SCENIC PROTECTION AS A LEGITIMATE GOAL OF PUBLIC REGULATION

*BY NORMAN WILLIAMS**

The propriety of public regulations of private activity that are based on aesthetic criteria — what is, or is not, pleasing to the sense of sight — has been the subject of long and serious debate. Without recounting again that long controversy,[1] it is safe to say that the courts have been moving steadily towards recognition that such regulation is a legitimate governmental activity, so long as the means chosen (by eminent domain, police-power regulation or what not) seem reasonably adapted to further the suggested aesthetic goal. Of course, reasonable people may often differ as to whether certain things are or are not beautiful in particular situations; and for this reason, most courts have, in recognizing the validity of aesthetic criteria, stopped just short of giving them the same degree of respect normally accorded to considerations of public health and safety.[2] However, the tendency in recent case law has been to note that in many situations there is a widespread consensus that A would be ugly if placed in surroundings characterized by B—a junk yard in a pleasant residential district would be an obvious exam-

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1. For my views on this subject, see 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW (2d ed. 1988) (ch. 11).

2. The Supreme Court has apparently given more or less unqualified approval to aesthetic regulations, without bothering with such a reservation, in a case where its multiple opinions created great confusion, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (White J, speaking for the plurality but no indication of dissent on this point in the four other opinions in this case). In fact this basic point was the only one in *Metromedia* which commanded unanimous assent. *See also* Berman v. Parker, 348 U.S. 26 (1954) (involving eminent domain).

ple. In such situations the courts have been willing to uphold the application of restrictions based on aesthetic criteria without worrying about how to deal with the more difficult problems at the margin, where reasonable people may reasonably differ.[3] Within the above context, the question of scenic protection as a legitimate goal has come up in a considerable number of recent cases, and the answer has been clear and definite—yes, this is a legitimate public goal. The reason for this is simple enough: with the widespread increase in both income and leisure time, many more people are able to—and have the opportunity to—indulge their preferences for a visually attractive environment, and public bodies have been responding with protective measures. The point is obvious enough so that it has penetrated to the economic development industry in several states, and so an environment to attract tourism is now recognized as an important part of the economic base of such areas. After all, conventions do not go to New Orleans to enjoy the salubrious climate, and they *do* go to Vermont to enjoy the mountain views in the background.[4] A small but fairly solid body of law has thus been accumulating on the question of protecting scenic views—whether this is a legitimate aim of public regulation and whether the restrictions adopted are reasonably appropriate to carry out the legitimate goal.

Courts settled the issue of the validity of using eminent domain for this purpose fairly early. The legal power to use such regulations to protect specific views has been the subject of some doubt, as with police-power regulation for aesthetic purposes generally. Neighbors have often wanted to use the public regulatory powers to insure that vacant land remained unused, and a line of older cases have, not unreasona-

3. *See particularly* United Advertising Corp. v. Borough of Metucker, 42 N.J. 1, 198 A.2d 447 (1964). The courts have been equally comfortable in upholding such regulations in an analogous situation, where again the distinctions made are clear enough to give some assurance of equal treatment in administration - that is, in historic districts based on a distinctive architectural style, where the observable special characteristics of that style provide clear standards for administering the regulations.

4. A particularly striking example of this economics-plus-aesthetics rationale, in the realm of practical political action, took place in Vermont. In the late 1960's, when the Legislature was considering the bill to prohibit (*and* to remove) billboards in Vermont, the local motel and hotel association strongly supported it and helped its passage: they understood that no one was going to come up and stay in their motels to look at a row of billboards.

In adopting this rationale in one of the early historic-district cases, the Louisiana court wrote an opinion that sounded more like a publicity release from the New Orleans Chamber of Commerce than a judicial opinion. *See* New Orleans v. Pergament, 198 La. 852, 858, 5 So. 2d 129, 131 (1941).

bly, been reluctant to approve this. Nonetheless, there has been a marked move towards upholding well-considered provisions for scenic protection generally, and a group of recent cases has gone a long way in approving both the general principle and important specific applications thereof.

EMINENT DOMAIN

Condemnation of land, in part to afford an opportunity to see scenic views, was approved long ago, and has never seriously been questioned in principle.[5] The Los Angeles County Highway Department sought to condemn a scenic strip of land running between mountains and the Pacific shore, located wholly within a privately-owned ranch and containing roads with no connections to roads beyond the ranch.[6] When this action was challenged as not for a public use, the Court upheld it easily.[7]

> The ranch owners concede that a genuine highway, in fact adapted as a way of convenience or necessity for public use and travel, is a public use. Their real contention is that these particular roads, while called highways are "highways" in name merely, that is, that they are shams under the name of public improvements, which cannot, in fact, furnish ways of convenience or necessity to the travelling public. This argument is based upon the fact that they extend through the ranch alone, the main road terminating within its boundaries, and connect with no other public roads at their western and northern ends. These roads will, however, be open to the general public to such extent as it can and may use them. . . .
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> But aside from these considerations, these roads, especially the main road, through its connection with the public road coming along the shore from Santa Monica, will afford a highway for persons desiring to travel along the shore to the county line, with a view of the ocean on the one side, and of the mountain range on the other, constituting, as stated by the trial judge, a scenic highway of great beauty. Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary conven-

5. Rindge Co. v. Los Angeles County, 262 U.S. 700 (1923). *Cf.* United States v. Gettysburg Electric Railway Co., 160 U.S. 668 (1896) (upholding the use of eminent domain on behalf of historic preservation and patriotism).

6. *Id.* at 703.

7. *Id.* at 705, 710.

> ience, but may extend to matters of public health, recreation and enjoyment. Thus, the condemnation of lands for public parks is now universally recognized as a taking for public use. *Shoemaker v. United States*, 147 U.S. 252, 297. A road need not be for a purpose of business to create a public exigency; air, exercise and recreation are important to the general health and welfare; pleasure travel may be accommodated as well as business travel; and highways may be condemned to places of pleasing natural scenery. *Higginson v. Nahart*, 11 Allen (Mass.) 530, 536. The Riverside Drive in New York is as essentially a highway for public use as Broadway; the Speedway in this city, as Pennsylvania Avenue. And manifestly, in these days of general public travel in motor cars for health and recreation, such a highway as this, extending for more than twenty miles along the shores of the Pacific at the base of a range of mountains, must be regarded as a public use.
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> For these reasons we conclude that these highways will, as found by the trial judge, afford accommodation to the traveling public, and that the taking of land for them is a taking for a public use authorized by the laws of California.[8]

However, the use of eminent domain to protect scenery is subject to judicial review as applied in particular cases. A Maine statute authorized the taking of land more than 1,000 feet from a highway right-of-way, in order to protect scenic values along the highway. In a challenge to this provision,[9] the court upheld the principle of the statute in general but held that the area authorized to be taken was too wide and that there was no evidence of real scenic values beyond 1,000 feet.[10]

> With regard to the statute's grant of power to the commissioners to acquire land along and adjacent to the highway "to provide roadside and landscape development for the preservation and development of natural scenic beauty" and "to integrate the public improvement with the *aesthetics* of the area traversed by the highway" (emphasis added), it would seem, and we so hold, that the concept — natural scenic beauty —, although more generally used in a subjective sense, connotes, in terms of highway beautification, a sufficiently definite concrete image when tested objectively so as to furnish in and of itself an adequate standard for the measurement of a proper exercise of discretion in a taking for such purposes.
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8. 262 U.S. at 706-08.

9. Finks v. Maine State Highway Commission, 328 A.2d 791 (Me. 1974).

10. *Id.* at 800.

So long as the taking, whether of a single parcel of land or of multiple parcels, results in one comprehensive area which is both contiguous to and near the highway, the end legislative result is reached. The only limitation is that the exercise of the power be not abused, as by reason of an unreasonable excessive taking or for arbitrary purposes inconsistent with the intent of the law.

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We can envision circumstances in which a taking of over 1000 feet of land by the Commission for highway beautification might be justified. Such might be the case if the shore of a lake or river might be somewhat beyond 1000 feet from the edge of the highway right of way. To take less than the full distance to the lake or river might leave a small area which, if not taken, could frustrate the very purpose of the Act.

The taking in the instant case in excess of 1000 feet from the edge of the highway right of way was unreasonable and an abuse of power. The record negates the existence of an unusual picturesque landscape on the fringes of the 1000 feet scenic highway border strip which, if not taken, would defeat the ends of this legislation. The land beyond 1000 feet is made up of marshlands and tidal flats and is indistinguishable from the entire surrounding area. It presents no likelihood of future development inimical to the preservation of the scenic value of the capsulated view from the highway. There is no natural boundary within immediate reach, such as a river, lake or mount, to permit a reasonable extension of the taking and yet keep it within the scope of a sensible application of the concept of land along, and adjacent to, the highway.[11]

REGULATION UNDER THE POLICE POWER

The Older Case Law — On Individual Views

It is fairly common to find in the older case law expressions of judicial reluctance to approve restrictions on land use, when these would keep land open merely so that neighbors could continue to enjoy a familiar view. Two examples will suffice. In an old Michigan case,[12] a town sought to enjoin violation of an ordinance requiring permits to drill for oil in connection with an application for a permit to drill on low-lying land between a bluff and an adjacent lake, and next to the

11. *Id.* at 796, 798-99, 800 (quoting 23 ME. REV. STAT. ANN. tit. 23, § 651 (1970)).

12. City of North Muskegon v. Miller, 249 Mich. 52, 227 N.W. 743 (1929).

city dump.[13] The Michigan court held the ordinance was valid as a general matter but invalid as applied to this particular area, and noted that there was no serious contention that this particular land could be used, as zoned, for residence.[14]

> Practically all the witnesses agreed that the lowland was useless for residence purposes. The principal reason for maintaining this property in the residence zone appears to be that the rear of the property on the bluff overlooks it, and that the masts of the oil derricks temporarily used in drilling operations would be visible from Ruddiman Avenue.[15]

Similarly, in a more recent New York case,[16] the court rejected, with the following comment, an appeal brought by neighbors to challenge an area variance permitting splitting a lot in two.[17]

> The principal objection of the neighboring landowners is directed at the clearing of the large, and apparently visually pleasant, wooded area for the building of the new residence and its access road and to the construction of a road that would run behind the homes of several of the objectors. While the neighbors might, quite understandably, feel aggrieved by the pending loss of the aesthetic effect generated by the De Poy premises, in the absence of statute or ordinance to the contrary, the De Poys could cut the trees and clear the area, for any reason at all, and were not under an obligation to maintain their home grounds for the benefit of their surrounding neighbors. The proposed road itself, while not as scenic as the natural wooded land, amply meets the requirements of the Town Law.[18]

Scenic Protection as a Legitimate Goal — Major Holdings

A number of important cases, arising out of the environmental movement, have explicitly approved the use of various public regulatory powers in order to protect specific scenic values. As so often happens, New York and California courts have led the way. In the Storm

13. *Id.* at 54, 227 N.W. at 743.

14. *Id.* at 59, 227 N.W. at 745.

15. *Id.* at 57, 227 N.W. at 744. In such a situation, where there is no evidence of special scenic value, similar decisions may still be expected.

16. Conley v. Brookhaven Zoning Board of Appeals, 40 N.Y.2d 309, 353 N.E.2d 594, 386 N.Y.S.2d 681 (1976).

17. *Id.* at 312, 353 N.E.2d at 595-96, 386 N.Y.S.2d at 682.

18. *Id.* at 315, 353 N.E.2d at 597, 386 N.Y.S.2d at 684.

King case,[19] one of the first of the recent major environmental controversies, a public utility (Consolidated Edison) proposed to obtain additional peak-hour power in the lower Hudson Valley by an elaborate arrangement—creating a artificial reservoir on top of Storm King Mountain, 1,000 feet above the river level—and the Federal Power Commission granted a license for this purpose.[20] In a challenge by a wide variety of neighboring groups, the Second Circuit held that the Federal Power Commission had construed its mandate much too narrowly and had failed to consider various alternatives and various environmental concerns.[21]

> The Storm King project is to be located in an area of unique beauty and major historical significance. The highlands and gorge of the Hudson offer one of the finest pieces of river scenery in the world. The great German traveler Baedeker called it "finer than the Rhine." Petitioners' contention that the Commission must take these factors into consideration in evaluating the Storm King project is justified by the history of the Federal Power Act.
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> "Recreational purposes" are expressly included among the beneficial public uses to which the statute refers. The phrase undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites. See Namekagon Hydro Co. v. Federal Power Comm., 216 F.2d 509, 511-512 (7th Cir. 1954). All of these "beneficial uses," the Supreme Court has observed, "while unregulated, might well be contradictory rather than harmonious." Federal Power Comm. v. Union Electric Co., 381 U.S. 90, 98, 85 S.Ct. 1253, 1258 (1965). In licensing a project, it is the duty of the Federal Power Commission properly to weigh each factor.
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> The Commission should reexamine all questions on which we have found the record insufficient and all related matters. The Commission's renewed proceedings must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered. The record as it comes to us fails markedly to make out a case for the Storm King project on, among other matters, costs, public convenience

19. Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

20. *Id.* at 611-12.

21. *Id.* at 612.

and necessity, and absence of reasonable alternatives.[22]

In California, the state prevailed in an action to enforce the requirement for county contributions to implement a two-state interstate compact regulating development around Lake Tahoe on the Nevada-California border.[23] Again, the court emphasized the quality of the scenery.

> The controversy which we are required to review focuses upon the Lake Tahoe Basin — an area of unique and unsurpassed beauty situated high in the Sierras along the California-Nevada border. Mark Twain, an early visitor to the region, viewed the lake as "a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea . . . with the shadows of the mountains brilliantly photographed upon its still surface . . . the fairest picture the whole earth affords." Year after year the lake and its surrounding mountains have attracted and captivated countless visitors from all over the world.
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> However, there is a good reason to fear that the region's natural wealth contains the virus of its ultimate impoverishment. A staggering increase in population, a greater mobility of people, an affluent society and an incessant urge to invest, to develop, to acquire and merely to spend-all have combined to pose a severe threat to the Tahoe region. Only recently has the public become aware of the delicate balance of the ecology, and of the complex interrelated natural processes which keep the lake's waters clear and fresh, preserve the mountains from unsightly erosion, and maintain all forms of wildlife at appropriate levels. Today, and for the foreseeable future, the ecology of Lake Tahoe stands in grave danger before a mounting wave of population and development.
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> Even without such explicit findings we could hardly avoid a conclusion that the purpose of the Compact is to conserve the natural resources and control the environment of the Tahoe Basin as a whole through area-wide planning. Lake Tahoe itself is an interstate body of water; the surrounding region, defined by the Compact, is also interstate, since it includes not only the lake but the adjacent parts of three counties of Nevada and two counties of California. . . . The water that the Agency is to purify cannot be

22. *Id.* at 613, 614, 621-22, 624-25 (citation omitted). *See also* Washington Department of Game v. Federal Power Commission, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954).

23. People ex rel. Younger v. County of El Dorado, 5 Cal. 3d 480, 488-90, 487 P.2d 1193, 1197, 1210-11, 96 Cal. Rptr. 553, 556-81 (1971) (citation omitted).

> confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wildlife which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive development which threaten the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole. Indeed, the fact that the Compact is the product of the cooperative efforts is impressive proof that its subject matter and objectives are of regional rather than local concern.
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> There is also a beneficial right in the People of the State of California to compel the counties to perform their duty. The unique scenic attributes which the Agency must preserve are enjoyed not only by the residents of the region but also by large numbers of the state's general citizenry. Failure of respondent counties to provide funds for the Agency at once impairs the functioning of that body and disturbs the harmony and effectiveness of interstate relations. The state, as a party to the interstate Compact, and as an entity which contributes funds to the Agency, has an important interest in securing the success of the Agency.[24]

Other recent opinions have been in accord. When the question was squarely raised in a Virginia federal case,[25] the court held invalid a designation by the Secretary of the Interior of much of a rural county in Virginia as a "landmark," together with his acceptance of preservation easements for the same purpose, because of insufficient standards and because of a confusion in the use of the two statutes involved.[26] Local resistance to development in Louisa County was originally provoked by a federal grant for a proposed state prison.[27] The court noted "a beautiful and remarkably well-preserved concentration of eighteenth and nineteenth century buildings of architectural merit,"[28] but

24. *Id.* at 485-86, 493-94, 491-92, 487 P.2d at 1194-95, 1201, 1199, 96 Cal. Rptr. at 554-55, 561, 559 (citations omitted).

25. Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839 (E.D. Va. 1980).

26. *Id.* The Historic Sites, Buildings and Antiquities Act of 1935, 16 U.S.C. §§ 461-69 (1982 & Supp. VI 1988); National Historic Preservation Act of 1966, 16 U.S.C. § 470-470w-6 (1982 & Supp. VI 1988).

27. Ely v. Velde, 451 F.2d 1130, 1132 (4th Cir. 1971).

28. 497 F. Supp. at 842. *See also* Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 311 A.2d 588 (1973) (holding that the environmental protection amendment to the Pennsylvania Constitution was not self-executing).

indicated some problem with the notion of a "historic site" about the size of Manhattan.[29]

The principal Maine environmental legislation[30] requires that new projects reviewed under the Act should not adversely affect existing scenic character, natural resources or property values. In the first important case, the Supreme Judicial Court upheld the statute[31] with the following comment:

> While the Legislature has used general language in requiring proof that the proposed development has adequate provision for fitting itself harmoniously into the existing natural environment, the Legislature has throughout the Act pointed out the specific respects in which the development must not offend the public interest and in which the development would be ecologically inharmonious. The Act recognized the public interest in the preservation of the environment because of its relationship to the quality of human life, and in insisting that the public's existing uses of the environment and its enjoyment of the scenic values and natural resources receive consideration, the Legislature used terms capable of being understood in the context of the entire bill. The Legislature has declared the public interest in preserving the environment from anything more than minimal destruction to be superior to the owner's rights in the use of his land and has given the Commission adequate standards under which to carry out the legislative purpose.[32]

Another group of cases has mentioned the concern for scenic resources briefly in passing, and with approval. For example, in a challenge to a transmission line, the Vermont Supreme Court noted a finding by the Public Utilities Commission that the proposed alignment would actually involve less interference with scenery than other possible routes, and implicitly approved that finding.[33] In a federal case,[34]

29. 497 F. Supp. at 847.

30. Site Location of Development, ME. REV. STAT. ANN. tit. 38, §§ 481-490 (1989 & Supp. 1989).

31. *In re* Spring Valley Development, 300 A.2d 736 (1973).

32. *Id.* at 751.

33. Vermont Electric Power Co., Inc. v. Bandel, 135 Vt. 141, 151, 375 A.2d 975, 981 (1977). This is the fifth time this legal proceeding reached the Vermont Supreme Court. *Id.* at 143, 375 A.2d at 977. Vermont has passed a substantial body of legislation protecting various aspects of its scenery, and there is one additional incidental indication of local judicial attitudes to such regulation. In National Advertising Co. v. Cooley, 126 Vt. 263, 227 A.2d 406 (1967), Chief Justice Holden dissented from the majority's decision to make a final decision upholding a local ordinance (restricting

an applicant challenged the refusal of an oil and gas lease at Jackson Hole, on the ground that the proposed lease would violate the policy in an Interior Department memorandum issued by Secretary Krug.[35] The Court noted that the whole area "is world renowned for its beauty" and that the Krug memorandum represented an obvious compromise of conflicting interests.[36] A California[37] decision upheld the disapproval of a subdivision in the Santa Monica Mountains which would involve massive changes in the terrain, including extensive grading and filling.[38] The Court described the proposal and held as follows:

> Since the home sites are to be on the top of ridges, the houses will restrict ocean view from other parts of the Santa Monica mountains and view of the mountains from significant parts of the ocean and ocean frontage.
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> The record is replete with evidence that the proposed development would create a major increase in the traffic using Pacific Coast Highway. . . . The record shows that, without the proposed development, Pacific Coast Highway is already overused, with frequent bumper-to-bumper delays. . . .
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> It is also clear that the proposed development involved a major change in the natural environment, removing natural vegetation, leveling hills and destroying a natural and scenic canyon. . . .
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> The same adverse effect of the proposed development falls within the requirement of [CAL. PUB. RES. CODE § 30240] that the natural habitat of the area not be excessively damaged.
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> In short, we cannot say that the commission, and the trial court, erred in regarding the cumulative effect of this large development as such as to fall without the permitted development that the statute envisages.[39]

In one of the first acreage zoning cases in the state of New York,[40] the court upheld such a requirement in a remote village at the northern

billboards), and commented: "I believe there is more involved in this declaration than the contamination of our scenic landscape." 126 Vt. at 270, 227 A.2d at 410.

34. Learned v. Watt, 528 F. Supp. 980 (D. Wyo. 1981).

35. *Id.* at 981.

36. *Id.*

37. Belmar Estates v. California Coastal Commission, 115 Cal. App. 3d 936, 171 Cal. Rptr. 773 (1981).

38. *Id.* at 941, 171 Cal. Rptr. at 776.

39. *Id.* at 938-39, 941-42, 171 Cal. Rptr. at 774, 776.

40. Gignoux v. Kings Point, 199 Misc. 485, 99 N.Y.S.2d 280 (1950).

end of a peninsula on Long Island as an appropriate move to provide a rural community for those who might desire the advantages of a quiet area and the beauty of rural surroundings.[41]

Protection of Specific Views

Another group of cases has upheld specific devices to protect particular aspects of an attractive view. These decisions included approval of the Denver Mountain View ordinance, a general view-protection ordinance in a Los Angeles suburb and a requirement affecting the color of paint in a historic district.

The view from Denver of the Front Range of the Rocky Mountains is one of the city's substantial assets. Since the 1960s, a city ordinance has protected this view to the West from a group of parks in Denver. The ordinance, based on an angle of view — which new buildings are not permitted to intercept — reads as follows:

> 2. (b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or cross-hatching shall exceed an elevation of five thousand five hundred forty-eight (5,548) feet above mean sea level plus two (2) feet for each one hundred (100) feet that said part of a structure is horizontally distant from the reference point . . .
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> (c) *Reference point.* The reference point is a point having an elevation of five thousand five hundred forty-eight (5,548) feet above mean sea level . . . .[42]

The ordinance was recently challenged for the first time, in connection with an amendment extending its protection to the views from an additional park in southeast Denver.[43] This was done in order to prevent construction of a proposed 21-story office building (permitted under zoning) which would block part of that view from the newly-protected park.[44] The court reviewed the situation carefully, and upheld the ordinance.

> The trial judge viewed each of the parties covered by the ordinance and made an express finding that there was a "panoramic mountain view" from the sighting point in Southmoor Park.
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> It has been well established that protection of aesthetics is a

41. *Id.* at 491, 99 N.Y.S.2d at 286.

42. Landmark Land Co. v. City and County of Denver, 728 F.2d 1281, 1282 (10th Cir. 1986).

43. *Id.* at 1282.

44. *Id.*

legitimate function of a legislature. *See Berman v. Parker*, 348 U.S. 26, 32-33, 75 S.Ct. 98, 102, 99 L.E.d 26 (1954). Especially in the context of Denver — a city whose civic identity is associated with its connection with the mountains — preservation of the view of the mountains from a city park is within the city's police power.

Appellants argue that SPEHA's reason for promoting the amendment was to protect the property values of its members' homes, not to protect the mountain view. Assuming that this is true, it does not affect the validity of the city council's action. The council enacted an amendment that is clearly directly related to preserving the mountain view — indeed, the gradations in allowable height based on distance from the sighting point are tailored to nothing else.

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Appellants argue further that, even if the protection of the mountain view is a legitimate purpose, this must be accomplished by a formal rezoning. Once it is settled that protection of aesthetics is a legitimate function and it is clear that this amendment is related to that goal, the city is free to choose the method of implementing that goal, within the constitutional parameter that the enactment is not arbitrary or capricious.[45]

In the strongest case to date in this field of law, an intermediate California Court upheld a municipal ordinance designed to prevent blocking specific existing views, and the Supreme Court dismissed on appeal.[46] Under this ordinance, if neighbors felt that proposed construction would impair their view, a procedure allowed the local Planning Commission to review the situation, suggest possible mitigation measures and, where appropriate, refuse to approve plans, i.e., deny a building permit—all subject to appeal to the City Council.[47] When

45. *Id.* at 1284, 1285-86.

46. Ross v. City of Rolling Hills Estates, 192 Cal. App. 3d 370, 238 Cal. Rptr. 561, *appeal dismissed*, 484 U.S. 983 (1987).

47. The relevant portions of the ordinance read as follows:

2. 1950. PURPOSE. The hillsides of the City constitute a limited natural resource in their scenic value to all residents of and visitors to the City and their potential for vista points and view lots. It is found that the public health, safety and welfare require prevention of needless destruction and impairment of views and promotion of the optimum utilization and discouragement of the blockage and misuse of such sites and view lots. The purpose of this ordinance is to promote the health, safety and general welfare of the public through:

"(a) The protection, enhancement, perpetuation and use of sites and view lots that offer views to the residents because of the unique topographical features which the Palos Verdes Peninsula offer, or which provide unique and irreplaceable assets to the City and its neighboring communities or which provide for this and future

plans for a residential addition were disapproved, plaintiffs challenged the ordinance as being void for vagueness — emphasizing the use of such words as "needless," "discourage," "view," "impairment" and "significantly obstructed."[48] However, the court decided that the ordinance provided a reasonably certain standard in light of the need for view protection, and added:

> The record discloses that the Council had before it appellants' proposal, a staff recommendation that mitigating factors be incorporated into the design from the City's planning director, graphs and photographs indicating the view of city lights from the impacted properties and the extent that the proposal would affect the view, and the testimony of Stan Crawford and Margaret Larson, who testified that their views from their residences would be affected by the proposed addition. That evidence supports findings

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generations examples of the unique physical surroundings which are characteristic of the City.

"(b) The maintenance of settings which provide the amenity of a view.

"(c) The establishment of a process of design review by which the City may render its assistance toward the objective that views enjoyed by residents of the City will not be significantly obstructed.

"1951. EVALUATION AND REVIEW. To protect the visual quality of highly scenic areas and maintain the rural character of the City, new development should not degrade highly scenic natural historical or open areas and shall be visually subordinate to the scenic quality of these areas.

"New development within the various view sheds contained in the City that would have a significant visual impact to those living adjacent to the development, shall be subject to design review. This review shall ensure that development and its cumulative impact is consistent with the previously mentioned standards.

"The design procedures and standards employed in new developments, alterations and additions to existing structures and lots should include appropriate measures that are consistent with appearance and design goals of the View Protection Ordinance. Development proposals should be coordinated in order to:

"(a) Maximize open space preservation.

"(b) Protect view corridors, natural vegetation, land forms, and other features.

"(c) Minimize the appearance of visually intrusive structures.

"(d) Prevent the obstruction of property owners' views by requiring appropriate construction of new structures or additions to existing buildings or adjacent parcels.

"(e) Assess the potential view loss from public areas of any proposed major structures as well as alterations and additions to existing structures.

"(f) Determine whether other suitable design options are available to the property owner in order that view obstructions may be eliminated or lessened in severity.

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Id. at. 374, 377, 238 Cal. Rptr. at 562-64.

48. *Id.* at 374-75, 238 Cal. Rptr. at 562-63.

of significant view impairment and of failure to mitigate the impact on existing views.[49]

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An ordinance in Paradise Valley (a wealthy Northern suburb of Phoenix, Arizona) required new houses to blend with the mountain background which dominates the valley, and not to reflect light unduly —i.e., directed against white houses.[50] The local zoning board granted a variance from this requirement on house color, apparently because the property owner/developer testified that all his life he had been hoping to build a "Mediterranean home," with white columns.[51] A neighbor challenged these proceedings, and the intermediate court held that the variance was invalid because it did not conform to the strict criteria for variances as set forth in the Arizona statute.[52]

The Board had no authority to grant a variance to allow Mr. DeMuro's personal preference for a color which would enhance the design he chose for his house.

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The color of a house is not a factor pertaining to the real property or which would deprive the property of uses or privileges enjoyed by other property of the same zoning classification. Permission to use an unapproved color not compatible with the requirements of the mountain building regulations also violated the following rules and regulations of the Board which prohibit a color variation.

* * * *

The Board's stated reasons for permitting the variance clearly demonstrate that the color variation had nothing to do with the size, shape, topography or location of the property and could not be a special circumstance pertaining to the real property. The permission to change the color in violation of the mountain building regulations was not necessary to relieve DeMuro from a demonstrable hardship but rather to serve as a personal convenience. Statutory provisions and the rules and regulations of the Board specifically state that any hardship must relate to the use of the land as opposed to the owner. A personal hardship does not justify a variance.[53]

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49. *Id.* at 376-77, 238 Cal. Rptr. at 564-65.

50. Arkules v. Board of Adjustment of Town of Paradise Valley, 151 Ariz. 438, 439, 728 P.2d 657, 658 (Ariz. Ct. App. 1986).

51. *Id.* at 441, 728 P.2d at 660.

52. *Id.* at 442, 728 P.2d at 661.

53. *Id.* at 441-42, 728 P.2d at 660-61 (citing HAGMAN, URBAN PLANNING AND

Another group of recent cases are concerned with attempts to prevent the blocking of particular views. The situations in these cases are therefore somewhat analogous to the group of other decisions previously discussed.[54] In certain situations, courts have upheld restrictions against new structures in this kind of situation, even without specific statutory authority. For example, pre-existing development effectively established a uniform building line along the rear of lots at the edge of Lake Washington in Seattle. Two proposed new buildings would project further into the lake, thereby cutting into the view from the pre-existing houses. In a rather surprising opinion,[55] using a "balancing test" and based partly on the state Shoreline Act, the court held that the proposed new development was a violation and ordered it removed.[56]

> We need not, in the instant case, rest our decision on the need to protect aesthetics alone. Here, the underlying findings establish that the loss of view substantially reduces the values of the shoreline properties of the Huntley's and their neighbors, thus entitling them to protection against that economic loss without payment by the state of just compensation.
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> * * * *
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> Second, the project is inconsistent with the permitted uses which favor preservation of the shoreline's natural character and the ecology of the shoreline. [WASH. REV. CODE § 90.58.020][57]

Again, in an important decision on the comprehensive plan problem,[58] a piecemeal amendment to both the Honolulu plan and the implementing zoning ordinance was adopted without full conformity with all the proceedings then needed for original adoption of a plan in Hawaii.[59] The court held that amendments must be passed by the same procedure as the original adoption.[60] The opinion contains a striking

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LAND DEVELOPMENT CONTROL LAW at 204). The criteria are essentially an adaptation of the familiar ones derived from Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939).

54. *See supra* notes 9-12.

55. The Dep't. of Ecology v. Pacesetter Constr. Co., Inc., 89 Wash. 2d 203, 571 P.2d 196 (1977). *Cf.* Collinson v. John L. Scott, Inc., 55 Wash. App. 481, 778 P.2d 534 (1989) (no action in nuisance for blocking a view).

56. 89 Wash. 2d at 210-11, 571 P.2d at 199-200.

57. 89 Wash. 2d at 212-13, 571 P.2d at 201.

58. Dalton v. City and County of Honolulu, 51 Haw. 400, 462 P.2d 199 (1969).

59. *Id.* at 412-13, 462 P.2d at 207.

60. *Id.* at 416, 462 P.2d at 209.

discussion of what is needed to provide a valid amendment to zoning ordinances in Hawaii — in effect outlawing piecemeal zoning amendments.[61] Here, the challenged and invalidated amendment permitted an increase in density in an area in Kailua, across the range from Honolulu on Windward Oahu.[62] The court held that plaintiffs had standing to bring the suit.

> Plaintiffs' interest in this case is that they "reside in very close proximity" to the proposed development. In fact two of the plaintiffs apparently "live across the street from said real property" upon which defendants plan to build high rise apartment buildings, thus restricting the scenic view, limiting the sense of space and increasing the density of population. Clearly this is a "concrete interest" in a "legal relation." Lynch v. Borough of Hillsdale, 136 N.J.L. 129 54 A.2d 723 (1947); *see generally* 3 Davis, Administrative Law Treatise 283-85 (1958). Clearly, too, this is an "actual controversy," not merely hypothetical problem.[63]

Nuisance Law

In one older case, a concurring opinion argued that the law of nuisance should take into account aesthetic nuisances as well as others.[64] However, this has not been followed up in the decades since.[65]

BEYOND THE POLICE POWER — THE INTERMEDIATE SOLUTION

There is no reason why all public action in this field must be at one of the two extremes, involving either (a) public regulation (and prohibition) of almost all rights, or (b) public acquisition of the land. There is a lot of room for the intermediate solution, involving splitting the fee between rights held publicly and rights left in privately. In an important case on this subject,[66] the Wisconsin court specifically upheld the use of eminent domain to condemn scenic easements along the Great

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61. The criteria set forth here for valid zoning amendments, along with others taken from the nation-wide case law, have been enacted into statutory law by the Vermont Legislature. *See* VT. STAT. ANN. tit. 24, § 4384(e) (1975 & Supp. 1989).

62. 51 Haw. at 401-02, 462 P.2d at 201.

63. 51 Haw. at 403, 462 P.2d at 202.

64. Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 191 S.E. 368, *concurring opinion at* 192 S.E. 291 (1930).

65. *See* Collinson v. John L. Scott, Inc., 55 Wash. App. 481, 778 P.2d 534 (1989) (no action in nuisance for blocking a view).

66. Kamrowski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

River Road, which runs along the Mississippi River in western Wisconsin.[67] Plaintiff's argument was essentially that acquisition of such an easement was not for a public use, because there was no public right of entry.[68] The court specifically held that the public use requirement

67. The scenic easements in question are reproduced in the opinion, and read as follows:

"RESTRICTIONS ON USE
AND OCCUPANCY"

"1. No use or occupation other than the hereinafter permitted use shall hereafter be established or maintained within or upon the restricted area.

"PERMITTED USE OF OCCUPATION
OF RESTRICTED AREA

"1. General crop or livestock farming including construction, erection, maintenance and repair of buildings incident to such use, and construction, maintenance or establishment of recommended soil conservation structures or practices, and normal farm improvements.

"2. Telephone, telegraph, electric or pipelines or microwave relay structures for the purpose of transmitting messages, heat, light or power.

"3. Single-family residential use.

"4. * * *

"5. Any use not heretofore specified which exists upon or within the restricted area as of the time of recording this instrument, including normal maintenance and repair of existing buildings, structures and appurtenances but such use shall not be expanded nor shall any structure be erected or structural alternations be made within the restricted area.

* * * *

"2. No dump of ashes, trash, rubbish, sawdust, garbage or offal, or any other unsightly or offensive material shall hereafter be placed upon the restricted area. Existing use for any such purpose shall be discontinued except where such use is incidental to the present occupation and use of the land, and when it conforms to applicable state and local requirements.

"3. No signs, billboards, outside advertising structures or advertisement of any kind shall be hereafter erected, displayed, placed or maintained upon or within the restricted area. Existing use for any such purpose shall be terminated, and any such purpose shall be terminated, and any such signs shall be removed, on or before *July 1, 1965*, except that one sign of not more than *8* square feet in size may be erected and maintained to advertise the sale, hire or lease of the property, or the sale and/or manufacture of goods, products or services incidental to a permitted occupation or use of the land.

"4. No trees or shrubs shall be destroyed, cut, or removed from the restricted area, except as may be incidental to a permitted occupation or use of the property, or required for reasons of sanitation and disease control, and except for selective cutting of timber by methods prescribed by written permit from the State Highway Commission.

"5. Lots used, leased or sold within the restricted area for residential purposes shall have a frontage on the adjacent state trunk highway 35 of not less than three hundred (300) feet for each residence.

Id. at 259-61, 142 N.W.2d at 793-94.

68. *Id.* at 261, 142 N.W.2d at 795.

was satisfied by the sort of use involved in visual enjoyment of a pleasant scene.[69]

> Although we have found no express statutory definition of "scenic easement," its purpose and general meaning appear from the legislative history just recited. It is also clear that the legislature has determined that the protection of scenic resources along highways is a public purpose, has set the policy of acquiring scenic easements along particular routes, in order to protect such resources, and has delegated to the state highway commission the function of deciding the exact terms of the easements to be acquired, and of exercising the power of eminent domain to acquire them.
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> The concept of the scenic easement springs from the idea that there is enjoyment and recreation for the travelling public in viewing a relatively unspoiled natural landscape, and involves the judgement [sic] that in preserving existing scenic beauty as inexpensively as possible a line can reasonably be drawn between existing, or agricultural (and in these cases very limited residential) uses, and uses which have not yet commenced but involve more jarring human interference with a state of nature. We think both views can reasonably be held.
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> The learned trial judge succinctly answered plaintiffs' claim that occupancy by the public is essential in order to have public use by saying that in the instant case, "the 'occupancy' is visual." The enjoyment of the scenic beauty by the public which passes along the highway seems to us to be a direct use by the public of the rights in land which have been taken in the form of a scenic easement, and not a mere incidental benefit from the owner's private use of the land.
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> * * * *
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> We are aware of the doctrine that zoning restrictions imposed under the police power cannot be based solely on aesthetic considerations, although the court has expressed doubt whether this is any longer the law. Plaintiffs do recognize of course, that the imposition of restrictions on use involved here is not an exercise of police power. The state is taking a portion of plaintiffs' property rights, and just compensation will be paid for what is taken.
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> Whatever may be the law with respect to zoning restrictions based upon aesthetic considerations, a stronger argument can be made in support of the power to take property, in return for just

69. *Id.* at 265, 142 N.W.2d at 797.

> compensation, in order to fulfill aesthetic concepts, than for the imposition of police power restrictions for such purposes. More importantly, however, we consider that the concept of preserving a scenic corridor along a parkway, with its emphasis upon maintaining a rural scene and preventing unsightly uses is sufficiently definite so that the legislature may be said to have made a meaningful decision in terms of public purpose, and to have fixed a standard which sufficiently guides the commission in performing its task.[70]

IN THE SUPREME COURT

Finally, in an important recent Supreme Court decision, the[71] Court split five to four on the validity of the California Coastal Commission's requirement of an easement of passage along a beach, connecting two public beaches, as a condition for permission to reconstruct and enlarge a house on the coast.[72] This is one of the recent cases which may have made (or tried to make) a major change in land use law.[73] The principal difference between Justice Scalia's majority opinion and the dissents by Justices Brennan, Blackmun and Stevens lies in the use of the presumption. Scalia has been trying in effect to reverse the normal presumption of validity and impose strict scrutiny on such regulations, of economic activity, much in the fashion of the *Lochner* era,[74] and much of Supreme Court law before 1937. The decision probably foreshadows a considerably more critical attitude towards various development exactions, on which towns all over the country have been running wild with very little statutory authority.

> The lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them. In short, unless the per-

70. *Id.* at 263-66, 142 N.W.2d at 796-97 (citations omitted).

71. Nollan v. California Coastal Commission, 483 U.S. 825 (1987). For my view of the long-term significance of *Nollan* and other recent decisions in the Supreme Court, see Williams & Ernst, *And Now We Are Here On A Darkling Plain*, 13 VT. L. REV. 635 (1989).

72. 483 U.S. at 827.

73. *Id.* at 826.

74. Lochner v. New York, 198 U.S. 45 (1905).

mit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion." . . .[75]

Justice Brennan dissenting, challenged the Court's characterization of the regulation.

The deed restriction on which permit approval was conditioned would directly address this threat to the public's access to the tidelands. It would provide a formal declaration of the public's right of access, thereby ensuring that the shifting character of the tidelands, and the presence of private development immediately adjacent to it, would not jeopardize enjoyment of that right. The imposition of the permit condition was therefore directly related to the fact that appellant's development would be "located along a unique stretch of coast where lateral access is inadequate due to the construction of private residential structures and shoreline protective devices along a fluctuating shoreline." The deed restriction was crafted to deal with the particular character of the beach along which appellants sought to build, and with the specific problems created by expansion of development toward the public tidelands. In imposing the restriction, the State sought to ensure that such development would not disrupt the historical expectation of the public regarding access to the sea.

The Court is therefore simply wrong that there is no reasonable relationship between the permit condition and the specific type of burden on public access created by the appellants' proposed development. Even were the Court desirous of assuming the added responsibility of closely monitoring the regulation of development along the California coast, this record reveals rational public action by any conceivable standard.[76]

CONCLUSION

The 20th century has seen a fairly steady progression toward clarification of legal doctrine on aesthetic regulations in two respects:

1. The importance and the legal validity of encouraging improved aesthetics in the environment, and

2. An increasing sophistication on how to define aesthetic problems in such a way as to make them subject, not to whim and caprice but to the rule of law, with equal treatment for all. As far as scenic protection is concerned, the three major new decisions at the

75. 483 U.S. at 837 (citations omitted).

76. 483 U.S. at 851-53 (citations omitted).

end of the 1980's have crystallized the situation. For, on the authority of experienced courts in important states, we have it (a) that the height of new buildings may be restricted to preserve the vista of a major mountain range, (b) that new development in a residential neighborhood may be held up, and modifications may be required, if a proposed development would block a neighbor's existing views, and (c) apparently even that public decision-making may prescribe the color of a house. We do not need anything more to speak confidently about the law in this field as settled: legal protection of scenic values is a legitimate goal of public endeavor, at least so long as the scenic values may be clearly defined. And it must not be forgotten that the Supreme Court has, not very thoughtfully, lent its general rhetorical support along the same lines.