Commonwealth v. Stephens: The Taking Doctrine at Work in Environmental Land Use Planning

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COMMONWEALTH V. STEPHENS: THE TAKING DOCTRINE AT WORK IN ENVIRONMENTAL LAND USE PLANNING

INTRODUCTION

When the long hunters first ventured into “Kaintucke” thousands of miles of unpolluted, untrammeled, free-flowing streams served as avenues for their explorations. Today, only a few remnants of that wilderness heritage remain relatively unspoiled.

. . . .

For those who would save these few pristine remnants for the appreciation and enjoyment of all Kentuckians, especially those yet unborn, the time is very short.¹

In 1972, the Kentucky General Assembly responded to this warning from the Advisory Commission on Wild Rivers by enacting a series of statutes to protect and preserve the wilderness rivers of Kentucky. The 1972 Wild Rivers Act with its 1976 amendments² seeks to protect designated wilderness areas through a system of limited land acquisition and land use regulations. The land use regulations operate to preserve the wilderness character of certain Kentucky rivers and their shorelines through prohibition of residential and commercial development. At the same time, the regulations allow the continuation of existing land uses, primarily agriculture and forestry.

Regulation of land use is usually held to be a valid exercise of police power and as such is not subject to the fifth amendment, which prohibits the taking of property without just compensation.³ Since 1922, however, the extent to which private land use can be regulated has been limited by the United States Supreme Court holding in Pennsylvania Coal Co. v. Mahon.⁴ In Mahon, the Court held that regulation of land may be so restrictive that it constitutes a taking of private property

¹ Advisory Commission on Wild Rivers, Natural Streams in Kentucky 1 (January 19, 1970) [hereinafter cited as Natural Streams in Kentucky].
³ See 1 Rathkopf, The Law of Zoning and Planning, §§ 2.01, 6.02, 7.01 (1975).
⁴ 260 U.S. 393 (1922).
for public use requiring compensation for the private landowner under the fifth amendment.

The Mahon doctrine has had a significant effect on state efforts to establish effective environmental land use regulation. Land use regulations are drafted cautiously, tempered by the knowledge that the courts may require compensation for regulations deemed too restrictive. Despite such drafting, courts frequently find regulation of land use for the protection of fragile environmental areas to be a taking of property requiring compensation.

Commonwealth v. Stephens is a clear example. In Stephens, the Kentucky Supreme Court held that application of the land use regulations prescribed by the 1972 Kentucky Wild Rivers Act would constitute a taking of property without just compensation. Stephens illustrates the potential of judicial application of the taking doctrine to impede effective environmental land use regulation. The decision can be more clearly understood after an examination of other river protection statutes, the judicial construction of these statutes, and the evolution of the Kentucky Wild Rivers Act.

I. WILD RIVERS PROTECTION IN OTHER STATES

A. The Statutes

Twenty-five states have "some form of river protection legislation." In several states the regulations are directed specifically at the protection of wild and scenic rivers. In addition,

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6 See Bosselman, supra note 5, at 1-50, 139-212.
7 539 S.W.2d 303 (Ky. 1976).
8 Priesnitz, Minnesota's River Program, 1976 Env'tl Com. 5, 6.

several states have enacted legislation for the protection of coastal and inland wetlands. The statutes implicitly recognize that uncontrolled development can destroy fragile waterside wilderness areas. Mechanisms for the protection of rivers include state land acquisition, state acquisition of scenic or other easements, and land use controls. The land use controls are implemented through various methods: Some statutes provide for direct state control on scenic areas; others require local governments to enact zoning ordinances which comply with state standards and provide for the direct application of standards by the state government only in the event of noncompliance by the local government.

Wild rivers statutes often operate to prevent private landowners from using their lands in a manner which will damage wilderness environments. As a result, these statutes generate controversies involving the taking doctrine when landowners assert in court that the land use regulations are too restrictive. The prohibited land use is generally a future use. The legal question is whether the prohibition of a future different use of land is a taking of property requiring compensation or merely

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Laws ch. 130, § 105 (Michie Supp. 1975). Each provides for police power regulation of private land use and for compensation of private landowners if the regulation becomes so great as to constitute a taking. Both New York and Massachusetts designate administrative officials to promulgate regulations necessary for the protection of the shorelines. The New York Act provides for compensation “in the event any land use is so directed to be discontinued . . . .” The Massachusetts law provides for the power of eminent domain in situations where the courts declare that the regulations are so stringent as to constitute a taking.

Note, State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation, 58 Va. L. Rev. 876, 879-80 (1972); see also 1 Rathkoff, supra note 3, at § 7.02.

Wetlands legislation is distinguished from wild rivers legislation in that wetlands refers to the shores of lakes, ocean marshes, and lowland swamps whereas wild rivers legislation concerns land immediately adjacent to rivers. In this Comment, both will be considered as one type of regulation because in the context of the taking issue, both types of legislation involve the regulation of private land for the protection of environmentally sensitive land areas adjacent to bodies of water.


Priesnitz, Minnesota’s River Program, 1976 Env’tl Com. 5, 6-7.


a police power regulation of land use for which compensation is not required.\textsuperscript{15}

B. \textit{Judicial Reaction to the Statutes}

Land use controls are a valid exercise of the police power.\textsuperscript{16} Generally, a reasonable exercise of police power is constitutional even if it renders severe economic damage to private citizens.\textsuperscript{17} Exercises of police power, which require no compensation, are distinguished from exercises of eminent domain which require compensation for the taking of private property for public use.\textsuperscript{18} Although separate concepts, these two ideas were combined in Justice Holmes' famous opinion in \textit{Pennsylvania Coal Co. v. Mahon},\textsuperscript{19} where the Court held that police power regulation may become so excessive that it constitutes a taking, and thus compensation is constitutionally required.

The \textit{Mahon} doctrine is often referred to as the "diminution of value" test.\textsuperscript{20} Under the diminution test, when the effect of the regulation on the land in question is to deny the landowner any reasonable or profitable use, the regulation is deemed a taking.\textsuperscript{21} The diminution test is often combined with a balancing test in which the benefits to society are compared with the detriments to the property holder.\textsuperscript{22} Sometimes a nuisance test is coupled with the diminution of value test.\textsuperscript{23} The nuisance test requires no compensation unless the private land regulations go beyond eliminating a nuisance to confer an actual benefit on the public. Conversely, compensation is not required for regulations which merely operate to prevent the private landowner from harming the public.\textsuperscript{24} The diminution

\textsuperscript{15} 1 RATHKOPF, \textit{supra} note 3, at § 7.03.

\textsuperscript{16} Id. at § 2.01.

\textsuperscript{17} Miller v. Schoene, 276 U.S. 272 (1928); Comment, \textit{Regulation of Land Use: From Magna Charta to a Just Formulation}, 23 U.C.L.A.L. Rev. 904, 913 n.53 (1976).

\textsuperscript{18} Comment, \textit{supra} note 17, at 904.

\textsuperscript{19} 260 U.S. 393 (1922). See BOSSELMAN, \textit{supra} note 5, at 124-38.

\textsuperscript{20} Comment, \textit{supra} note 17, at 911.

\textsuperscript{21} Metzger, \textit{supra} note 5, at 793.

\textsuperscript{22} Note, \textit{supra} note 10, at 887.

\textsuperscript{23} See, \textit{e.g.}, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416-22 (1922); Mugler v. Kansas, 123 U.S. 623 (1887).

\textsuperscript{24} 1 RATHKOPF, \textit{supra} note 3, at § 6.12.
of value test is applied on a case by case basis. While there have been many attempts to analyze these principles, the only generally accepted conclusion is that it is difficult to find principles that will predict the outcome of specific cases.

In situations where a future land use is prohibited by environmentally directed land use regulations, the courts are divided in determining when a taking has occurred. The fact situations generally involve prohibitions against dredging and filling of wetland lots and prohibitions against flood plain development. Several courts have held that such prohibitions qualify as takings. For example, in State v. Johnson, a Maine court upheld Maine's site location law which required permits for certain developments which substantially affected a local environment. Johnson was denied a permit to use fill to elevate his lot above the high water. Although the court upheld the law, they held that the denial constituted a taking requiring compensation because the preservation of the wetlands created a public benefit. In MacGibbon v. Board of Appeals, the plaintiff was denied permission to fill his shorefront property pursuant to a local zoning ordinance which had as its objective the preservation of wetlands in their natural state. The court found that such a preservation would constitute a taking. In Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, a New Jersey environmental preservation ordinance that prohibited dredging and filling was held to

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28 265 A.2d 711 (Me. 1970).
be an unconstitutional taking without compensation.

Yet there appears to be a trend developing in later decisions to uphold similar land use regulations as constitutional without compensation. In *Turnpike Realty Co. v. Town of Dedham*, the Massachusetts Supreme Judicial Court distinguished *Morris County* and upheld a zoning ordinance which restricted flood plain use to agricultural, silvicultural and recreational uses. In *Scott v. State*, one of the few reported decisions dealing directly with wild rivers legislation, the petitioner argued that a taking without compensation resulted from a temporary freeze on the use of her land. The Oregon statute provides for a one-year waiting period during which the property owner and the state attempt to reconcile their differences as to reasonable land use. If there is no agreement at the end of one year, the landowner may proceed with the desired use unless the statute provides compensation. The Oregon court found the one-year freeze without compensation to be a reasonable exercise of the police power. Finally, in *Just v. Marinette County* petitioner made the now familiar claim that the denial of a permit to dredge and fill his wetlands property was a taking without compensation. However, the Wisconsin court upheld the permit denial, describing it as "a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizen's property."

C. Analysis of the Judicial Response

The issue in each of these cases is not whether the property owner can continue his present use; instead, the issue is whether the property owner may use the land in a new and different way. Thus the precise loss to the landowner is the difference between the commercial value of the present use and

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31 Comment, *supra* note 17, at 918; cf. *Bosslman*, *supra* note 5, at 322, 323.
33 The court emphasized economic as opposed to environmental considerations; further, the owner was allowed to continue reasonable uses, and the evidence conflicted on the extent of diminution.
35 201 N.W.2d 761 (Wis. 1972).
36 *Id.* at 767-68.
the commercial value of future uses of the property.

In situations where the taking is a prohibition against a future land use, conflicting values underlie the determination of whether compensation is required. One view emphasizes the right of property owners to make free and unfettered use of the land which they possess. The other emphasizes the idea that a property holder's use of land is limited by considerations of the public interest.

One indicator of a court's willingness to allow regulation without compensation is the court's characterization of the impact of a regulation as either conferring a new benefit on the public or preventing a harm to a present public interest.

The difference in the outcome of the litigation in these cases depends mostly upon whether the court views the potential harm to the community as damage to an existing right or interest of the community resulting from the activities of the landowner or whether it considers that there is a basic freedom [for the landowner] to put land to some beneficial use and [that] to forego that right is to confer upon the public a benefit.

This point is illustrated by the Johnson and Just decisions in which different courts reached opposite conclusions in similar fact situations. In Johnson, the court stated that preservation of marshland, a public benefit, could not be accomplished by rendering the private land "commercially valueless." This approach casts the state in an affirmative role as it attempts to secure a public benefit at the price of depriving the landowner of his present right to use the land in a commercially valuable manner. In contrast, the court in Just held that the private landowner was trying to increase the value of his land to the damage of "the general public by upsetting the natural environment." With this approach, the private landowner is cast in the affirmative role as he attempts to acquire a new benefit to the detriment of a present public right.

37 Commonwealth v. Stephens, 539 S.W.2d 303, 305-06 (Ky. 1976).
38 Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).
39 1 RATHKOPF, supra note 3, at § 7.03.
41 Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972).
This analysis suggests that one rationale used by the courts to allow increased land use regulation is an expansion in the concept of what constitutes present public rights.\textsuperscript{42} Correspondingly, private actions that were once considered innocent may now be viewed as harmful to the public. For example, in earlier decisions, the preservation of a marsh through regulation was considered to constitute acquisition by the public of a benefit which it did not previously possess. Some later court decisions, however, indicate that the marsh is already a natural resource of the public. Thus when the state prohibits dredging of the marsh, it is merely preventing a private property owner from destroying a public resource. This rationale permits the expansion of allowable police powers without necessitating rejection of the \textit{Mahon} doctrine.\textsuperscript{43}

Increased awareness of the impact that private land use decisions have upon the welfare of society will likely result in continued expansion of the concept of present public rights.\textsuperscript{44} Furthermore, as the societal costs of certain types of private land uses become known, "landowners may validly be required to bear the external costs of their own actions."\textsuperscript{45} The dredging and filling of wetlands provides an example of how unregulated private land use generates external costs:

A great part of the cost of wetlands development is therefore borne not by the private developer, but by other segments of society. Fishermen pay for wetlands development in reduced catches; consumers in higher prices for fish and oysters; sportmen and nature enthusiasts in lost recreational opportunities; and neighboring landowners in increased flood damage. Society as a whole must bear the cost of an artificial increase in the rate of estuarine "decay."\textsuperscript{46}

Coupled with this growing awareness of the cost to society of private land use decisions is an increased allegiance to the

\textsuperscript{42} Comment, \textit{supra} note 17, 919-35 (1976).
\textsuperscript{43} See, Just \textit{v.} Marinette County, 201 N.W.2d 761, 767 (Wis. 1972).
\textsuperscript{44} \textit{Task Force on Natural Resources and Land Use Information and Technology, Land: State Alternatives for Planning and Management}, 4-8 (Council of State Governments 1975).
\textsuperscript{45} Dunham, 58 \textit{COLUM. L. REV.} 650, \textit{supra} note 26 at 664, \textit{noted in} 1 \textit{Rathkoff}, \textit{supra} note 3, at § 7.02.
\textsuperscript{46} Note, \textit{supra} note 10, at 879 (1972).
concept that our natural resources do not belong to this generation alone but are held in trust for future generations. The logical response by the courts is an increasing tendency to sustain land use regulations which are designed to protect our environment.

II. THE EVOLUTION OF THE KENTUCKY WILD RIVERS ACT

The Kentucky Wild Rivers Act, originally enacted in 1972, has been shaped by an interplay of legislative and judicial forces. In 1972, the Kentucky General Assembly enacted the original wild rivers legislation “to preserve the unique primitive character of those streams in Kentucky which still retain a large portion of their natural and scenic beauty, and to prevent future infringement on that beauty by impoundments or other manmade works.” The Act designates wild rivers by name, and provides for the addition to the system of “streams... that are essentially free-flowing, with shorelines and scenic vistas essentially primitive and unchanged, free from the works of man and pleasing to the eye.”

The Secretary of the Department for Natural Resources and Environmental Protection is required to: (1) Establish the boundaries of the system; (2) promulgate “regulations necessary for the preservation and enhancement of the stream areas...”; and (3) exercise the power of eminent domain to purchase a fee simple or lesser interest in land as necessary. The 1972 Act mandated various land use regulations, including: (1) Prohibiting new roads and buildings; (2) prohibiting all mining; (3) prohibiting mechanical modes of transportation; (4) allowing select cutting of timber with the approval of the secretary; (5) allowing construction of utility and pipe lines with the approval of the secretary; and (6) allowing continuation of existing agricultural land use.

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47 1 B. COHEN & V. YANNACONE, ENVIRONMENTAL RIGHTS AND REMEDIES at § 2.1 (1972).
49 KRS § 146.220 (Supp. 1976).
50 KRS § 146.230 (Supp. 1976).
51 KRS § 146.250 (Supp. 1976).
52 KRS § 146.270 (Supp. 1976).
53 KRS § 146.280 (Supp. 1976).
While the prohibitions seem strict, they are reasonable in light of the type of land they are designed to protect. By statute the affected land areas must be "essentially primitive . . . and free from the works of man."55 One example of the land type being regulated is the Rockcastle River, which the Advisory Commission on Wild Rivers describes as "rugged, wilderness in character with limited access."56 Although these regulations might qualify as burdensome if applied to heavily developed areas, the Act does not apply to any developed area. It is not unduly burdensome to prohibit the construction of new buildings on land which is remote and currently used only for the production of timber or for agricultural purposes.

Commentators disagreed on the extent of compensation required under the 1972 Act. The express language of the Act clearly rules out the purchase of all lands within the system.57 Obviously, if some land within the system is privately owned, the regulation of private use would be essential to protection of these wilderness areas. The Act also states that nothing in the law should be construed to "deprive any landowner of his property or any interest or right therein without just compensation."58 One commentator interpreted this "just compensation" clause as merely a superfluous restatement of constitutional principles added to allay the objections of opposing legislators.59 A Kentucky circuit court disagreed with this interpretation. Focusing on the just compensation language, the court held that "to the extent that the land may not be used, the owner is, by express provision of the Act, entitled to compensation."60

The state appealed the circuit court decision to the Kentucky Supreme Court while the 1976 General Assembly was in session. The constitutional attack on the statute was well pub-

55 KRS § 146.250 (Supp. 1976).
54 Natural Streams in Kentucky, supra note 1, at 16.
57 KRS § 146.220 provides, "It is not [intended] . . . to require or to authorize acquisition of all lands or interests in lands within the exterior boundaries or the stream areas but to assure preservation of the scenic, ecological and other values and to provide proper management of the recreational wildlife, water and other resources."
59 Brief for Citizens' League to Protect the Surface Rights, Inc. as Amicus Curiae at 6-13, Commonwealth v. Stephens, 539 S.W.2d 303 (Ky. 1976).
60 Commonwealth v. Stephens, No. 85519, at 2 (Franklin Circuit Court, June 23, 1975) (construing KRS § 146.280).
licized and it is safe to assume that the members of the legislature were well aware of the adverse circuit court ruling. The response by the legislature was to enact Senate Bill 309, a major revision of the Act which focused on private land use regulation.

Senate Bill 309 removed any doubts about legislative intent to regulate private lands by adding the following sentence to the introductory portions of the Wild Rivers statute: "It is the intent of KRS 146.200 to 146.350 to impose reasonable regulations as to the use of private and public land within the authorized boundaries of wild rivers . . . and *where necessary*, to enable the department to acquire . . . interests . . . to lands within the authorized boundaries . . . ." The just compensation clause in the 1972 statute which was the basis for the circuit court decision in *Stephens* was changed from requiring compensation for any deprivation of "property or any interest or right therein" to a requirement that compensation be provided for the taking of a "fee simple title to or lesser interest in property." These changes indicate that private land use will be regulated and that compensation will be provided only for the taking of a legally recognized property "interest" or "estate."

The changes are significant because they remove the basis for the circuit court decision. The circuit court had construed the 1972 Act to require compensation to the extent that land use was prohibited. Presumably, under this interpretation a landowner could collect compensation if regulations prevented the use of land for a more "valuable" purpose, for example, where a landowner is prevented from subdividing land currently devoted to agricultural purposes. Under the 1976 revisions, compensation will be given only for the taking of an interest in land, not for prevention of a more valuable use of land.

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64 1976 Ky. Acts, ch. 197, § 8 (amending KRS § 146.280 (1972)) (codified at KRS § 146.280 (Supp. 1976)).
In addition, the 1976 revisions greatly liberalize the land use regulations. All existing uses are exempted from the regulations. Construction of new roads and buildings, which was prohibited before, is now permitted if it is necessary to achieve a permitted use. The earlier prohibition on all mining was changed so that only strip mining is prohibited. Mechanical transportation is now allowed in connection with existing uses. Finally, the revised regulations permit a landowner to apply for a change of use in cases where he wishes to engage in select cutting of timber, resource removal, or agricultural use. The revisions establish a procedure that guarantees the landowner a timely answer to his application for a permit, judicial review, and compensation for lost profits due to wrongful restraint of land use.⁶⁵

In sum, the amended Act provides reasonable land use regulations well suited for the designated wilderness areas. In addition, provisions are made for the public purchase of private lands where necessary. The Act protects the right of private landowners to use their land in a reasonable manner and at the same time provides necessary protection for a natural resource which belongs to each of us.

III. Stephens v. Commonwealth

*Stephens v. Commonwealth*⁶⁶ provides an opportunity to examine the relationship of the taking doctrine to environmental policy. *Stephens* is the first decision of the Kentucky Supreme Court which addresses the validity of regulating private land use for the purpose of preserving scenic and wilderness areas. In holding that imposition of the 1972 land use regulations would be a taking without compensation, the Court indicates a preference for a limited conception of what constitutes present public rights in environmental conflicts. The case is unique among previously cited cases in that it deals directly with a wild rivers statute in which land use regulations are prescribed by the statute.

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⁶⁶ 539 S.W.2d 303 (Ky. 1976).
A. **Background**

Stephens was the manager and principal owner of "Tombstone Junction," a commercial "wild west town" which is located on a major highway. The large land holding on which the amusement town is located includes land bordering the Cumberland River just upstream from scenic Cumberland Falls. This stretch of river is included in the designated rivers protected by the Kentucky Wild Rivers Act. Stephens had plans to provide transportation from Tombstone Junction to a spot where tourists could view the falls, either by chairlift or by train. When Stephens began bulldozing and cutting timber, Kentucky's Secretary of Natural Resources and Environmental Protection filed suit in Franklin Circuit Court seeking an injunction against further operations.

The circuit court issued the injunction but held that the Commonwealth would have to pay for what it took, declaring that the Kentucky Wild Rivers Act required compensation to the extent that any landowner is deprived of any land use.\(^6\) While the case was on appeal to the Kentucky Supreme Court, the 1976 Kentucky General Assembly amended the law, loosening the land use restrictions. The amendments were enacted on March 29, 1976,\(^8\) and became effective on June 19, 1976.\(^9\) The Stephens decision, based on the 1972 Act without the amendments, was handed down on July 2, 1976 after the amendments had become effective.

B. **The Opinion**

In Stephens the Court held that where the official boundaries of the Wild Rivers System are not yet established, application of the 1972 regulations would constitute a taking of property without compensation.\(^0\) The opinion included three major arguments in support of the decision. First, the Court held that there can be no violation of the Act until the boundaries of the Wild Rivers System are established. The Court noted that these boundaries were not delineated at the time the original

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\(^6\) Commonwealth v. Stephens, No. 85519 (Franklin Circuit Court, June 23, 1975).
\(^8\) Legislative Record, April 5, 1976 at 34-35 (Legislative Research Commission).
\(^9\) KRS § 146.290 (1976).
\(^0\) 539 S.W.2d at 303.
action was filed, and they had not yet been delineated. The Court reasoned that since the boundaries were unknown, it was impossible to determine whether the landowner's property fell within the regulated area. The Court concluded that the boundaries must be established before a landowner can be held in violation of the Act. As the concurring opinion notes, the Court could have dismissed the request for an injunction on this ground alone. Instead, the Court chose to examine the constitutional issues raised by the Act.

Second, the Court held that if the Act were currently in force, it would violate the Kentucky Constitution as a taking without just compensation. The Court first cites Pennsylvania Coal Co. v. Mahon: "If a regulation goes too far it will be recognized as a taking." The Court does not attempt to evaluate the 1972 land use regulations in terms of the particular property involved, nor does it attempt to limit its constitutional analysis to the facts of the case. The Court simply concludes that if these regulations were applied, they would qualify as a taking.

Third, the Court held that the statute is enabling rather than self-executing legislation, on the theory that if the regulations were construed as self-executing and thus currently in force, they would constitute a taking. The Court states that "[t]o hold that the Act is self-executing would be to violate Section 13 of the Kentucky Constitution.

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71 Id. at 307, 308.
72 Id. at 309 (concurring opinion).
73 Id. at 306, 307. Ky. Const. § 13 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."
74 539 S.W.2d at 307.
75 Id. at 306, 307.
76 The Court states:
   If [the Act] is self-executing, then the legislature itself has made a taking, has designated the land use, and has attempted to provide for deferred payment. On the other hand, if the Act is enabling legislation only, we must examine the Act itself to ascertain the methods or programs by which the goal the legislature sought to accomplish may be accomplished.
77 Id. at 306.
78 Id. at 307.
C. Weaknesses of the Opinion

There are several problems with the Court's analysis. First the Court did not need to raise a constitutional issue, since the case could have been dismissed and the injunction denied until the boundaries were established. As Justice Palmore notes in his concurring opinion:

The "wildest" aspect of this controversy involving the "Wild Rivers Act" is that a suit was brought to enjoin a violation of the act within a geographic area that has never been defined . . . . Technically that should end the matter and obviate the rest of the discussion. What the majority opinion does, however, is to provide some further guidance . . . .

Even if traditional objections to the unnecessary raising of constitutional questions are overlooked, the value of the "guidance" offered by the Court is significantly reduced because the statute on which the analysis is based was thoroughly revised before the opinion was handed down. The 1976 General Assembly made many changes in the land use regulations, and although the Court takes notice of the 1976 amendments, it does not refer specifically to the language of the new law.

Because of the significant changes in the 1976 amendments, the Court's analysis of the 1972 regulations is not necessarily applicable to the current law.

Application of the taking doctrine is usually on a case by case basis, requiring an examination of all the relevant facts before a decision is rendered. However in determining that application of the 1972 regulations would be a taking, the Court does not evaluate the impact of the regulations on the specific property in this case. In Stephens the regulated land was a forested hillside, linked with commercial property in a scenic area. Upon close examination of the facts, the Court might have found that the statute, which allowed selective cutting of timber, was not an unreasonable burden on the private landowner.

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79 Id. at 309.
80 KRS § 146.290 (Supp. 1976). For an explanation of these changes, see text accompanying note 65, supra.
81 539 S.W.2d at 305.
82 1 Rathkoff, supra note 3 at § 6.03.
Another problem created by the Court's failure to analyze the impact of the regulations in light of the particular facts of this case is that the holding of the decision is broader than necessary. Since the land in Stephens adjoins commercial property, the impact of the regulations might be more severe than in cases where the same regulations were applied to forest land in a remote and relatively inaccessible area. The Court does not consider such distinctions because it makes no attempt to limit its holding to the facts of the case.

The Stephens opinion interprets portions of the Wild Rivers Act as enabling legislation in an apparent effort to uphold the constitutionality of the Act. However, the mandatory language of the Act seems clear: "[The secretary] shall, by June 16, 1974 determine generally the boundaries . . . . The secretary shall adopt such rules . . . . Land uses to be allowed as follows . . . ." In the absence of specific analysis of statutory language to justify its interpretation, the Court's determination that the Act is enabling seems questionable.

The most critical objection to the Court's reasoning in Stephens is the Court's refusal to consider an expanded concept of present public resources. The Court declares that "[t]he beauty of the Cumberland River is something wonderful to behold." In an early opinion dealing with the ownership of wild animals, the United States Supreme Court stated, "[t]here are some things which belong to no one, and the use of which is common to all." Arguably, the pristine character of these wilderness areas is a present natural resource belonging to all, which no private landowner has the right to destroy. As the public becomes aware of the damage that a private landowner's unrestricted use of land can inflict upon society, the courts must be ready to sustain the reasonable exercise of the police power necessary to prevent such harms.

D. Impact of the Decision

If Stephens is interpreted as requiring the Commonwealth

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83 KRS § § 146.250, .270, .290 (Supp. 1976) (emphasis added).
84 539 S.W.2d at 306.
86 See text accompanying note 48, supra.
87 See Just v. Marinette County, 201 N.W.2d 761, 765-69 (Wis. 1972).
to purchase all lands located within the Wild Rivers System, the System has been dealt a crippling blow. Such purchases, requiring an estimated public expenditure of seventy-four million dollars, would result in an unnecessary shifting of land ownership from the private to the public sector.

Two arguments weigh heavily against such a construction. First, the two factors underlying the decision, the strict land use regulations of the 1972 Act and the lack of delineated boundaries, are no longer present. The 1972 regulations have been amended, and the official boundaries have been established. The doctrine of precedent requires that the holding not include the Court's opinions but instead be limited to the Court's decision on the material facts. Recognizing this principle, the official position of the Office of General Counsel of Kentucky's Department for Natural Resources and Environmental Protection is that the holding in Stephens is limited to situations where the boundaries of the system are not established.

The second argument against a construction of Stephens as requiring purchase of all regulated land areas is the growing documentation of the detrimental impact of private land use decisions on society as discussed earlier. The lack of effective land use planning has been accompanied by conversion of productive agricultural and forest land to urban sprawl; loss of historic landmarks; difficulty and unnecessary expense in finding locations for environmentally sensitive facilities; construction in hazardous locations; construction requiring unnecessary expense in meeting energy, water, and waste disposal needs; loss of open space; and damage to fragile wilderness

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\[\text{Footnotes:}\]

\footnote{Even if the decision is limited to its facts, Stephens will still influence the decisions of state administrators. See Courier Journal, Jan. 22, 1976, § C. at 3, Col. 1. A leading authority has concluded that a significant aspect of the taking issue is its influence on the decisions of administrators who attempt to anticipate court decisions. \textit{Bosselman, supra} note 5 at iv, 323, 324.}

\footnote{Courier Journal, Jan. 22, 1976, § C, at 3, col. 1.}

\footnote{Telephone interview with Alan Harrington, Office of General Counsel, Ky. Dept. for Natural Resources and Environmental Protection, October 29, 1976.}

\footnote{Goodhart, \textit{Determining the Ratio Decidendi of a Case}, 40 \textit{YALE L.J.} 161 (1930).}

\footnote{Telephone interview with Alan Harrington, Office of General Counsel, Ky. Dept for Natural Resources and Environmental Protection, October 29, 1976.}

\footnote{See text accompanying notes 8-48, \textit{supra}.}
areas. The Kentucky Supreme Court recognizes the power of the state to impose police power regulation without compensation, even in situations where the landowner is denied the most profitable use, or where the private loss is for the public benefit. A recognition of the public harm permitted by unregulated private land use coupled with application of these traditional police power concepts should logically result in an increased acceptance of land use regulation for environmental purposes.

IV. CONCLUSION

The Kentucky Supreme Court will soon have to deal with these problems because two new suits have been filed in lower Kentucky courts challenging the Wild Rivers Act. In addition, the Court will increasingly be called upon to sustain land use regulation statutes. For example, statewide comprehensive land use planning is supported by federal and state officials and has been adopted by twenty-one states. Furthermore,

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84 Task Force on Natural Resources and Land Use Information and Technology, Land: State Alternatives for Planning and Management, 5, 51 (Council of State Governments 1975).
85 City of Shively v. Illinois Central R.R., 349 S.W.2d 682 (Ky. 1961).
86 Scholemer v. City of Louisville, 182 S.W.2d 782 (Ky. 1944).
87 Clark v. City of Paducah, 439 S.W.2d 84 (Ky. 1969).
88 In situations where the courts uphold the constitutionality of environmental land use regulations, the question of whether the private landowner will receive compensation remains. The fact that the power exists to impose burdensome regulations on landowners without compensation does not mean that it is wise to do so. Legislatures should consider the merits of providing compensation for landowners where although not technically an unconstitutional taking, the regulation would cause significant loss to the private landowner.
89 Telephone interviews with Alan Harrington, Office of General Counsel, Ky. Dept. for Natural Resources and Environmental Protection, October 29, 1976 and February 28, 1977. Stephens v. Commonwealth, Civil Action Number 2948, McCreary Circuit Court, is described by Harrington as a reverse condemnation action brought by the executor of Stephens’ estate. During the action discussed in this Comment, Stephens was prohibited from certain land uses by court order; Civil Action 2948 seeks compensation for losses due to these restrictions. The other action, Stearns Coal & Lumber Co. v. Kentucky, Civil Action Number 2294, is also described as a reverse condemnation action alleging the unconstitutionality of the Kentucky Wild Rivers Act. As of February 28, a trial date had not been set for either case.
90 Council of State Governments, The States’ Role in Land Resource Management, 6, 7, 16 (1972); id. 26 (Supp. 1972); Task Force on Natural Resources and Land Use Information and Technology, Land: State Alternatives for Planning and Management, supra note 94, at 10, 11.
environmental problems will require solutions through land use regulation. The Court must not allow its interest in preserving freedom of land use for the landowner to protect private actions which harm the public interest.

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