# PROPOSED LEGISLATION FOR HIGHWAY CORRIDOR PROTECTION

ALLEN FONOROFF†

## I. INTRODUCTION

The urbanization of the United States is accelerating at a very rapid pace. Many states and regions are beginning to feel and will continue to feel the effects of uncontrolled growth. One consequence of such growth is the destruction of scenic values which are vital to the environment in which man must live.

The problems incident to urbanization have aroused considerable interest in the preservation of open space and scenic values. Uncontrolled urban sprawl, for example, has displaced thousands of acres of agriculture, threatened the preserves for wildlife, despoiled the forests and mountains, and created serious problems of flooding and water pollution. The reasons are many and stem from the rapid economic expansion which the United States has been experiencing. Accompanying the significant increase in real income has been the continued growth in automobile ownership, highway construction, and automobile travel. On the other hand, because of the economics of agriculture, the small farm is quickly disappearing and when it is not replaced by a more intensive type of land use or consolidated into larger farms, it is allowed to literally go to seed. The landscape quickly deteriorates with wild growth because the farmer cannot afford to maintain the pasture land, fields, and orchards. What then is to become of this unproductive land? These are among a few of the problems with which government must grapple.

Many states, such as Vermont, count scenery among their most precious possessions. It is also an asset of regional and national importance. The preservation of natural and man-made beauty is so much a part of American heritage and well-being that government, at almost every level, has become concerned with its protection and enhancement and has also become aware that the preservation of beauty fosters growth and economic maturity. One aspect of scenic preservation has been isolated for attention and resolution by the State of Vermont—the preservation of scenic assets along the roadside. With

† Assoc. Professor of Planning, and Director, Office of Community Affairs, Case Western Reserve University.

this as a statement of public policy, a critical question arises: what legal steps can be taken to accomplish effective control over the use of land along the public highways?

## II. Implementing Public Policy

The implementation of a policy to preserve scenic values along the roadside can be accomplished through voluntary or mandatory cooperation among many segments of society. At the political level, cooperation is required between federal and state programs, among the various departments of government within the state (highway, finance, taxation, etc.), between elements of local government (planning and zoning authorities) and the state, as well as between one local unit and another. Outside of government, cooperation is required between various elements of the business community, between them and all levels of government, and with civic and citizen organizations. In short, there is a multitude of organizational and private activity representing vested interests, public and private, that must be coordinated to achieve success. Of major significance is whether the people are ready and willing to accept the direction of the policy and its implementation.

The protection of scenic values centers on the roads, for the network of roads and highways has historically been the agency of communication for mankind. Even today, roads play a key role in shaping development and land use. Roads provide the arena from which citizens and visitors view the beauty or ugliness of the landscape, and roadside scenery is the most seriously threatened. In the years before zoning and subdivision regulations, any kind of development was accepted in the name of progress. Yet there are major policy alternatives that provide a range of choices to guide development. The complex of urban problems is such that traditional attitudes and concepts of transportation require reappraisal. Can the economic dynamics of today's society be determined at the local level through voluntary cooperation? Can they be decided by the highway engineer concerned with the economics of construction?

The responsibility for policy-making and coordination of activity designed to exploit the rich resources associated with a highway system requires a new approach by the higher levels of government. Legislative direction at the state level would appear to be an effective instrument for expressing public policy and for establishing the methods for preserving scenic values along a state's highway system.

## III. Why Preserve Scenic Values?

Two words supply the answer to the question, "Why preserve scenic values?" They are *economics* and *aesthetics*. Moreover, economics and aesthetics can be equated to two other words of legal significance—general welfare. The general welfare of every political subdivision in a state is enriched by the preservation and protection of its scenic values. As applied to Vermont, for example, the logic is quite simple:

1. Vermont's scenery is exceptionally beautiful;
2. exceptional beauty attracts people;
3. people impressed by the aesthetics of Vermont, spend money in the State, and some open new businesses and industries;
4. therefore, the preservation of the State's scenic resources and beauty can help insure its economic well-being.

The existence of scenic assets has been responsible for attracting new businesses and industries, permanent residents, part-time summer and winter residents, and tourists to the state. The influx of people helps support existing retail facilities and recreation centers and creates opportunities for new investment. The state's scenic resources have been one of the stimulants for increasing employment and real income. The preservation of scenic and historic assets has led to increased real estate values within and around the areas subject to regulation.

Vermont's natural aesthetic resources generate an estimated annual expenditure of 189 million dollars in the state.[1] Equally important are the effects of preservation on the economy generally.[2] In view of the threat to scenic values, protective legislation is required to preserve and enhance scenic values in order to reinforce the economic viability of a state, and to achieve the aesthetic objectives and amenities so necessary in a complex urbanizing society. Recognizing these objectives as valid goals of public policy, Philip H. Hoff, Governor of the State of Vermont, initiated a study, through the State's Central Planning Office, aimed at assessing scenic and historic values and the development of methods for their preservation.

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1. Report of the Governor's Panel on Scenery and Historic Sites (1963).

2. *See* American Soc'y of Planning Officials, Planning for Preservation 14, 15 (1964).

## IV. The Legislation

The study initiated by the Governor of Vermont resulted in recommendations for new legislative techniques that would deal effectively with the preservation of the State's scenic values. This legislation was divided into two major areas for remedial action:

1. Regulation through the use of the police power, and
2. acquisition of the fee or any lesser interest in land through the use of the power of eminent domain.

After analyzing the nature of scenic assets and the reasons for their protection and enhancement, careful consideration was given to choosing the appropriate legal tools that would accomplish that objective. For example, some scenic assets (certain gaps through the Green Mountains) require complete public ownership. Other assets, such as the scenery that is in view at short intervals along the highway, require the acquisition of less than the fee. Finally, there are those unique scenic assets that can be protected by regulation through the police power. The focus of this article is on the use of the police power as an effective method of protecting scenic values.

The proposed legislation was designed to preserve and to enhance scenic values visually related to Vermont's highways by regulating the use of land adjacent to such highways. It is but one of several ways that is used to accomplish the stated goal. The legislation is reproduced at the conclusion of this article.

In brief, the legislation classifies areas of unique scenic significance into two categories—scenic corridors, and scenic sites. The scenic corridors chosen require immediate protection. The Federal Interstate Highway System is one such corridor; the other is the system of highways which carries an intermediate volume of traffic and provides unusual scenic beauty.

In general, the law prohibits the location of certain obnoxious uses within one-half mile of the highway right-of-way or between its right-of-way and a ridgetop, whichever distance is less. There are several exceptions:

1. The prohibitions do not apply when the highways are located within cities, incorporated villages, or settled areas;
2. The usual motorist services (motels, eating establishments, and service stations) are permitted along one major route, and within one-half mile of the right-of-way of any part of an interchange with a Federal Interstate Highway.

Permitted residential uses are regulated with respect to minimum lot area, and the size, location, and lighting of signs are also regulated.

The second item of unique scenic significance that is protected by the police power is the scenic site. The word "unique" is the key to this analysis because justification of legislative action will depend to a great extent upon the special characteristics of this category. The category includes small cemeteries, covered bridges, and other historic sites and uses. The same obnoxious uses are forbidden within specified distances; however, the regulations do not apply to an area predominantly used for commerce or industry which is specially defined.

Other similar areas of special scenic value—approaches to historic towns, rural churches, etc.—may be designated for similar protection by a state agency. Standards are set forth to guide the agency in the selection of such areas and provisions are made for public participation through hearings. The regulations protect the right to sell farm produce as well as non-conforming uses that were in active operation before the passage of the law.

## V. The Constitution and the Police Power

Although the approach taken in the Vermont legislation is limited to roadside scenery, its implications are much broader. First of all, a ride in the country affords most people with their primary contact with scenery. Second, residential, commercial, and industrial development tend to follow and concentrate along transportation corridors. Finally, these corridors offer a variety of experience, traveling as they do through the city, the suburb, and the countryside. Therefore, the problems presented are broad, involving not only protection of existing scenic values, but also positive action to improve and enhance scenic values.

The proposed legislation attempts to encourage the use of two very important legal remedies: the police power[3] and the power of eminent domain. Moreover, the objectives to be achieved are classified into categories so that the most appropriate and effective legal remedy is used.

### A. Private Property

The common law and constitutional rights and obligations that are a part of the ownership of land have shaped the growth of the United

3. Because of the unique approach of the Vermont legislation, precedent could not be found in the case law. The discussion of the police power builds up from analogies with those areas of aesthetic control that have been accepted by the courts.

States. These rights and obligations have changed significantly over the years as required by the forces of survival and growth. It has never been possible for anyone to do as he pleased on his own land; the contrary has often been emotionally announced, with citations;[4] nevertheless, property rights have been adjusted to accommodate the economic and social needs of the people.

The continuing complex economic and social problems that confront the United States today will require flexibility and not dogma in refining the concepts of private property and the public interest. Judicial acceptance of land use controls depends upon the "justice" of the restriction. Therefore, the questions to be decided are whether the restrictions imposed are a reasonable method for achieving a reasonable objective; whether the public benefits to be derived are sufficient to justify a restriction on private property; whether the property owner is able to secure a reasonable use of his land; and whether the regulations are clear and unambiguous.

### B. Police Power

The use of the police power to regulate aesthetics has been the subject of much litigation for it raises significant constitutional questions. The use of the police power is limited by constitutional requirements of due process and equal protection. The courts have laid down very broad criteria for judicial review of these constitutional concepts.[5] For example, the guarantee of equal protection before the law does not require the universal application of a legislative act. In keeping with a valid legislative purpose, distinctions may properly be made in the application of regulations.[6] Nor is the legislature required to be omniscient and completely solve a problem in one legislative pronouncement.[7]

It is fair to conclude, therefore, that a statute which is designed to protect and promote the economic well-being of the state and thus the general welfare of its people, and which sets out a course of action, all of which is directed at a unique classification reasonably related to the statutory purpose, is a valid and constitutional exercise of the police power.

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4. 1 BLACKSTONE, COMMENTARIES 139 (1782).
5. *See* Nebbia v. New York, 291 U.S. 502 (1934).
6. Railway Express Agency v. New York City, 336 U.S. 106 (1949).
7. Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905).

### C. Reasonable Use of Land

Regulating the use of land so that it remains "open space" raises constitutional questions of reasonableness. From time to time, some municipalities have attempted to zone private property for an "exclusive" purpose.[8] The constitutional question to be answered in this situation is whether the land owner has a reasonable expectation of receiving a reasonable return on his investment—the land.

However interesting the issues raised by these questions may be, they are not at all applicable to scenery preservation legislation. The proposed legislation leaves the owner of land considerable latitude and choice with respect to its use and development within carefully defined areas of regulation. The legislation prohibits a handful of uses whose presence within the proscribed areas would completely frustrate its legitimate objectives. No attempt is made to "freeze" land in its natural state either by prohibiting all use or so restrictively regulating land as to render it valueless.[9]

### D. Aesthetics and the Police Power

Clearly, government may act in the interests of aesthetics when exercising its power of eminent domain. However, the proposed legislation sets forth regulations restricting the use of land which does not involve a "taking," and therefore would not require compensation. Although the United States Supreme Court has not chosen to speak definitively on the subject of aesthetics and the police power, a strong trend has developed within state and federal court decisions which indicates that beauty will soon be able to enter the halls of justice unassisted by the crutches of public health and public safety.[10] Aesthetic

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8. McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932 (1953), *cert. denied,* 348 U.S. 817 (1954); Vernon Park Realty Co. v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954). *Cf.* Greenhills Home Owners Corp. v. Village of Greenhills, 5 Ohio St. 2d 207, 215 N.E.2d 403 (1963).

9. *See, e.g.,* Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963); City of Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785 (Law Div. 1961); Kozesnik v. Montgomery Township, 24 N.J. 154, 182, 131 A.2d 1, 16 (1957); Arverne Bay Constr. Co. v Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

10. Price, *Billboard Regulation Along the Interstate Highway System,* 8 KAN. L. REV. 81 (1959); Laggis, *The Role of Aesthetics in the Exercise of Police Power and its Application to South Dakota's Highway Beautification Statute,* 11 SOUTH DAK. L. REV. 157 (1966). *Cf.* Powers, *Control of Outdoor Advertising, State Implementation of Federal Law and Standards,* 38 NEB. L. REV. 541 (1959); Note, 13 SYR. L. REV. 325 (1961); Note, 110 U. PA. L. REV. 899 (1962).

considerations are inseparable in their effect on considerations other than health, safety, morals, and are in fact a very important element of the general welfare. To so narrowly dissect the meaning of general welfare is contrary to the vast body of knowledge in economics, sociology, and other behavioral sciences.[11]

In deciding constitutional questions, the judiciary must evaluate conflicting social values. Every restriction on the use of real property is measured against society's desire to achieve the objective for which the restriction is imposed. The courts have exercised extreme care in evaluating land-use regulations. In its early history, aesthetics had been excluded as a legitimate objective of the police power. Today, however, the courts have traditionally held that aesthetic considerations may be taken into account along with other valid considerations.

There is a long history of judicial land-use control in decisions dealing with common law nuisances.[12] Reconciliation of the value of appearance and the value of "property rights" was difficult because of the adverse connotation of the word "aesthetic."[13] Beauty was considered a matter of individual taste and, therefore, beyond the competence of the court.[14] The courts made easy distinctions between activities which were offensive to the senses of smell and hearing, and balanced the equities in deciding upon damages or injunctive relief.[15] However, a more recent nuisance decision has recognized a relationship between unsightly nuisances and the right of enjoyment of neighboring properties.[16]

Some courts have taken a very strong position in finding a viable relationship between aesthetic values and the economic health of a community. "There are areas in which aesthetics and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound."[17] The rationale for this and other decisions rests firmly on the proposition that the aesthetic controls were

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11. *See, generally,* Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal,* 20 LAW & CONTEMP. PROB. 218 (1955).

12. W. PROSSER, TORTS 395 (2d ed. 1955). *See also* Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases,* 1955 WIS. L. REV. 440.

13. Anderson, *Architectural Controls,* 12 SYR. L. REV. 26 (1960).

14. Lane v. City of Concord, 70 N.H. 485, 49 A. 687 (1901).

15. Wade v. Miller, 188 Mass. 6, 73 N.E. 849 (1905).

16. Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 191 S.E. 368 (1937).

17. United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964).

enacted to protect property values, and therefore, the economic health of the community.[18]

The development of criteria for judging aesthetics presents a very real and a very difficult problem. One difficulty can be found in attempts to apply the same aesthetic yardstick to different types of aesthetic values. For example, regulating the design and appearance of buildings, as some communities do through boards of architectural review, is quite different from regulations designed to protect a community's scenic and historic heritage. It is not the purpose here to develop standards for the administration of aesthetic regulations. Suffice it to say that standards are set forth for those aesthetic values with which the proposed legislation is concerned. It is the state's duty to select those natural and man-made phenomena that should be preserved and protected from any encroachment because to do otherwise would bring irreparable damage to the total community. This approach is consistent with the purpose and intent of the Highway Beautification Act of 1965.[19] It is not necessary to evaluate the yardstick established by Justice Fuld in *People v. Stover*.[20] Beginning in 1956, Stover protested the tax rate of Rye, New York, by stringing a clothesline hung with rags across his front yard each year. Six clotheslines later, the city amended its zoning ordinance[21] and Stover was convicted of violating the ordinance. In upholding the conviction and the ordinance the court said, ". . . [the ordinance] simply proscribes conduct which is unnecessarily offensive to the visual sensibilities of the average person."[22]

The preservation of the scenic values described and classified in the proposed legislation is not dependent on the hypothetical average person. The destruction of these values would in some measure affect everyone.

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18. Hankins v. Borough of Rockleigh, 55 N.J. Super. 132, 150 A.2d 63 (App. Div. 1959); Borough of Point Pleasant Beach v. Point Pleasant Pavilion Inc., 3 N.J. Super. 222, 66 A.2d 40 (App. Div. 1949); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955).

19. At the bill-signing ceremony, President Johnson said ". . . what has been divinely given by nature will not be recklessly taken away by man."

20. 12 N.Y.2d 462, 191 N.E.2d 272 (1963).

21. The ordinance prohibited the erection or maintenance of clotheslines, drying racks, poles, etc. in front and side yards abutting a street.

22. 12 N.Y.2d at 468, 191 N.E.2d at 276.

### E. Billboards, Junk Yards, and Other Open Land Uses

One of the strongest and most obvious justifications for the use of aesthetics within the police power is found in the cases dealing with signs and billboards. Community indulgence in visual blight had apparently reached its saturation point at the beginning of the twentieth century. Civic reaction manifested itself in an attack on the unsightly billboards.[23]

Community appearance lost the initial skirmish with the courts holding tenaciously to the doctrine that aesthetic considerations were beyond the scope of the police power.[24] A different handle was required by the courts if the door to the sanctum of the police power was to be opened. Such a handle was fashioned, but based upon a legal fiction that is still very much in use today and which adds nothing but confusion to the concept of the police power. Again the United States Supreme Court showed the way. In 1899, the Massachusetts legislature limited the height of buildings in the vicinity of the State House primarily to preserve a beautiful setting for public structures in which the public had invested its funds. The court's decision in *Welch v. Swasey*[25] was based on public safety, in that height regulations were required to protect the public against the danger of fire. Aesthetics, however, were not to be completely ignored. Regulations otherwise rooted in the public health, safety, and morals might also have an aesthetic objective.

It was not long after *Welch v. Swasey* that the courts reinforced the attack to preserve community appearance. The police power was available to regulate billboards because, if unregulated, these devices provided a danger to the public health, safety, and morals. That the billboards were also ugly, and that their ugliness played a part in stimulating the enactment of restrictive legislation, was not fatal to the exercise of the police power.[26]

Through the years the courts have shown an increased willingness

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23. Proffitt, *Public Esthetics and the Billboard,* 16 CORNELL L. Q. 151 (1931).

24. City of Passaic v. Paterson Bill Posting Co., 72 N.J.L. 285, 62 A. 267 (Ct. Err. & App. 1905).

25. 214 U.S. 91 (1909).

26. St. Louis Gunning Advertisement Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed per stipulation,* 231 U.S. 761 (1913). *See also* Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944).

to recognize and give effect to aesthetic considerations.[27] Perhaps the strongest statement by a state court is that of the Supreme Judicial Court of Massachusetts.[28] In answer to an argument that the sign regulations were promulgated primarily to protect scenic beauty the court said:[29]

> Grandeur and beauty of scenery contribute highly important factors to the public welfare of the state. To preserve such landscape from defacement promotes the public welfare and is a public purpose. . . .
>
> Even if the rules and regulations of billboards and other advertising devices did not rest upon the safety of public travel and the promotion of the comfort of travelers by exclusion of undesired intrusion, we think that the preservation of scenic beauty and places of historical interest would be sufficient to support them. Considerations of taste and fitness may be a proper basis for action in permitting and denying permits for locations for advertising devices.

Adding weight to this body of authority are several cases decided by Florida's Supreme Court upholding sign regulations designed to improve community appearance.[30]

Aesthetic considerations have played an important role in legislation regulating junk yards, top soil removal,[31] sand, stone, and gravel operations,[32] and similar types of open land uses. Through zoning

27. Preferred Tires, Inc. v. Village of Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (Sup. Ct. 1940); General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930) (prohibiting billboards within 500 feet of a park, parkway, or boulevard); People v. Wolf, 127 Misc. 382, 216 N.Y.S. 741 (Co. Ct.), *rev'd* 220 App. Div. 71, 220 N.Y.S. 656 (1926), *appeal dismissed,* 247 N.Y. 189, 159 N.E. 907 (1928). Following the same trend are Merritt v. Peters, 65 So. 2d 861 (Fla. 1953); Commonwealth v. Trimmer, 53 Dauphin Co. Rep. 91 (Pa. 1942); Churchill & Tait v. Rafferty, 32 Phillip. I. Rep. 580 (1915), *appeal dismissed,* 248 U.S. 591 (1918).

28. General Outdoor Advertising Co. v. Dep't of Public Works, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed,* 297 U.S. 725 (1936).

29. 289 Mass. at 185, 187, 193 N.E. at 816, 817.

30. Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960); Dade County v. Gould, 99 So. 2d 236 (Fla. 1957); International Co. v. City of Miami Beach, 90 So. 2d 906 (Fla. 1956); City of Miami Beach v. Ocean and Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941).

31. Krantz v. Town of Amherst, 192 Misc. 912, 80 N.Y.S.2d 812 (Sup. Ct. 1948); Lizza & Sons, Inc. v. Town of Hempstead, 19 Misc. 2d 403, 69 N.Y.S.2d 296 (Sup. Ct. 1946), *aff'd,* 272 App. Div. 921, 71 N.Y.S.2d 14 (1947).

32. Town of Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243, *cert. denied* 326 U.S. 739 (1945); *see also* Town of Billerica v. Quinn, 320 Mass. 687, 71 N.E.2d 235 (1947).

and other types of land use controls, these uses have been regulated and even prohibited.

The Oregon Supreme Court upheld the total exclusion of automobile wrecking yards from Oregon City.[33] The Court stated the principal question: "Whether the city can wholly exclude a use of property on the sole ground that the use is offensive to aesthetic sensibilities," and gave its answer: "Aesthetic considerations alone may warrant an exercise of the police power."[34]

In upholding a statute prohibiting unscreened junk yards near highways, Kentucky's highest court rested its decision on the proposition that aesthetics is a proper basis for police power regulation.[35] In view of the most recent decisions, and the new impetus provided by the federal government, it seems most probable that the courts will continue to give a more realistic appraisal to the value of aesthetics.

### F. Historic Preservation

Regulations designed to protect historic buildings and sites and the aesthetic quality of the state have been established on solid legal ground, partly because of the close relationship between the economic value of these assets to the general well-being of the state. Preservation of historic neighborhoods, sites, and buildings has also been the object of legislation basing its rationale entirely on cultural and aesthetic values. New Orleans,[36] Nantucket,[37] Williamsburg,[38] Philadelphia,[39] Santa Barbara,[40] and Santa Fe[41] are but a few cities that have enacted architectural controls to preserve an aesthetic historic quality. All of these regulations were designed to control the exterior architectural design of existing and future buildings. When these legislative acts have been subjected to judicial scrutiny, they have been, with rare exception, upheld time after time. The only possible constitutional rationale for the validity of such laws must be their contribu-

33. Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965).

34. 240 Ore. at 46, 49, 400 P.2d at 261, 262.

35. Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964). *See also* Delmar v. Planning and Zoning Bd. of Town of Milford, 19 Conn. Supp. 21, 109 A.2d 604 (1954).

36. La. Const. 1921, art. 14, § 22A (added in 1936); New Orleans, La., Ordinance No. 14,538, *amended* by Ordinance No. 15,085.

37. Mass. Laws 1955, ch. 601.

38. Williamsburg, Va., Ordinance No. 21, § 23-45 (1951).

39. Philadelphia, Pa., Zoning and Planning Code § 14-2005 (1959).

40. Santa Barbara, Cal., Ordinance No. 2228, § 1 (1949).

41. Santa Fe, N.M., Ordinance No. 1957-18 (1957).

tion to the general welfare, and this is possible because of the aesthetic values involved.

The New Orleans Ordinance has been sustained in several cases[42] leaving no doubt that the preservation of aesthetic values is a part of the general welfare which justifies the use of the police power. In addition to the value of aesthetics the court found that preservation also added economic benefits to the community. In *City of New Orleans v. Levy*[43] the court said:

> Perhaps esthetic considerations alone would not warrant an imposition of the several restrictions contained in Vieux Carre Commission Ordinance. But . . . this legislation is in the interest of and beneficial to inhabitants of New Orleans generally, the preserving of the Vieux Carre section being not only for its sentimental value but also for its commercial value, and hence it constitutes a valid exercise of the police power.

Enhancing the economy of the community thus appears to have gained acceptance in judicial opinions concerned with aesthetics and historic preservation. There has been a strong line of recent decisions establishing the validity of architectural controls which rely upon the police power to regulate the appearance of building facades in historic areas. The rationale for these decisions seems to rest squarely on aesthetic considerations and the economic well-being of the community involved. It was obvious to the highest court in Massachusetts, for example, that Nantucket and certain areas of Boston attracted visitors primarily because of their scenic and historic qualities. Any act, the court reasoned, that would destroy this quality would by its incongruity diminish the economic vitality of the areas involved.[44] Following a similar line of reasoning, the Supreme Courts of New Mexico[45] and New Hampshire[46] have upheld architectural controls.

Developing the concept and validity of architectural control is only part of the total program. To be effective, such controls must be

42. City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953); City of New Orleans v. Pergament, 198 La. 952, 5 So. 2d 129 (1941); City of New Orleans v. Impastato, 198 La. 206, 3 So. 2d 559 (1941).

43. 223 La. at 28, 29, 64 So. 2d at 802, 803 (1953).

44. Opinion of the Justices, 333 Mass. 773, 780, 128 N.E.2d 557, 562 (1955).

45. City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964).

46. Town of Deering *ex rel* Bittenbender v. Tibbetts, 105 N.H. 481, 202 A.2d 232 (1964).

designed as reasonable regulations. Moreover, they must be capable of enforcement by competent administrative officials. In 1959, the Rhode Island legislature authorized historic area zoning. An historic zone was established by South Kingston, and a seven-man commission was required to pass upon the exterior appearance of all proposed construction. The ordinance applied to buildings of historic and architectural significance and required other buildings to be generally compatible. It was also specifically provided that design should not be limited to any one period of architectural style. A brick addition connecting two clapboard church buildings was rejected by the Commission, but reversed by the Board of Appeals. The Board's decision was based on its opinion that the brick construction was generally compatible. The Rhode Island Supreme Court upheld the Board and the general validity of the local ordinance.[47] Because the regulations were carefully drawn and wisely administered, the court could find adequate standards for administrative judgment.

### G. Other Aesthetic Controls

Communities have long relied upon the police power to accomplish aesthetic goals in other regulatory contexts. For example, minimum lot area regulations in zoning ordinances have been upheld because of judicial approval of an underlying aesthetic motivation. There is a growing judicial awareness of the interrelationship of community appearance and the general welfare.[48]

By relying so heavily upon the effect of a minimum lot area or building size regulation on property values, it seems almost inescapable that the courts are finding that community appearance (aesthetics) has a direct relationship to property values, and therefore, regulations designed to protect property values justify the exercise of the police power.[49]

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47. Hayes v. Smith, 92 R.I. 173, 167 A.2d 546 (1961).

48. Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 So. CAL. L. REV. 149 (1954).

49. Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165, 89 A.2d 693, *appeal dismissed* 344 U.S. 919 (1953). *See also* Cromwell v. Farrrier, 19 N.Y.2d 263, 225 N.E.2d 749(1967); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272 (1963). These cases explicitly recognize the relevance of aesthetic objectives to the implementation of zoning and police powers. For other large lot cases accepting aesthetic justifications *see* Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952) (five acres); Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942) (one acre).

A study of the early zoning decisions clearly indicates that aesthetic considera-

Concern for visual attractiveness has induced some communities to enact architectural controls, but there are relatively few cases testing their validity. However, it would appear obvious that these ordinances, in attempting to regulate and control exterior design, must find their justification in aesthetic considerations. Architectural control has received very strong approval by the Wisconsin supreme court.[50] The Village of Fox Point had enacted a "look alike" ordinance which prohibited the issuance of a building permit unless its Building Board found as a matter of fact that "the exterior architectural appeal and functional plan [would] not be so at variance with either the exterior architectural appeal and functional plan of the structures already contructed or in the course of construction in the immediate neighborhood . . . as to cause substantial depreciation in property values. . . ." The decision upholding the ordinance rests heavily upon the reasoning expressed in the earlier lot area and building size cases which related the regulation to the preservation of property values and, therefore, to the general welfare.[51]

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tions were a part of the rationale for regulation, although not in themselves sufficient reason to uphold the validity of zoning. Nevertheless, these cases gave new meaning to the expansiveness of the general welfare as used in the police power. The exclusion of certain uses from various use districts was upheld on grounds of public health, safety, and general welfare in which aesthetic considerations played an important if not exclusive role. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925). One of the earliest zoning cases to reach a state supreme court was State *ex rel,* Civello v. City of New Orleans, 154 La. 271, 97 So. 440 (1923). The court relied upon aesthetic considerations in upholding an ordinance excluding retail uses from residential districts.

50. State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955). *Cf.* City of West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 30 So. 2d 491 (1947).

51. 269 Wis. at 270, 69 N.W.2d at 222. *See also* Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963); Hankins v. Borough of Rockleigh, 55 N.J. Super. 132, 150 A.2d 63 (App. Div. 1959).

The federal and state courts have also long recognized the power of government to spend public funds for public parks which serve to enhance the amenities of life and the appearance of the community. United States v. Gettysburg Electric Ry., 160 U.S. 688 (1896); NICHOLS, EMINENT DOMAIN § 7.516 (3d ed. 1950). The use of tax dollars to acquire land for median strips within highway for purposes of landscaping is justified as a public purpose. *In re:* Matter of Clinton Avenue, 57 App. Div. 166, 68 N.Y.S. 196 (1901). *See also* Bunyan v. Commissioner of Palisades Interstate Park, 167 App. Div. 457, 153 N.Y.S. 622 (1915). The creation and preservation of scenic values was further strengthened by the decision of the United States Supreme Court in Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923). Condemnation of land for a highway was upheld as a public purpose because its location would afford the traveler a beautiful view. Citation to the famous dictum in Berman v. Parker, 348 U.S. 26, 33 (1954), is also appropriate.

## VI. Conclusion

The preservation of unique scenic values by use of the police power, if subjected to judicial review, will be measured by the objectives to be accomplished and the reasonableness of selecting the objects to be regulated. If these objectives have a substantial relationship to the public welfare and the classification is logically in keeping with the legislative objective, the constitutional requirements for validity will have been met. The police power is used to regulate the use of land simply because uncontrolled use would be detrimental to the public interest.[52]

The view from the highway has become a principal concern of federal legislation, and a national policy has been expressed in the several federal-aid highway programs. Highways must be planned and constructed to do much more than merely provide the cheapest distance between two points. Highway facilities are an integral part of the environment, and their success requires aesthetic as well as engineering quality.

Implementation of the national highway policy is no different from implementation of the state's policy of preserving its unique scenic characteristics through a system of land use regulations based upon the police power. Aesthetic preservation of historic and cultural areas would appear to be within the limits of the police power. Judicial opinions have made major strides toward establishing aesthetic considerations on their own merits as a justification for the use of the police power. However, if the judicial attitude is such that beauty cannot be recognized alone, there is no longer any question that legislation which is designed to protect and enhance scenic values and which contributes to the economic value of the community is a valid exercise of the police power.

52. Vartelas v. Water Resources Comm'n, 146 Conn. 650, 153 A.2d 822 (1959).

AN ACT TO PRESERVE AND TO ENHANCE SCENIC VALUES IN THE STATE OF VERMONT WHICH ARE ADJACENT TO OR CAN BE SEEN FROM STATE HIGHWAYS, INCLUDING THE FEDERAL INTERSTATE HIGHWAY SYSTEM, BY REGULATING THE USE OF LAND ADJACENT TO SUCH HIGHWAYS AND BY AUTHORIZING THE ACQUISITION OF LAND AND VARIOUS TYPES OF RIGHTS AND INTERESTS IN LAND.*

IT IS HEREBY ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF VERMONT.

SECTION 1. LEGISLATIVE FINDINGS. [omitted]

SECTION 2. PURPOSES.

In order to deal with the problems set forth in Section 1, the provisions of this act are designed to preserve and to enhance scenic values as seen from highways in Vermont; to retain Vermont residents and to attract new residents and tourists, and thereby to strengthen the base of the recreation industry and to increase employment and income, business, and investment, and to support existing businesses; to support state and local tax systems; to enable the state to plan its orderly growth in the face of increased pressures from metropolitan areas to the north and south and particularly to deal with the impact of the Federal Interstate Highway System; to provide for the enjoyment of scenic values and thus to contribute to physical and mental health and to preserve the traditional American countryside.

SECTION 3. DEFINITIONS AND RULES OF CONSTRUCTION.

For the purposes of this act the following words and terms shall be defined and interpreted in accordance with the provisions set forth in this section.

(a) *Definitions.*

(1) State highway. A "state highway" shall include any public road for which federal or state funds are expended, whether for acquisition, construction, maintenance or other purposes.

(2) Junk yard. [omitted]

(3) Areas used for commerce or industry. [omitted].

(4) Ridgetop. "Ridgetop" applies to land on the side of a ridge beyond its crest for such distance as may be required to

* This statute was drafted by Mr. Fonoroff, and by Norman Williams, Jr., Visiting Professor of Law, Rutgers University. It was introduced in somewhat modified form in the Vermont legislature, but was not enacted into law.

assure that any building or other structure regulated by this act cannot be seen from a state highway.

(5) Settled area. [omitted]

(6) Scenery Preservation Council. The "scenery preservation council" is an advisory body appointed by the Governor to advise and assist the State Planning Director in the performance of his duties with respect to this act.

(7) Cultural centers. "Cultural centers" are those land areas within which are carried on the study or performance of music, literature, history, and art, including such places as the Marlboro music festival site.

(b) *Rules of Construction.* [omitted]

SECTION 4. PROTECTION OF UNIQUE SCENIC AREAS.

The General Assembly finds that within the state there are areas of special and unique scenic significance. These scenic areas have tangible values that are significant contributions to the economic well-being of the state. They also represent less measurable, but equally important, intangible values that contribute significantly to the spiritual and physical well-being of its citizens.

The rapid expansion and urbanization of the metropolitan areas to the south and to the north, and the increasing pressures for development within the state, are threatening to encroach upon and destroy these special and unique assets, which therefore require immediate protection in the public interest. The regulations set forth below are established to protect these areas of special and unique significance, by encouraging the use of land in private ownership which will enhance the value of such areas.

(a) *Scenic Corridors Along the Federal Interstate Highway System.* The Federal Interstate Highway System provides a unique opportunity within Vermont to see a wide variety of views as one continuous scenic experience for unusually long distances.

Along any Federal Interstate Highway, the uses listed in Section 4 (e) shall not be located within one-half (½) mile of the right-of-way of such a highway, or between such right-of-way and a ridgetop, whichever distance is less. However, these restrictions are modified for areas around an interchange as provided in section 4 (f) below. The regulations set forth in section 4 (f) shall also apply to permitted uses along such highways.

(b) *Intermediate-Traffic Scenic Corridors.* A series of scenic corridors within the state, as described in the State

Comprehensive Plan, each extending for at least ten (10) miles and with an intermediate volume of traffic, provides a remarkable continuity of visual experience in passes through the Green Mountains or in a series of ridges and valleys of extraordinary scenic beauty, almost without interruption. These scenic corridors are along the following highways: [the highways are then named.]

Along the state highways, listed above, except within incorporated villages, the uses listed in section 4 (e) shall not be located within one-half (½) mile of the right-of-way of such highways, or between such right-of-way and a ridgetop, whichever distance is less. The regulations set forth in section 4 (f) shall also apply to permitted uses along such highways.

(c) *Scenic Sites.* Along state highways in Vermont there are scenic sites of special and unique value, representing major features of the state's historic heritage and of her cultural life, past and present. The following are such scenic sites:

Small cemeteries

Covered bridges

Historic sites, designated as significant by the Vermont Board of Historic Sites

Village greens and small rural churches, designated as significant by the Vermont Board of Historic Sites

Educational institutions

Cultural centers

Public parks

Lake shores

Along any state highway, except in an area predominantly used for commerce or industry (as defined in section 3), the uses listed in section 4 (e) shall not be located within five hundred (500) feet of the boundary of, or so located to obscure the view of, any of the scenic sites listed above. The regulations set forth in section 4 (f) shall also apply to permitted uses along such highways.

(d) *Designated Areas of Special Scenic Value.* Along state highways in Vermont there are other types of scenic sites, whose special and unique significance depends upon their natural setting. The following are such scenic sites:

Rivers and streams

Marshes, wildlife preserves, and other areas of special ecological values

A strip of land along such highways from which a view of mountain ranges, mountains, or lakes is observable for at least five hundred (500) feet along the highway

The approaches to historic towns

The approaches to major outdoor recreation areas

Along any state highway, except in an area predominantly used for commerce or industry (as defined in section 3), the uses listed in section 4 (e) shall not be located within five hundred (500) feet of the boundary of, or so located to obscure the view of, any of the special scenic areas designated in accordance with the provisions of this section. The regulations set forth in section 4 (f) shall also apply to permitted uses along such highways.

(1) Criteria for designation of such areas. The State Planning Director with the advice of the Scenery Preservation Council shall designate specific areas of special scenic value as described above as part of a scenery preservation plan and shall consider the following factors in selecting such specific areas:

The primeval character of land area, although not necessarily completely undisturbed

The importance of conservation of wildlife and flora

The existence of rare or vanishing species of plant life, or other unique or characteristic combinations and patterns of form, color, and texture of natural phenomena Geological and ecological quality and significance

The historical and scenic significance of settlements, and the historical significance of other areas

(2) Notice and Public Hearing. [omitted]

(e) *Prohibited Uses.* The uses listed below shall not be located within the protected areas established in paragraphs (a) through (d) of this section 4:

Amusement parks

Automobile repair garages

Bowling alleys and similar amusement establishments

Drive-in theatres

Dumps

Eating establishments, except those located in residential buildings. No exterior alteration affecting the residential character of the building, no identification sign larger than twenty four (24) square feet in total area shall be permitted

Filling stations

Gravel pits

Junk yards
Open storage of non-agricultural products, such as lumber, builders' supplies, heavy machinery and equipment, tires, etc.
Motels
Natural gas or petroleum storage tanks which are located above ground
Outdoor advertising signs
Quarries
Trailer parks
Trucking terminals
Used car sales lots

(f) *Other Use Regulations.* All permitted uses located within the protected areas established in paragraphs (a) through (d) of this section 4 shall conform to the regulations set forth below:

(1) Residential lot size. All new residences shall be located on parcels having a minimum lot area of two (2) acres, except when located within settled areas or along lake shores.

(2) Essential motorist service facilities. Gasoline service stations, automobile repair garages, motels, and eating establishments, may be located in the area within one-half (½) mile of the edge of the right-of-way of any part of an interchange with a Federal Interstate Highway.

(3) Signs. Only one (1) sign identifying the name and address of a permitted use, and the products or services offered, is permitted. A "for sale" or "for rent" sign may be permitted, but not to exceed twelve (12) square feet in total area.

All other permitted signs shall not exceed twenty-four (24) square feet in total area. A permitted sign shall not project more than one (1) foot in any direction if attached to a building, and in no case shall any sign exceed a height of eighteen (18) feet above the average finished grade level of the premises upon which it is located.

Permitted signs may be lighted by continuous illumination only, and shall be so erected that the source of light is not visible from outside the premises. Flashing, moving, or mechanical signs of any kind shall not be permitted.
If any type of lighting is used to illuminate or outline the shape of any building or part thereof, the same regulations shall apply.

(4) Sale of farm produce. Nothing in this act shall be construed to prohibit the sale of farm produce.

(5) Non-conforming uses. Except as otherwise provided by law, the restrictions of this section shall not apply to any establishment listed in section 4 (e) that has been in existence and active operation prior to the effective date of this act.

(6) Violation. [omitted]

(7) Penalty [omitted]

(8) Application of overlapping regulations. [omitted]

SECTION 5. ACQUISITION OF RIGHTS AND INTERESTS IN LAND. [This part of the statute has been omitted]