approval from the EPA in 1974.[10] Under the plan, the Kentucky General Assembly delegated responsibility for regulating air quality within the Commonwealth to the Department for Natural Resources and Environmental Protection (the Department),[11] although county air pollution control districts[12] may share jurisdiction with the Department if certain standards are met.[13] The Department

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activity, to make grants to states to develop air pollution control programs, and to intervene directly to stop certain instances of interstate air pollution. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963). Amendments in 1965 and 1966 to the Clean Air Act expanded the power of the federal government to control motor vehicle exhaust and to make grants to the states. Clean Air Act Amendments, Pub. L. No. 89-272, §§ 101-03, 79 Stat. 992, 995-96 (1965); Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, §§ 201-09, 79 Stat. 992, 992-96 (1965); Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954 (1966). The federal role in combatting air pollution was further increased by the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967).

[4] Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

[5] Clean Air Amendments of 1970, Pub. L. No. 91-604, § 107(a), 110, 84 Stat. 1678, 1680, 42 U.S.C. §§ 7407, 7410 (Supp. IV 1980).

[6] 40 C.F.R. pt. 50 (1981).

[7] Ambient air is outdoor air used by the general public. 40 C.F.R. § 50.1(e) (1981).

[8] 42 U.S.C. § 7409(b)(1) (Supp. IV 1980).

[9] 42 U.S.C. § 7409(b)(2) (Supp. IV 1980).

[10] 39 Fed. Reg. 10,277 (1974). The plan was submitted in February 1972, and received initial approval on May 31, 1972. 37 Fed. Reg. 10,842, 10,868-69 (1972).

[11] KY. REV. STAT. ANN. § 224.340 (Bobbs-Merrill 1977) [hereinafter cited as KRS].

[12] KRS §§ 77.005-.990 (1980) state the procedure for establishing county air pollution control districts and prescribe the role of such districts.

[13] KRS § 224.450(2) (1977).

is empowered to establish emission standards for air contaminants;[14] to require air pollution control districts to adopt regulations and standards no less stringent than the Department's regulations;[15] to revoke an air pollution control district's concurrent jurisdiction for failure to administer its program in compliance with the statutes and the Department's regulations;[16] and to require any air contaminant producer to obtain a permit for operation or construction.[17]

B. *"Prevention of Significant Deterioration" Review*

The Clean Air Act establishes a method for protecting existing air quality[18] as well as a method for improving air quality.[19] In order to accomplish the former objective, EPA promulgated uniform national air quality standards for certain pollutants.[20] A region which meets these standards for a particular pollutant is then subject to a "Prevention of Significant Deterioration (PSD)

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[14] KRS § 224.330 (1977).

[15] KRS § 224.450(2) (1977).

[16] *Id.*

[17] 401 KY. ADMIN. REGS. 50:035 (1980), adopted pursuant to KRS § 224.033 (1977) which requires the Department to prescribe regulations for the prevention, abatement, and control of air pollution.

In 1976, the United States Supreme Court held that federal facilities were not subject to state permit requirements under § 118 of the Clean Air Amendments of 1970, although the Court agreed § 118 did embody Congressional intent to require federal facilities to comply with state emission standards and compliance schedules. 42 U.S.C. § 7418 (1976, amended 1980). Hancock v. Train, 426 U.S. 167, 190-99 (1976). The *Hancock* case arose from efforts of the Kentucky Department of Natural Resources and Environmental Protection (DNREP) to apply the Department's permit requirements to federal air pollution sources in the state. When the federal facilities refused to obtain permits, Kentucky brought the action for declaratory judgment and injunctive relief.

In 1977, following the Supreme Court's ruling in *Hancock*, Congress amended § 118 to make clear its intent that not only the substantive requirements of state air pollution plans adopted under the Clean Air Act, but also state procedural requirements are fully applicable to federal facilities. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 116(a), 91 Stat. 711. The House Interstate and Foreign Commerce Committee's report specifically states that the committee's intent in amending § 118 was to overrule through legislation the Supreme Court's decision in *Hancock*. H.R. REP. No. 294, 95th Cong., 1st Sess. 199, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1277-78. *See* 42 U.S.C. § 7418(a) (Supp. IV 1980).

[18] 42 U.S.C. §§ 7470-91 (Supp. IV 1980).

[19] 42 U.S.C. §§ 7501-08 (Supp. IV 1980).

[20] 40 C.F.R. §§ 51.13-.14 (1981).

increment" for the pollutant. The PSD increment sets a legal parameter on the degree to which the air in the region may become more polluted before the permissible limit for the pollutant (PSD ceiling) is exceeded.[21] The difference between a current level of pollution in an area for a particular type of pollutant and the PSD ceiling for that pollutant is called the "available PSD increment," and as local air pollution emissions increase, the amount of "available PSD increment" decreases until further increases in air pollution emissions for that particular pollutant are impermissible.

The development of any major new source of air pollution obviously has the potential of consuming part or all of the "available PSD increment" for a particular pollutant in any given area. Under the mechanism of a PSD review, the Department for Natural Resources and Environmental Protection allocates the "available PSD increment" for a particular pollutant in a region among air contaminant producers on a first-come basis.[22]

In *Western Kraft Paper Group v. DNREP*,[23] the Kentucky Court of Appeals held that DNREP's allocation of "available PSD increment" to a utility company was proper even though the utility had not obtained a certificate of public convenience and necessity from the state Energy Regulatory Commission, a certificate which is a prerequisite to construction by a utility.[24] Western Kraft objected to the Department's PSD allocation because it planned to expand its operations in the same county, and could not do so if the utility company possessed the "available PSD increment."[25] Western Kraft contended that the utility company was required by KRS section 278.020(3)[26] to obtain a certificate of convenience and necessity prior to applying to the Department for a PSD review, and that the utility company's failure to obtain the certificate invalidated the Department's reservation of the "available PSD increment" to the utility.[27]

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[21] 42 U.S.C. § 7473 (Supp. IV 1980).

[22] Western Kraft Paper Group v. DNREP, 632 S.W.2d 454, 455 (Ky. Ct. App. 1981).

[23] 632 S.W.2d 454 (Ky. Ct. App. 1981).

[24] *See* KRS § 278.020(3) (1981).

[25] 632 S.W.2d at 455.

[26] *See* KRS § 278.020(3) (1981).

[27] 632 S.W.2d at 454.

The Kentucky Court of Appeals found that subsection (1), not subsection (3), of KRS section 278.020 applied to the case.[28] Relying on prior decisions construing the two sections,[29] the court noted that subsection (1) applies only to cases of new utility construction and does not prohibit a utility from obtaining needed authority from other government agencies before applying for a certificate of public convenience and necessity.[30] In contrast, subsection (3) does prohibit a utility from going to other governments or agencies before obtaining a certificate, but that subsection applies only when the utility plans to expand its services without new construction.[31] Since the utility in *Western Kraft Paper Group* was planning only to construct new facilities, not to expand its service, the court found that subsection (1) applied and the reservation of the "available PSD increment" was proper even though the utility did not obtain a certificate of public convenience and necessity prior to the reservation.[32]

C. *Department Reversal of a Prior Decision*

Western Kraft Paper Group also considered the question of whether the Department has the authority to reverse its own prior order.[33] After the utility company had applied for a PSD review, the Department reserved the "available PSD increment" to the utility.[34] But approximately one year later, the Department suspended the PSD reservation until the utility company applied

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[28] *Id.* at 456. The Energy Regulatory Commission apparently advised the Department to the same effect when asked for its assistance in determining the propriety of granting the reservation to Kentucky Utilities when no certificate had yet been obtained. *Id.* at 455.

[29] The court cited two decisions in support of this distinction, Kentucky Util. Co. v. Public Serv. Comm'n, 252 S.W.2d 885 (Ky. 1952), and Public Serv. Comm'n v. Blue Grass Natural Gas Co., 197 S.W.2d 765 (Ky. 1946).

[30] *See* KRS § 278.020(1) (1981). Much more information is required to be submitted with an application for a certificate for construction than is required when applying for a certificate for service. *Compare* 807 KY. ADMIN. REG. 5:001E § 8(1) (1981) regarding service certificates *with* 807 KY. ADMIN. REG. 5:001E § 8(2) concerning construction applications.

[31] KRS § 278.020(3) (1981).

[32] 632 S.W.2d at 456.

[33] *Id.* at 455.

[34] *Id.* at 454.

to the Energy Regulatory Commission for a certificate of convenience and necessity. Less than thirty days later, the Department withdrew its suspension after determining that a utility company which plans to construct a new plant does not have to obtain the certificate prior to applying for state environmental authorization for new construction.[35] Western Kraft claimed that the Department lacked authority to reverse its suspension decision.[36]

The Kentucky Court of Appeals held that the Department has the authority to correct or change its decision as long as it retains subject matter jurisdiction.[37] It found that the Department continued to have such jurisdiction because the language of the suspension order was tentative and because KRS section 224.081(2) "specifically authorizes" the Department to reverse its own decisions.[38] The court reasoned that since KRS section 224.081(2)[39] enables a person aggrieved by a determination of the Department to demand a hearing within thirty days, that the statute impliedly gives the Department jurisdiction over the matter for thirty days following issuance of the suspension order.[40] In

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[35] *Id.* at 454-55.

[36] *Id.* at 454.

[37] *Id.* at 455. Western Kraft asserted that Phelps v. Sallee, 529 S.W.2d 361 (Ky. Ct. App. 1975), should be followed to support a finding that the Department was without authority to reverse itself and withdraw the suspension. In *Phelps*, the court had held that the Banking and Services Commissioner lacked statutory authority to modify, change or set aside an order approving articles of incorporation once it had been issued. *Id.* In *Western Kraft Paper Group* the court distinguished *Phelps* on the ground that the statutes governing banking are different than those which apply to the Department. 632 S.W.2d at 455.

The court of appeals in *Western Kraft Paper Group* instead relied on Union Light, Heat & Power Co. v. Public Serv. Comm'n, 271 S.W.2d 361 (Ky. 1954) which held the Public Service Commission could set aside a prior order as long as the agency, like a court, retained subject matter control over the question submitted to it. *Id.* at 365-66.

[38] 632 S.W.2d at 455. The court's reasoning that reversal is "specifically authorized" is open to attack on the ground that KRS § 224.081(2) (Cum. Supp. 1980) is intended only to provide a method for challenge of Department determinations. Procedures for notice and hearings before the Department which could, through the adversary process, result in a hearing officer overturning an order are not the same as a provision authorizing the Department to reverse itself basically on its own motion. The court's analysis of KRS § 224.081(2) (Cum. Supp. 1980) in *Western Kraft Paper Group* seems even more suspect in light of the language in *Phelps* that "such power does not exist where it is not specifically conferred upon the agency by the express terms of the statute creating the agency." 529 S.W.2d at 365.

[39] KRS § 224.081(2) (Cum. Supp. 1980).

[40] 632 S.W.2d at 455.

this case as the Department acted within thirty days, its reversal was a timely one.[41]

II. WATER CONSERVATION AND DEVELOPMENT[42]

A. *Introduction*

Recognizing that growth in population, expansion of industry, and advances in technology create ever increasing demands for water for industrial, municipal, and recreational uses, while droughts, flooding, and pollution limit use of water resources and damage other resources,[43] the Kentucky General Assembly has enacted statutes to promote and regulate the conservation, development, and beneficial use of Kentucky's water resources.[44] These statutes make DNREP responsible for administering various aspects of the state's water management programs as well as developing appropriate rules and regulations.[45] For example, the Department has the power to issue permits for the construction of any obstruction across or along a stream,[46] and it also controls the issuance of permits for water withdrawal.[47] The Department administers the Wild Rivers Act as well.[48]

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[41] *Id.*

[42] The authors have attempted to include in this section important administrative decisions handed down by DNREP. The reader should bear in mind, however, that a comprehensive treatment of administrative decisions is not possible largely because research in this area is very difficult. Department decisions are neither published nor compiled into a topical index. The administrative cases which are included were discovered through conversations with Department attorneys and former hearing officers. The authors appreciate the assistance of Hugh Archer, Carl Breeding, Alan Harrington, John R. Leathers, Pedro Miranda, Ronald Van Stockum, Jr., and Bob Yarbrough in the research process.

Although these administrative decisions are not published, they are a matter of public record and copies may be obtained through the Office of General Counsel, DNREP, Fifth Floor, Capital Plaza Tower, Frankfort, Kentucky 40601.

[43] KRS § 151.110 (1980).

[44] KRS §§ 146.200-.350 (1980 & Cum. Supp. 1980) (Wild Rivers Act); KRS §§ 151.010-.990 (1980 & Cum. Supp. 1980); KRS §§ 262.010-.990 (1981); KRS § 350.029 (1977); KRS § 433.757 (1975).

[45] KRS § 151.125 (1980).

[46] KRS § 151.125(6) (1980).

[47] KRS § 151.125(4) (1980).

[48] KRS § 146.270 (1980).

B. *Construction Permits*

Any person, city, county, or political subdivision of the Commonwealth must obtain a permit from DNREP before beginning construction of an embankment, levee, dike, bridge, fill, or other obstruction across or along any stream, or in the floodway of any stream.[49] This permitting power is similar to the Department's power to grant or deny surface mining permits, and has been the subject of recent administrative proceedings.[50]

In *Susan K. Uebel*,[51] the hearing officer sustained the Department's reliance on a 1974 "final" floodway map rather than an 1979 "preliminary" floodway map in approving a permit application for construction of a barge loading facility on land adjacent to the Ohio River. A citizen lodged a challenge to the issuance of a permit,[52] alleging that the Department had failed to consider properly that the facility might increase the danger of flooding.[53] The petitioners contended that the Department should have used the 1979 "preliminary" map because it included the area subject to the proposed permit while the 1974 map did not.[54]

The hearing officer noted testimony that the 1979 map was prepared for the purpose of eliciting public comment and corrections,[55] and that the Department itself recommended changes in

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[49] KRS § 151.250(1) (1980). This section does authorize DNREP to issue regulations exempting from the permit requirement dams, embankments or other obstructions which are not of such size and type as to require approval by the Department. The Department has never issued such regulations.

[50] In Chester Coleman, DNREP Rep. No. 1823-V-14 (May 23, 1980), the Department's permit power was challenged but the action was dismissed by the hearing officer because petitioners made only general allegations and failed to support their claims with sufficient evidence.

[51] DNREP Rep. No. 2222-04 (Sept. 25, 1981).

[52] A hearing on the challenge was held pursuant to KRS § 151.180 (1980).

[53] There was evidence that natural drainage in the area had become obstructed due to erosion from poor farming methods. Susan K. Uebel, DNREP Rep. No. 2222-04, at 4. Also the landowners testified that the permitted area had been flooded three times in the past decade. *Id.* report at 2-3.

[54] *Id.* at 4-5. The permit could be properly issued only if the site was located outside the floodway area and drainage was found adequate. *Id.* at 5.

[55] *Id.* at 6-7.

the map which would place the area in question outside the floodway.[56] The officer then concluded that the permit was issued on the basis of the best data available and thus was valid.[57]

In *Willie Blankenship*,[58] a private citizen failed to obtain a construction permit prior to building an embankment along a creek.[59] The Secretary issued an order[60] requiring removal of junk cars used in the embankment fill and grading of the remaining fill to a two-to-one slope.[61] The petitioner appealed the order at an administrative hearing.[62]

The evidence produced at the hearing established that the petitioner, in the aftermath of a serious flood, innocently relied on the oral permission of county officials to construct the embankment instead of applying to the Department for a construction permit.[63] The petitioner admitted using junk cars as the foundation of the fill.[64] Although the Department no longer considers this method of fill construction an accepted engineering practice, the evidence showed that another state agency had used such a method of construction in the past.[65] Indeed, the county used a new approved method on the side of the creek opposite the

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[56] *Id.* at 6.

[57] Although the decision upheld the Department's action, it suggested that the petitioners missed a potentially successful basis of attack. At the pretrial conference, the petitioners had questioned whether the Department had developed regulations to insure appropriate consideration of specific elements in deciding permit requests. The issue was not pursued at the hearing, but the hearing officer did note that "the issuance of permits in the factual circumstances of this case seems at best to be an ad hoc effort." *Id.* at 8.

[58] DNREP Rep. No. 2140-04 (Oct. 20, 1980).

[59] The petitioner's failure to obtain a construction permit from the Department violated KRS § 151.150(2) (1980). *See also* KRS § 151.140(1980) (requiring withdrawal permits).

[60] DNREP Rep. No. 2140-04, at 3. The Secretary of the Department issued the order pursuant to KRS §§ 151.125(5), .297(2) (1980).

[61] DNREP Rep. No. 2140-04, at 3.

[62] The hearing was held pursuant to KRS § 151.180 (1980) (repealed 1980).

[63] DNREP Rep. No. 2140-04, at 7. The official testified they would not have granted their approval if they had known where the petitioner intended to place the fill. The hearing officer, in considering the testimony, noted the confusion which existed at the time of the 1979 flood and concluded that Blankenship's failure to adequately explain the location of the fill was "no less understandable than the County officials' failure to explore more fully the fill's location prior to granting approval." *Id.* at 9.

[64] *Id.* at 2.

[65] *Id.* at 7.

petitioner's fill, but the evidence established that the county's fill had washed out during a subsequent heavy rainfall while the petitioner's "improperly" constructed fill had not.[66] Furthermore, the Department failed to establish a sufficient basis for its determination that a two-to-one slope was necessary to maintain the stability of the fill and to prevent erosion.[67]

Considering all the evidence, including photographs of the petitioner's fill, the hearing officer recommended, and the Secretary agreed, that the only equitable solution was to allow the embankment to remain.[68] The Secretary issued a new order requiring the petitioner merely to finish seeding the slope and to plant trees.[69]

C. *Compensation of Landowners Under the Kentucky Wild Rivers Act*

In 1972 the Kentucky General Assembly enacted the Kentucky Wild Rivers Act,[70] which is intended to preserve certain streams in their free-flowing condition because their natural, scenic, scientific, and aesthetic values outweigh their present and future value for water development.[71] To attain that goal, the Wild Rivers Act attempts to maintain the primitive character of streams designated as "wild rivers"[72] by regulating the use of surrounding public and private property.[73]

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[66] *Id.* at 5-6.

[67] *Id.* at 8. The Department's experts testified that the fill would be unstable because soil would not adhere to the car surfaces, resulting in erosion and possible slides once the soil became wet and lubricated. *Id.* at 4. The Department failed to identify clearly the soil composition, however—one of three necessary factors in determining the proper slope. *Id.* at 8.

[68] *Id.* at 10.

[69] The amended order was made on October 20, 1980.

[70] Act of Mar. 23, 1972, ch. 117, §§ 1-17, 1972 Ky. Acts 525, 525-33 (codified as KRS §§ 146.200-.350 (1980), *amended* Act of Mar. 29, 1976, ch. 197, §§ 1-11, 1976 Ky. Acts 442, 442-45, *recodified* KRS §§ 146.200-.360 (1980 & Cum. Supp. 1980)).

[71] KRS § 146.220 (1980).

[72] *Id.* KRS § 146.241 (1980) designates eight rivers, or parts thereof, as wild rivers. KRS § 146.260(1) (1980) directs the Secretary of DNREP to propose other rivers for future addition to the wild rivers system.

[73] The land use restrictions in designated stream areas imposed by the 1972 Act were contained in Act of Mar. 23, 1972, ch. 117, § 10, 1972 Ky. Acts 525, 530-31, (*amended*

In *Commonwealth v. Stephens*,[74] the landowners defended an action brought by DNREP to enforce the restrictions on land use[75] by challenging the constitutionality of the restrictions as a taking of property without just compensation.[76] The Kentucky Supreme Court held that the Department's attempt to enjoin the defendants' activities failed because the Secretary of the Department had not designated the boundaries of the wild rivers system;[77] and, therefore, the Court could not determine whether the

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Act of Mar. 29, 1976, ch. 197, § 9, 1976 Ky. Acts 442, 444, *codified* KRS § 146.290 (1980)). The General Assembly amended this section in 1976 to ease restrictions on land use. See the text accompanying notes 82-86 *infra* for discussion of the amendment.

[74] 539 S.W.2d 303 (Ky. 1976). For an in-depth analysis of the decision, see Comment, *Commonwealth v. Stephens: The Taking Doctrine at Work in Environmental Land Use Planning*, 65 KY. L.J. 729 (1976-77).

[75] 539 S.W.2d at 304. DNREP sued to enjoin the landowners from cutting timber or otherwise disturbing an area surrounding the Cumberland River, a designated wild river. Cutting of timber was prohibited by KRS § 146.290 (Act of Mar. 23, 1972, ch. 117, § 10, 1972 Ky. Acts 525, 530-31, *amended* Act of Mar. 29, 1976, ch. 197, § 9, 1976 Ky. Acts 442, 444-45)).

[76] 539 S.W.2d at 306-08. The landowners based their defense on a claim of inverse condemnation, i.e., a claim for recovery of the value of the property they alleged the government had taken indirectly without formally exercising its power of eminent domain. The defendants argued that although the Wild Rivers Act was constitutional, it was not a valid exercise of the state's police power, and that it authorized through its provisions restricting use of property in designated river areas a taking of private property for which compensation must be paid. *Id.* at 306.

Exercises of eminent domain require compensation for the taking of private property for public use, Comment, *supra* note 74, at 731. In contrast, a reasonable exercise of the police power does not impose a duty to compensate property owners on the state even though some suffer economic losses as a result. City of Shively v. Illinois Cent. R.R., 349 S.W.2d 682, 685 (Ky. 1961), *appeal dismissed*, 369 U.S. 120 (1962). *See* Comment, *supra* note 74, at 732. A purportedly valid exercise of the police power, however, may impose restrictions on land use so great that the government's actions constitute an indirect taking of property, and compensation of the property owner is required. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Comment, *supra* note 74, at 732. To determine whether restrictions on use constitute a taking, the diminution in value of the subject property must be balanced against the benefits accruing to the general public from the imposed restrictions. 260 U.S. at 413-14.

[77] 539 S.W.2d at 308. The case was decided under the Act of Mar. 23, 1972, ch. 117, § 6, 1972 Ky. Acts 525, 528-29 (codified prior to its amendment in 1976 as KRS § 146.250) which directs the Secretary of the Department to set the boundaries of the stream area associated with the wild river by June 16, 1974. The boundaries must include at least the visual horizon from the stream but should not exceed 2,500 feet from the center of the stream. Although it found the provision requiring designation of boundaries to be mandatory, the Court determined the date set by the legislature for action was directory only. 539 S.W.2d at 308. The Act as amended in 1976 contains the same deadline. Act of Mar.

alleged land use violations had occurred within an area subject to the Act.[78] In addition, the Court held that enforcement of the land use restrictions contained in the Wild Rivers Act constituted a taking which would require compensation of the affected property owners[79] under both the Act[80] and section thirteen of the Kentucky Constitution.[81]

The impact of *Stephens* was muted by the action of the Kentucky General Assembly the same year. Learning of the lower court's adverse decision requiring the Department to compensate landowners whose property lay within the wild rivers system, the

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29, 1976, ch. 197, § 5, 1976 Ky. Acts 442, 444 (codified as amended at KRS § 146.250 (1980)).

[78] 539 S.W.2d at 308. Justice Palmore in his concurrence identified this as the true basis of the decision and pointed out that the Court did not need to analyze the constitutionality of the Act. *Id.* at 309 (Palmore, J., concurring).

[79] *Id.*

[80] *See* 539 S.W.2d at 306. The Court relied in part on KRS § 146.280(1) (1980) which provides in pertinent part: "Nothing in [the Wild Rivers Act] shall be construed to deprive a landowner of the fee simple title to or lesser interest in his property without just compensation."

[81] 539 S.W.2d at 307. The Kentucky Constitution provides, "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." KY. CONST. § 13. As the plain language of the provision indicates and as it has been interpreted by the Kentucky courts, the state must compensate the property owner *before* the property is taken. *See, e.g.*, Goodwin v. Goodwin's Ex'r, 290 S.W.2d 458 (Ky. 1956).

Although the majority in *Stephens* does not clearly state its rationale for holding that enforcement of the Act's land use restrictions would constitute a taking, two findings are implied which are necessary to the holding. First, the Court recognized that ownership of property encompasses the privilege to use and enjoy it as the landowner sees fit, and that infringement of this privilege is an infringement of his property interest. 539 S.W.2d at 305-06. Thus, if the restrictions are viewed as "depriv[ing] a landowner of . . . [a] lesser interest in his property" for purposes of KRS § 146.280(1) (1980), the state is obligated to compensate landowners whose property use is restricted.

Secondly, the majority opinion implies that the Court considered the Act's restrictions to be such an unreasonable exercise of the state's police power as to constitute an indirect taking, and obligate the state to compensate the affected landowners. The Court, without expressly finding that the restrictions of the 1972 Act were unreasonable, cited *Pennsylvania Coal*, the United States Supreme Court case which held that compensation is due when the state's police power is unreasonably exercised. 539 S.W.2d at 306 (citing Penn. Coal Co. v. Mahon, 260 U.S. 393 (1922)). Justice Palmore's concurring opinion flatly states that the restrictions are excessive. *Id.* at 309 (Palmore, J., concurring). See note 76 *supra* for a discussion of the *Pennsylvania Coal* case.

The *Stephens* Court did refuse to hold that mere enactment of the Wild Rivers Act constituted a taking and instead construed it as enabling legislation under which a taking occurs when the Act is unreasonably applied. *Id.* at 306-07.

General Assembly amended the Wild Rivers Act in 1976, while *Stephens* was on appeal.[82] The Act's provision for "just compensation"[83] to owners of certain property interests within the wild rivers system was modified to apply only to acquisition of "easements or lesser interests in or fee title to lands within the authorized boundaries of the wild rivers"[84] in an effort to make compensation unavailable when the Act's effect on a landowner is only to restrict use, not to require transfer of a property interest.[85] In addition, land use restrictions were eased. Construction of new roads and buildings is now allowed if necessary to carry out a permitted use. Mining, other than strip mining, is no longer absolutely prohibited, while existing uses and the attendant utilization of mechanical transportation are exempted from the land use limitations. The landowner may also apply for a change of use to allow selective cutting of timber, resource removal or agricultural use.[86]

Despite the 1976 amendments, the taking issue remains significant under the Kentucky Wild Rivers Act. *Stephens* clearly has continued vitality when applied to a fact pattern in which a taking of the property is found to have occurred prior to 1976.[87]

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[82] Act of Mar. 29, 1976, ch. 197, §§ 1-11, 1976 Ky. Acts 442, 442-45 (codified as amended as KRS §§ 146.200-.360 (1980 & Cum. Supp. 1980)). See Comment, *supra* note 74, at 738-39.

[83] Act of Mar. 23, 1972, ch. 117, § 10, 1972 Ky. Acts 525, 530-31.

[84] KRS § 146.220 (1980).

[85] Comment, *supra* note 74, at 739. However, note that the change of language still does not avoid compensation if the court finds the amended restrictions are still so excessive as to be an unreasonable exercise of the state's police power, if enforced, and so substantial an infringement of the landowner's privilege to use and enjoy his property as to infringe on a property interest. See note 81 *supra* for a discussion of the role of these two findings in the *Stephens* case. Furthermore, § 13 of the Kentucky Constitution requiring payment of just compensation for a taking of private property for public use would still be controlling despite the legislature's attempt to narrow the compensation clause in the Wild Rivers Act. See note 81 *supra* for the pertinent text of § 13.

[86] *Compare* Act of Mar. 23, 1972, ch. 117, § 10, 1972 Ky. Acts 525, 530-31 *with* KRS § 146.290 (1980) (*as amended* Act of Mar. 29, 1976, ch. 197, § 9, 1976 Ky. Acts 442, 444).

[87] The appeals process may soon bring such a case to the Court. The McCreary Circuit Court has held in Stearns Coal & Lumber Co. v. Commonwealth, No. 2994 (McCreary Cir. Ct. Jan. 30, 1981), that the Department was liable for damages for a taking of property whose use, particularly for strip mining, was restricted by the Act.

In theory, the amendments should compel a different interpretation of the issue when the 1976 Act applies.[88] But the intended expansion of permissible land uses under the amendments becomes illusory on closer examination. For example, although the present Act supposedly provides for select cutting of timber and other resource removal pursuant to regulations promulgated by the Secretary of DNREP if accompanied by issuance of a permit, no such regulations have been forthcoming from the Department and, thus, the pre-1976 restrictions still apply to these uses.[89] Strip mining and instream dredging are still absolutely prohibited, and modes of travel continue to be severely restricted within protected areas.[90] Existing and agricultural uses are permitted but these hardly satisfy the desire of some landowners to use their property for more profitable but restricted uses. Thus, the 1976 amendments have little effect on the application of the Act, so that the *Stephens* interpretation of the Act requiring compensation to affected landowners may survive the 1976 amendments.[91]

The circuit court in *Stearns Coal & Lumber Co.* concluded that the enforcement of provisions of the Kentucky Wild Rivers Act and other actions by the Department over a three year period resulted in a taking of the plaintiff's property in 1975. *Id.* Judge Johnson found the property in question, which included not only a fee simple ownership but mineral rights as well, had diminished in value due to the restrictions on mining and other uses imposed by the Act and that the land could not be used profitably. *Id.*, slip op. at 6, 11. The court rejected the Department's argument that the 1976 amendments to the Act should govern whether a taking had occurred and suggested further that the permitting provision added in 1976 might be an unlawful delegation of power to the Department. *Id.* at 13-14. The *Stephens* problem of failure to designate the wild river area is not present in *Stearns Coal* because evidence was introduced that the Department had designated the boundaries of the protected zone surrounding the wild river at issue in the case.

[88] Comment, *supra* note 74 at 738-40. While the author of this Comment adopted this optimistic viewpoint, the writer could not have known that the Department would fail to enact regulations enabling the 1976 amendments to have the desired effect.

[89] KRS § 146.290 (1980). In fact, restrictions on cutting timber was one of the restrictions specifically at issue in *Stephens*. 539 S.W.2d at 304.

[90] KRS § 146.290 (1980).

[91] If the *Stephens* decision has continued vitality after the 1976 amendments to the Act, the Court has dealt a perhaps deadly blow to the wild river system in Kentucky by interpreting the Act as requiring compensation to be paid to all landowners whose property lays within the stream area. The estimated cost of acquisition by the state of such property interests was approximately 74 million dollars in 1976. Comment, *supra* note 74, at 745.

D. *Liability Under the Fish and Wildlife Resources Act*[92]

No private or public person, firm or corporation is permitted to place any substance in public waters which might injure aquatic life.[93] In *City of Murray v. Commonwealth*,[94] a municipality discharged raw sewage into a stream because of a malfunction in a sewage treatment plant built to state specifications.[95] The city argued that liability could not be imposed for the resulting death of certain species of fish because the city had not been negligent.[96]

The Kentucky Court of Appeals found that, in prohibiting placement of injurious substances in public waters, the General Assembly intended to afford the greatest protection possible to aquatic life.[97] According to the court, the legislature would have stated its intent to impose liability only in cases of negligence, if that had been its intent.[98] Therefore, the court concluded that the statute imposed strict liability[99] on the city for the damage caused by the release of raw sewage into the river.

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[92] KRS §§ 150.010-.993 (1980 & Cum. Supp. 1980).

[93] KRS § 150.460 (1980).

[94] 584 S.W.2d 403 (Ky. Ct. App. 1979).

[95] *Id.* at 404. Several recent federal cases have interpreted similar pollution discharge regulations under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. IV 1980), including United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974) (upholding regulation of discharge of pollutants into a nonnavigable tributory of a navigable stream and imposing a fine on Ashland Oil for failing to give immediate notice of such discharge); United States v. Beatty, Inc., 401 F. Supp. 1040 (W.D. Ky. 1975) (holding reasonable a regulation which deemed that discharge of oil causing a sheen or film or discoloration of the water is harmful and affirming imposition of appropriate civil penalties); United States v. Kentland-Elkhorn Coal Corp., 353 F. Supp. 451 (E.D. Ky. 1973) (regarding the propriety of issuing a civil injunction to prevent criminal violation of the Act through discharge of blackwater due to coal operations, and holding that discharge of blackwater does constitute an "obstruction" of navigable waters and "refuse" for purposes of the Act).

[96] 584 S.W.2d at 404.

[97] *Id.* at 405.

[98] *Id.* The Court noted that KRS § 150.015 (1980) provides that the language of the statute be liberally construed to further the legislative purpose of preserving and conserving wildlife. 584 S.W.2d at 405.

[99] *Id.* The Court noted that prior Kentucky decisions had accepted the strict liability doctrine in products liability cases, citing Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197 (Ky. 1976); Kroger Co. v. Bowman, 411 S.W.2d 339 (Ky. 1967).

III. ZONING

A. *Introduction*

Land use control, like air and water regulation, is aimed at resource conservation and development and has a tremendous impact on the environment of particular communities. An examination of zoning cases is therefore essential to our discussion of environmental law.[100]

Planning and zoning are primarily local issues, but local ordinances must comply with the prerequisites imposed by the Commonwealth's Zoning Enabling Act.[101] Initially, a planning unit, consisting of a city or county acting independently, cities and their counties acting jointly, or groups of counties and their cities acting regionally, must be formed[102] and a planning commission appointed.[103] Thereafter, the planning commission must prepare a comprehensive plan to assure that public and private development occurs in an orderly fashion.[104] The Zoning Enabling Act delineates the minimum elements of a comprehensive plan,[105] as well as the minimum research required to support the elements of the plan.[106] If these prerequisites are met, zoning ordinances in conformance with the comprehensive plan may be adopted by the cities and counties within the planning unit.[107]

B. *Subdivision Regulations*

The planning commission may adopt regulations for the subdivision of land after it has completed the statement of objectives, land use, transportation, and community facilities elements of the comprehensive plan. Once the commission has

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[100] See Griffin & Becker, *Zoning—Kentucky Law Survey*, 67 KY. L.J. 627 (1978-79) for a recent survey of Kentucky zoning law.

[101] KRS §§ 100.111-.991 (1982).

[102] KRS §§ 100.113 (1982).

[103] The method of appointing planning commission members in most cases is delineated in KRS § 100.133 (1982). The procedure for appointing a commission in a county with a population greater than 300,000 is contained in KRS § 100.137 (1982).

[104] KRS § 100.183 (1982).

[105] KRS § 100.187 (1982).

[106] KRS § 100.191 (1982).

[107] KRS § 100.207 (1982).

adopted subdivision regulations, any subdivision of land must be approved by the commission.[108]

In *Lampton v. Pinaire*,[109] developers applied to the local planning and zoning commission for approval of their subdivision plat. The commission conditioned its approval on the developers' dedication to the county of additional land for a right-of-way along an existing street[110] and on the county fiscal court's agreement to improve the existing street.[111]

The Kentucky Court of Appeals held that the zoning commission had the authority under the Commonwealth's Zoning Enabling Act to require the developers to dedicate additional right-of-way as a condition precedent to approval of the developers' subdivision plan.[112] The court emphasized that it was illogical to allow private development of property to increase traffic on adjacent, preexisting roads and then to require the local community to bear the expense of condemning property to improve roads to meet the increased traffic burden.[113] The court remanded the case to the trial court, however, to determine the

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[108] KRS § 100.273 (1982). The regulations adopted must conform to the comprehensive plan and include requirements for the design of streets, utilities, recreation areas and other facilities, specifications for the physical improvement of streets, utilities and other facilities, and requirements for reserving land for public use pending government purchase. KRS § 100.281 (1982).

KRS § 100.277 (1982) prohibits subdividing any property, recording any subdivision plat or selling any lots until the developer has obtained commission approval.

[109] 610 S.W.2d 915 (Ky. Ct. App. 1980).

[110] *Id.* at 917. The county's subdivision regulations set forth explicit guidelines for dedication. *Id.* at 918.

[111] *Id.* at 917.

[112] The trial court had held that the provisions of the county subdivision regulations requiring dedication of additional right-of-way for existing streets were unconstitutional as a taking of property without just compensation. The court of appeals reversed, holding that a local government may adopt subdivision regulations which require dedication of land for public purposes if the state's statutes authorizes such dedication, and if the regulation is applied reasonably and with due process. *Id.* at 918-19.

The court found state statutory authority for the *Lampton* regulations in KRS § 100.281(4), (5) (1982). Although the court indicated that subsection five provided authorization for the subdivision regulations containing dedication requirements, that section deals only with provisions to reserve land, not dedicate it. For a discussion of the use of reservation provisions in land use planning, see the notes to MODEL LAND DEV. CODE §§ 3-201, -202 (Proposed Official Draft 1975).

[113] 610 S.W.2d at 919. The concept underlying dedication requirements and other exactions on subdivision developers is cost internalization. 3 E. YOKELY, ZONING LAW AND PRACTICE § 17-8 (4th ed. 1979).

reasonableness of the amount of land the developer was required to dedicate for the right-of-way.[114]

The court held invalid the second condition placed on approval of the developers' plat—an agreement by the county's fiscal court to improve existing streets.[115] It found that the zoning commission does not have the authority to require a fiscal court, an independent legislative body, to agree to make improvements.[116] Rather, by dedicating the additional right-of-way, the developer had complied with the promulgated zoning regulations and the zoning commission must approve the developers' subdivision plat.[117]

C. *Denial of Zoning Change Requests*

An accepted objective of planning is the elimination of nonconforming uses.[118] The court of appeals' decision in *Landgrave v. Watson*[119] is consistent with this objective. In *Landgrave*, the plaintiffs had purchased a service station which was a nonconforming use[120] in a residential district.[121] Without applying for the

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[114] 610 S.W.2d at 919.

[115] *Id.* at 920.

[116] *Id.* The sought-after approval concerned a county road. Improvement of county roads is solely within the authority of the fiscal court.

[117] *Id.* Approval of subdivision plats upon compliance with regulations is considered a ministerial act. Snyder v. Owensboro, 529 S.W.2d 663, 664 (Ky. Ct. App. 1975).

[118] *See* 4 E. YOKELY, *supra* note 113, at § 22-7.

[119] 593 S.W.2d 875 (Ky. Ct. App. 1979).

[120] Kentucky's Zoning Enabling Act defines a "nonconforming use or structure" as "an activity or a building, sign, structure or portion thereof which lawfully existed before the adoption or amendment of the zoning regulation, but which does not conform to all of the regulations contained in the zoning regulation which pertain to the zone in which it is located." KRS § 100.111(12) (1982). In order to be a valid nonconforming use, the use must have been lawfully in existence at the time the zoning ordinance was enacted or amended and have been continued since that time. 4 E. YOKELY, *supra* note 113, at § 22-2. Occasional activity on the property will not suffice to establish a nonconforming use. Durning v. Summerfield, 235 S.W.2d 761, 763 (Ky. 1951) (holding that occasional use of property in a residential zone for a carnival did not establish a nonconforming use).

Ordinances authorizing nonconforming uses were enacted in response to fears of unconstitutionality if immediate discontinuance of the use was required, especially since a nonconforming use, once created, runs with the land and can be likened to a property right. 4 E. YOKELY, *supra* note 113, at § 22-6.

[121] The property in question was zoned commercial in 1943. 593 S.W.2d at 876. While the commercial classification was in effect, the service station was constructed. In

appropriate zoning change, they began to convert the property into a liquor store.[122] After being served with a cease and desist order, the plaintiffs did apply for a zoning change.[123] The city-county planning commission and the fiscal court denied their request.[124] The circuit court then overruled the denial of the zoning change request and ordered the county to amend its zoning map to reflect the commercial classification of the property.[125]

The Kentucky Court of Appeals reviewed the evidence[126] to see if it supported the denial of the zoning change request.[127] It rejected the plaintiffs' argument that major changes within the area[128] made the property in question worthless under a res-

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1965, the area was rezoned residential and the service station was granted nonconforming use status. *Id.*

[122] *Id.*

[123] *Id.* The plaintiffs originally appealed from the order, which was issued on the basis that the physical conversion of the structure was improper, but the appeal was unsuccessful on procedural grounds. *Id.*

[124] 593 S.W.2d at 876-77. The commission's resolution denying the zone change was issued after a public hearing held in accordance with KRS §§ 100.211, .214 (1982) and finding of facts required by KRS § 100.213 (1982). *Id.*

[125] *Id.* at 877.

[126] The court of appeals found that a circuit court's scope of review in zoning matters is limited to determining whether the agency acted within its powers; whether the agency afforded procedural due process to the parties; and whether the agency made findings of fact supported by substantial evidence in granting or denying the zoning change request. *Id.* Also, it noted that a de novo trial by the circuit court is impermissible. *Id.* (citing City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n, 379 S.W.2d 450 (Ky. 1964)). Under the facts of this case, the court's review was limited to whether the evidence supported the denial as required by due process and KRS § 100.213 (1982).

[127] *See* KRS § 100.213 (1982). The purpose of the statute, in requiring that certain conditions be met before a map amendment is permitted, is to insure that zoning conforms to prior planning and to prevent indiscriminate, piecemeal rezoning. Manley v. City of Maysville, 528 S.W.2d 726, 728 (Ky. 1975); Hines v. Pinchback-Halloran Volkswagen, Inc., 513 S.W.2d 492, 494 (Ky. 1974). Without such restrictions on the ability of a community to grant a zone change, the requirement in KRS § 100.183 (1982) that each planning unit prepare a comprehensive plan would be made meaningless by subsequent arbitrary zone changes.

[128] 593 S.W.2d at 877-78. The area was zoned commercial from 1943-65 but pri-

idential zoning classification because the plaintiffs had not explored the fact that the residential classification permitted uses other than single-family residential.[129] It also found that the commission and the fiscal court had acted in accordance with a properly developed comprehensive plan, and noted that neighborhood residents strongly opposed any variation from the plan.[130]

The court concluded the plaintiffs had failed to present compelling evidence to support their claimed need for rezoning and that, although obvious hardship befell the owners, hardship alone was not a sufficient basis for a zoning change. Finding that the planning commission and the fiscal court had not acted arbitrarily in denying the request,[131] the court of appeals reversed the circuit court[132] and upheld elimination of the nonconforming use.

D. *Disqualification of Planning Commission Members*

The Zoning Enabling Act provides that "[a]ny member of a planning commission who has any direct or indirect financial interest in the outcome of any question before the body shall disclose the nature of the interest and shall disqualify himself from

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marily residential, not commercial development, occurred.

[129] *Id.* at 876-77. The court agreed that the property in question would not be suitable for a residence because the land was paved and surrounding land uses included a dry cleaner, a convenience grocery store and a service station. *Id.* at 876-77. However, the court noted that the residential zone permitted churches, schools and clubs in addition to single-family dwellings. *Id.*

[130] *Id.* at 877.

[131] The test of arbitrariness to be followed on review of decisions made by a planning commission or a fiscal court is drawn from an earlier decision, Fiscal Court v. Stallings, 515 S.W.2d 234 (Ky. 1974). For a case where refusal to make a zoning reclassification was held to be arbitrary, see Taylor v. Coblin, 461 S.W.2d 78 (Ky. 1970). Note that the local legislative body must make sufficient independent findings of fact to override a planning commission's denial of a zoning change request. Caller v. Ison, 508 S.W.2d 776, 777 (Ky. 1974); McKinstry v. Wells, 548 S.W.2d 169, 174 (Ky. Ct. App. 1977). The fiscal court, however, may adopt the findings of the planning commission, as the fiscal court did in *Landgrave*, 593 S.W.2d at 877, when it approved the planning commission's ruling. *See* City of Louisville v. McDonald, 470 S.W.2d at 173.

[132] 593 S.W.2d at 878. The court did not reach the second issue raised on appeal, i.e., whether the circuit court could direct a zone map amendment, if the denial was

voting on the question."[133] In *City-County Planning Commission v. Jackson*,[134] a case of first impression, the Kentucky Court of Appeals addressed the issue of what constitutes a "direct or indirect financial interest in the outcome" and concluded that potential liability of commission members for an erroneous zoning ruling does not constitute such a "financial interest."[135]

The planning commission initially denied a developer's proposal to construct multifamily housing on appropriately zoned land.[136] The developer filed suit in United States District Court, requesting that the commission's decision be reversed and that $1.6 million in damages be awarded against the commission members.[137] Prior to determining whether monetary damages should be awarded, the federal court ordered a new hearing at which the commission approved the developer's plan.[138] Residents of the neighborhood in which the proposed project was to be constructed then appealed the commission's decision.[139]

The residents argued that the potential liability of the commission members for the damage claim of the developer was a sufficient financial interest to disqualify the entire commission from acting on the developer's application.[140] The Kentucky Court of Appeals found that the disqualification statute was intended "to prevent direct and indirect financial enrichment to the board members . . . who [have] property or matters for consideration by the commission" and was not intended "to deprive members from ruling on a matter because they have been finan-

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found to have been arbitrary. *Id.* For a case holding that a circuit court has no power to direct a zone map amendment, see 548 S.W.2d at 174.

[133] KRS § 100.171(1) (1982).

[134] 610 S.W.2d 930 (Ky. Ct. App. 1980).

[135] *Id.* at 932.

[136] *Id.* at 930. Although the planned construction of multifamily housing was proper for the zone, the planning commission was required by local ordinance to determine that plans and specifications were appropriate for a particular neighborhood. *Id.* After a hearing, the commission denied approval on that ground. *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.* at 931.

[140] *Id.* The approval would have been void for lack of a quorum at the meeting approving the development. KRS § 100.171 (1982).

cially threatened or are placed under some comparable duress."[141] Therefore, the commission members were held qualified to act upon the developer's request for approval of his subdivision plans because possible financial enrichment was not involved.[142]

The court of appeals also noted that if the rule suggested by the residents were adopted, filing of a damage suit by a disappointed applicant would effectively immobilize a planning commission.[143] Although the rule adopted by the court precludes the possibility that a damage claim will obstruct the administrative process, it leaves the door open to a situation where the threat of a damage action against a planning commission may encourage a commission to acquiesce to the demands of the applicant.

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[141] 610 S.W.2d at 932. Because this was a case of first impression, the court looked to decisions in other jurisdictions for guidance. The court relied on three Connecticut cases: Anderson v. Zoning Comm'n, 253 A.2d 16 (Conn. 1968) (refusing to disqualify zoning commission member whose interest was extremely remote); Kovalik v. Planning & Zoning Comm'n, 234 A.2d 838 (Conn. 1978) (disqualifying commission member who owned eight percent of land in zone being considered); Lake Garda Improvement Ass'n v. Town Planning & Zoning Comm'n, 199 A.2d 162 (Conn. 1964) (invalidating zoning changes because of commission member's personal litigation with opponent of the change).

The *Jackson* court turned to Connecticut law mainly because it found the Connecticut disqualification provision similar to Kentucky's. 610 S.W.2d at 931. *Compare* CONN. GEN. STAT. ANN. §§ 8-11 (West Supp. 1981) *with* KRS § 100.171(1) (1982). Two distinctions are readily apparent, however: (1) the Connecticut provision does not require the commission member to disclose the nature of the interest while under Kentucky law he must; and (2) the Kentucky statute refers only to financial interests while the Connecticut statute refers to both financial and personal interests. By analogizing to Connecticut law, the Kentucky court may be erroneously reading the personal interest limitation into Kentucky law.

[142] 610 S.W.2d at 932. The courts do not agree on whether disqualification is necessary. *See* 3 E. YOKELY, *supra* note 113, at § 18-8. Some courts stress that a zoning commission member should be disqualified if his activities project an appearance of bias. Daly v. Town Planning & Zoning Comm'n, 191 A.2d 250 (Conn. 1963); Barbara Realty Co. v. Zoning Bd. of Review, 128 A.2d 342 (R.I. 1957). Other decisions take a more lenient approach. Anthony v. City of Kewanee, 223 N.E.2d 738 (Ill. App. 1967) (self-interest of council member regarding zone change did not require withdrawal in the absence of fraud); Turf Valley Assocs. v. Zoning Bd., 278 A.2d 574 (Md. 1971) (open expression of stance on amendment was not adequate bias for requiring disqualification).

[143] 610 S.W.2d at 931. Other courts have also expressed concern about the handicap which would be placed on local government if every conceivable interest could force zoning officials to disqualify themselves. Armstrong v. Zoning Bd. of Appeals, 257 A.2d 799, 806 (Conn. 1969); Anderson v. Zoning Comm'n, 253 A.2d at 20.

E. *Intent of the Zoning Enabling Act*

In *Kindred Homes, Inc. v. Dean*,[144] the Kentucky Court of Appeals addressed the continued validity of a county's interim zoning regulations[145] after adopting a comprehensive plan.[146] The interim regulations zoned agricultural all land in the county except for two cities. The fiscal court, adopting the planning commission's recommendation, denied the plaintiffs a zoning map amendment which would permit them to build a residential development on land zoned agricultural under the interim regulations.[147]

Although the court of appeals recognized that interim zoning regulations adopted pursuant to the statement of goals and objectives for a comprehensive plan are valid,[148] the court invalidated these interim regulations because the planning commission had failed to replace them with permanent controls after the comprehensive plan was adopted.[149] Therefore, the plaintiffs were held

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[144] 605 S.W.2d 15 (Ky. Ct. App. 1979).

[145] Interim zoning regulations are provided for in KRS § 100.334(2) (1982).

The purpose behind authorizing communities to adopt interim zoning regulations prior to adoption of a comprehensive plan is to temporarily preserve the status quo. 2 E. YOKELY, *supra* note 113, at § 10-3. If the community lacks such authority, the danger is that developers and others, upon learning of the intent to adopt a comprehensive plan, will move quickly to establish otherwise incompatible uses in the interim period prior to the completion of the plan. Those incompatible uses will then have to be allowed to remain as nonconforming.

Courts in other states have split on the question of whether interim zoning regulations are a valid exercise of the police power. *Id.* at § 10-2. Kentucky follows the majority rule of upholding interim zoning regulations when the community has statutory authority to enact the controls. *Id.* at § 10-6. Darlington v. Board of Councilmen, 140 S.W.2d 392, 395 (Ky. 1940); Op. Ky. Att'y Gen. No. 77-540 (Sept. 1, 1977). Grounds other than the absence of a statutory grant of authority on which temporary controls have been held invalid include: (1) enactment of the ordinance to prevent development by particular individuals; (2) indefinite language; (3) unusually long delays in implementing a final plan; (4) failure to follow the requirements outlined in the state zoning enabling act for adoption of such regulations. 2 E. YOKELY, *supra* note 113, at § 10-5.

[146] 605 S.W.2d at 16.

[147] *Id.*

[148] *Id.* at 17. The court cited Daviess County v. Snyder, 556 S.W.2d 688 (Ky. 1977), in which the Kentucky Supreme Court held that the statement of goals and objectives required by KRS § 100.193 (1982) must be adopted prior to enactment of interim zoning ordinances in order for the ordinances to be held valid.

[149] 605 S.W.2d at 17. The court drew on the earlier decision of City of Erlanger v.

not bound by the commission's decision which had been based on the interim regulations. Voiding the interim regulations left in effect only the comprehensive plan.[150]

The *Kindred Homes* decision is consistent with the purpose of the Zoning Enabling Act to require zoning both to conform to prior planning and not to be changed in piecemeal fashion.[151] A reasoned, planned approach to growth cannot be achieved if a community continues to rely on interim regulations enacted prior to development of a comprehensive plan. To hold otherwise renders worthless the planning process and comprehensive plan.

In *Creative Displays, Inc. v. City of Florence*,[152] the integrity of the Zoning Enabling Act in insuring a methodical approach to growth was again at stake, but this time in the context of the adoption of a comprehensive plan.[153] The suit challenged the validity of billboard ordinances based on a joint city-county comprehensive plan adopted in 1966 in an effort to comply with the

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Hoff, 535 S.W.2d 86 (Ky. 1976). The *Hoff* suit arose when owners of property in a shopping center were denied a building permit for a service station based on a zoning regulation which prohibited service stations in that area. *Id.* at 87. The city adopted a comprehensive plan pursuant to the Zoning Enabling Act, but failed to adopt permanent zoning ordinances based on the comprehensive plan. *Id.* Instead, it merely reenacted as "permanent zoning regulations" its preexisting interim regulations to meet the time limits contained in KRS § 100.367 (1982). The *Hoff* court held that the ordinances were inconsistent with the comprehensive plan and were therefore invalid. 535 S.W.2d at 88.

The *Kindred Homes, Inc.* court analogized from *Hoff* that interim zoning regulations adopted pursuant to a statement of goals and objectives become invalid when the regulations were incompatible with a comprehensive plan adopted at a later date. 605 S.W.2d at 17. Certainly interim zoning regulations which zone the greater part of a county agricultural in the face of a comprehensive plan which recognizes the potential for residential development in the area are inherently incompatible.

[150] The court of appeals affirmed the circuit court's holding as void the planning commission's amendments to the comprehensive plan without the fiscal court's approval. 605 S.W.2d at 18.

[151] Hines v. Pinchback-Halloran Volkswagen, Inc., 513 S.W.2d 492; City of Louisville v. Kavanaugh, 495 S.W.2d 502 (Ky. 1973); KRS § 100.191 (1982).

[152] 602 S.W.2d 682 (Ky. 1980).

[153] The term "comprehensive plan" has been defined as "a general plan to control and direct the use and development of property in a municipality . . . by dividing it into districts according to the present and potential use of the property." 1 E. YOKELY, *supra* note 113, at § 5-3. Requiring zoning ordinances to be in accordance with the comprehensive plan is intended to prevent an arbitrary or capricious exercise of the zoning power. *Id.* at § 5-2. See the text accompanying notes 101-07 *supra* for an outline of the required components and process for formulating a comprehensive plan in Kentucky.

Act.[154] The plan simply mirrored preexisting, separate plans for the city and county.[155] The Kentucky Supreme Court invalidated[156] the billboard ordinance because the comprehensive plan failed to comply with the requirements of the Zoning Enabling Act.[157]

The Court found that the *pro forma* adoption of the preexisting plans failed to comply with the requirement that each planning unit "shall prepare" a comprehensive plan.[158] Furthermore, the statement of goals and objectives in the individual preexisting city and county plans did not properly address the concerns of a county-wide planning unit.[159] Similarly, the research, analysis, and projections prepared separately for the existing city and county plans were found insufficient to support county-wide planning decisions.[160] Finally, the Court found that the public

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[154] 602 S.W.2d at 683.

[155] *Id.* The plaintiffs agreed that the substantive requirements of KRS § 100.187 (1982), which establishes minimum contents of a comprehensive plan, had been met. However, the plaintiffs still argued that the comprehensive plan was invalid because of the *pro forma* manner in which it was adopted. 602 S.W.2d at 683.

[156] The court of appeals had upheld the billboard ordinances, finding that the planning unit's comprehensive plan was valid because it was in "substantial compliance with the applicable statutory requirements." Creative Displays, Inc. v. City of Florence, No. 78-CA-1195-MR (Ky. Ct. App. Sept. 14, 1979). The Kentucky Supreme Court expressly stated that the "substantial compliance" standard used by the court of appeals was improper and that the Act must be strictly construed. 602 S.W.2d at 684 (citing Daviess County v. Snyder, 556 S.W.2d at 688; City of Erlanger v. Hoff, 535 S.W.2d at 86; Hines v. Pinchback-Halloran Volkswagen, Inc., 513 S.W.2d at 492).

[157] Underlying the Court's holding was concern that the city and county had evaded the legislature's intent to encourage county-wide zoning in more than name only. 602 S.W.2d at 683. *See* KRS § 100.121 (1982). The Act strongly encourages the formation of joint planning units. Furthermore, the Act allows a city or county to establish an independent planning unit after the failure of certain procedures which include "interrogation" between city and county leaders toward establishing a joint planning unit. KRS § 100.117 (1982).

[158] 602 S.W.2d at 683. KRS § 100.183 (1982) mandates that the commissioner "shall prepare a comprehensive plan." *Id.* The Court observed in *Creative Displays* that the Zoning Enabling Act "is predicated on the belief that good zoning only follows from good planning." 602 S.W.2d at 683.

[159] 602 S.W.2d at 683. KRS §§ 100.187(1)-.193 (1982) require that the planning commission for the unit prepare a statement of goals and objectives as an element of the comprehensive plan. The Court acknowledged that the plan prepared by the commission in *Creative Displays* did contain a statement of goals and objectives. 602 S.W.2d at 683. However, because the statement was developed without considering the needs of the planning unit as a whole, its content was of little value. *Id.*

[160] 602 S.W.2d at 683. KRS § 100.191 (1982) requires that extensive research and analysis be done to provide a solid basis for the development of a comprehensive plan.

hearings held on the individual city and county plans did not satisfy the requirement that a public hearing be held before adoption of a comprehensive plan.[161] As the comprehensive plan was invalidated, the ordinances based on it were likewise held invalid.[162]

F. *Bond Forfeiture Under Conditional Use Permits*

Louisville & Jefferson County Board of Zoning Adjustment v. Joseph C. Hofgesang Sand Co.[163] raised a question about bond forfeiture similar to that involved in performance bond forfeitures in surface mining.[164] In order to obtain a conditional use permit[165] for the operation of a sanitary landfill, the company executed a bond to insure compliance with the landfill regulations.[166] Subsequently, the permit was revoked because of the company's noncompliance[167] and forfeiture of the entire amount

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[161] 602 S.W.2d at 683-84. KRS § 100.197 (1982) provides that "[t]he planning commission shall hold a public hearing and adopt the element [of the comprehensive plan] by a regulation . . . ." The Court found that the failure to hold a public hearing on the county-wide comprehensive plan deprived the citizens of the county and the city of the opportunity to express their views. 602 S.W.2d at 683-84.

[162] *Id.* at 684. Pursuant to KRS § 100.367 (1982), since the deadline for compliance had passed, the comprehensive plan and ordinances were void. *See* City of Erlanger v. Hoff, 535 S.W.2d at 88.

[163] 617 S.W.2d 40 (Ky. 1981).

[164] Performance bonds in surface mining are used to secure compliance with the rules and regulations governing surface mining. If an operator's permit is revoked for noncompliance with these rules and regulations, the bond is forfeited. KRS § 350.130(1) (Cum. Supp. 1980).

[165] See KRS § 100.111(5) (1982) which defines a conditional use. See also KRS §§ 100.217, .237 (1982) for creation and duties of a board of adjustment which is empowered to grant conditional use permits.

The conditional use permit is a valid zoning technique which grants to a community the flexibility to place in a zone a use which would otherwise be excluded, with conditions to limit the disadvantages of allowing the use. *See generally* 2 E. YOKELY, *supra* note 113, at § 14-9. Although the two concepts are sometimes confused, a conditional use is not the equivalent of a use variance. *Id.* The distinction between the two is not likely to present a problem in Kentucky, however, because the Kentucky Zoning Enabling Act allows variances only in dimensions, not use. KRS § 100.241 (1982).

[166] 617 S.W.2d at 40.

[167] *Id.* The company was placing toxic liquid waste in the landfill, a use prohibited by local land use regulations. *Id.* The permit was revoked pursuant to KRS § 100.237(4) (1982) which provides for periodic inspections of the permitted site to determine whether

of the bond was sought.[168] The Kentucky Supreme Court articulated the following general rule:

> [W]here a bond is given to a public body as a condition of a license or as a condition of compliance with the law, upon a breach, the full penalty of such bond may be recovered, in the absence of express or implied provisions to the contrary in the statute or ordinance that prescribes the bond, or in the bond itself.[169]

The Court concluded that nothing in the language of the bond,[170] the mortgage securing the bond,[171] or the zoning ordinance mandating execution of the bond,[172] evidenced any inten-

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the landowner is complying with the conditions placed on the use, a hearing procedure to be followed in the event noncompliance is discovered, and an authorization of revocation of the permit upon a finding of noncompliance.

[168] 617 S.W.2d at 40. The board held a mortgage on the property in question as security for the bond. *Id.* The case arose as a condemnation action by the county instituted after the conditional use permit was revoked. The board was named a party because of its mortgagor status. *Id.* at 41. The board then cross-claimed for the full amount of the bond. The company argued that the board was only entitled to recover the amount necessary to cover any damage which the board had incurred as a result of the noncompliance. *Id.* at 40.

The trial court granted summary judgment for the board of adjustment but was reversed by the court of appeals which relied on American Book Co. v. Wells, 83 S.W. 622 (Ky. 1904), and Commonwealth v. Ginn, 63 S.W. 467 (Ky. 1901), to hold that the amount of bond to be forfeited depended on whether the parties intended it to serve as a penalty or as liquidated damages. 617 S.W.2d at 41. The Kentucky Supreme Court recognized that the *Ginn* decision discussed liquidated damages in holding that the full amount of the bond should be forfeited. *Id.* However, the Court disagreed with the court of appeals' interpretation of *Ginn* and *Wells*, pointing to the later case of City of Paducah v. Jones, 104 S.W. 971 (Ky. 1907), which held that the parties' intentions and any questions of the amount of damages are irrelevant when a bond is executed as security by a licensee that the law will be obeyed. 617 S.W.2d at 42.

[169] *Id.* at 41 (citing United States v. Zerby, 271 U.S. 332 (1926); 104 S.W. 971; 83 S.W. 622; 63 S.W. 467).

[170] The bond stated that "the condition of this obligation is such that if the Principal shall perform said . . . operation in accordance with the conditions of said application and approval then this obligation shall be null and void; otherwise to remain in full force and effect." 617 S.W.2d at 41.

[171] The statement of purpose in the mortgage instrument provided "[t]hat the mortgagor has this day executed a penal bond to the morgagee . . . to secure its faithful performance of all regulations and conditions set forth in the application and approval thereof for conditional use to permit . . . a landfill area for an industrial and sanitary dump . . . ." *Id.*

[172] *Id.*

tion contrary to a total bond forfeiture.[173] It stated that the purpose of the bonding requirement is not to provide compensation for damages resulting from noncompliance, but rather to act as a penalty to insure compliance with the regulations.[174]

[173] *Id.*

[174] *Id.* at 42. The Court emphasized that the right to operate a landfill is a privilege conferred upon the company by the board. The board, as grantor, has the right to condition the exercise of that privilege including the ability to require a bond as insurance that the conditions will be satisfied. *Id.*