Legal Techniques To Protect and To Promote Aesthetics Along Transportation Corridors

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American planning has come to depend too much on either (a) outright acquisition of land, or (b) police power regulation with no compensation; and the future is likely to see experimentation with various combinations of regulatory techniques and devices involving partial compensation, together with an expansion of the authority of public officials to take affirmative action. The protection (and promotion) of aesthetic factors along transportation corridors will be a natural potential proving ground for such an approach.

After long resistance, many courts now recognize aesthetics as a proper goal of land-use regulation; and this prolonged debate is now really beside the point. However, the main problem remains—how to define adequate standards and rules of law to guide regulatory power when applied to aesthetics. Several lines of recent legal cases are relevant to the validity of police power regulation in this context. While traditional legal fictions are now less important, the courts are tending to emphasize new combinations of factors, particularly the interrelationship of aesthetic and economic factors and are groping for new tests to provide the basis for reasonable regulation.

Turning to substance, the first requirement is to define the problem, i.e., to specify exactly what scenic values are most in need of preservation. California and Wisconsin were the first to take the lead in working out new legal controls; and Vermont is now considering a proposed scheme of regulation for rural scenery, with carefully defined roles for each different type of land-use regulation.

•This topic is of special interest to me—not only because of its intrinsic importance, but also as one of the most important problems arising in my current work on a comprehensive study of zoning and planning law.

THE CONTEXT

Protection of scenery along transportation routes is of special significance now—because our scenery is increasingly threatened, and also because its preservation is increasingly important.

The increasing threat to our scenery comes as a direct result of economic expansion in an affluent society. For the rapid current increase in real income is accompanied

1 The full extent of that increase is not generally realized. Nationally, the median income actually rose during the 1950's from a bit over $2600 to nearly $4800. According to the best projections available (prepared for the Outdoor Recreation Resources Review Commission), the mean income is expected to rise as follows: 1960—$5,410; 1976—9,170; and 2000—13,320.

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by equally (or even more) rapid increases in leisure time, in auto ownership, and in travel, by car and otherwise; and these in turn result in the construction of more highways and other transportation routes—and thus in all the "development" and the "improvements" which follow quite naturally. Moreover, this thrust of development into new areas comes at a critical moment for rural America; for the widespread abandonment of farms has raised a serious, and quite new, question. If large areas of rural land are no longer farmed, what can they be used for? In the absence of useful activities to support maintenance, such land is likely to revert to messy brush, and (at least in the East) eventually to forest; and so a pleasant landscape may deteriorate and disappear, even without active human intervention to help the process along.

Our scenic assets, thus increasingly threatened, are also increasingly important for our future, for several reasons. First, explosive growth is (and will be) almost entirely concentrated in the outer parts of expanding metropolitan areas; and much of our population is therefore necessarily losing regular contact with the countryside. When I was a boy growing up in a small town, we could always walk down to the end of town, and find ourselves in open country. This was a standard way of life in earlier American history, and one which is widely reflected in our literature; yet already this is an unusual experience for most Americans, and within another generation it will be rare. Second, tourism is an increasingly important factor in many areas—often coinciding with the areas where employment is decreasing sharply, in agriculture and otherwise—and in such areas scenic preservation has become a major contribution to the local economic base. Finally, now that the nation's most critical economic problems have been solved—or, rather, are at least being attacked—it is appropriate that government should begin shifting its sights, and take the initiative in helping to improve the equalitative aspects of life.

DEFINITION OF THE PROBLEM

The focus here, then, is on scenery as viewed along major transportation corridors—or, more broadly, on the whole aesthetic experience there. The primary emphasis is naturally upon highways, but I am including others (primarily rail) as well, since the problems are much the same. For convenience, however, I will speak in terms of highways.

Now this limitation to highway scenery is not as restrictive as it sounds. After all, for many people the major contact with scenery does come while driving or travelling. Moreover, such corridors include a broad variety of landscapes, urban as well as rural. And, since population and employment tend to concentrate along transportation corridors, the scenic experiences available there will (to some extent) be enjoyed by larger numbers of people.

The first problem is of course what we mean by "aesthetic" and "scenery." To define what is aesthetically pleasing has always been recognized as a slippery business, and this is no place to try to resolve a debate which has lasted for centuries. For present purposes, some simple ground rules will have to suffice. I shall use the word

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2 How expressive this real estate phraseology can be!
3 Together with the increasing consolidation of farms into larger units, which raises somewhat different problems. For example, in the last 15 years the number of active farms in Vermont has declined from 19,000 to 7,000. In New Jersey, the number of active farms has been reduced by almost half during the last decade, and land in farms has dropped form 1 3/4 million to 1 1/4 million acres—with the rate of attrition rising steadily, as follows: 1950-55—41 acres per day, average; 1955-60—104 acres per day, average; and 1960-65—115 acres per day, average.
4 About 90% of the expected national increase in population is expected to come in the outer parts of metropolitan areas (SMSAs), with the non-SMSA areas taking up the rest of the growth and the central cities holding about even. Moreover, over half of the growth in SMSAs is expected to be concentrated in a few of the largest metropolitan areas.
5 And what about scenery as viewed from the air? The pattern of forest and open fields is the most conspicuous feature from above, together with major highways. Compare the discussion on Vermont, below.
"aesthetic", and shall refer to scenery, in the broadest sense—to include all those impressions of the physical environment, excluding the immediate foreground, which reach us wholly or primarily through the sense of sight, as distinguished from noise, smells, etc. What is aesthetically pleasing will then include all the various combinations of terrain and the man-made modifications thereof, natural growth, buildings and structures, and the visible activities of those living thereon. The problem, then, involves far more than restricting billboards and junk yards, important as these are; for we are concerned here with the protection, and perhaps even more with the enhancement, of all types of pleasant views. We hear a lot now (at long last) about air pollution and water pollution; our topic today is landscape pollution.

TYPE OF LEGAL REMEDIES

For these purposes, four types of remedies are available:

1. Persuasion.
2. Incentives, which might be defined as persuasion plus a carrot.
3. Public regulation of private development, primarily (but not entirely) through the police power.
4. Affirmative action by public authorities.

In general, American planning has tended to depend far too much upon police-power regulations. Such a policy has the marvelous advantage that it doesn't cost the taxpayers anything; but the continuing heavy reliance upon it probably comes partly from sheer force of habit. The principal future directions in American land-use controls are, then, clear enough—

1. To expand the scope of No. 4, affirmative action by public authorities, and
2. To bridge the gap between No. 2 and No. 3, i.e., to work out a combination of police power and partial compensation techniques. (I.E., when should we pay?)

The latter is likely to start in selected critical areas, not everywhere at once; and aesthetic controls are among the natural first choices for this—along with the closely-related matter of preservation of open space, and the amortization of non-conforming uses involving substantial structures.

THE LEGAL CONTEXT—CONSTITUTIONAL LAW

Use of the police power in order to promote aesthetics, along highways or any place else, naturally raises touchy constitutional issues. Necessarily (though a bit reluctantly) I bow to long tradition, and start with a review of recent major trends in constitutional law—in relation to the police power in general, and to the regulation of aesthetics in particular. The dominant trend, for thirty years now, has of course been towards upholding public regulation of private property in all sorts of different situations, except where questions of civil liberties are involved. However, in connection with aesthetic regulations, special considerations arise.

In General

In order to understand the problem here, we must start from a few basics. Speaking generally, the police power may be invoked to restrict the use of private property when the following conditions are met:

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9It will be recognized that such a definition includes under "aesthetic" some things which are normally (and properly) thought of as separate planning goals—as for example, peace and quiet in a low-density residential area.

7At least as taxpayers.

8These areas and the regulations will have to be carefully defined; for this is also an area of great danger—arising from the fact that, once this door is opened, every developer will be demanding compensation for all his disappointed speculative hopes.

9How to define the outer limits of the two alternative presumptions, set forth in United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938), is another (and a perennial) problem.
The goal is an appropriate object of public policy.

2. The device used is an appropriate means to proceed toward that goal—or, at least, a reasonable man might so believe; or, to put the matter differently, the device is not obviously intended to accomplish something else.

3. The property owner retains some reasonable possibility of making use of the land, and deriving some income therefrom, now or in the not too distant future.

4. The burdens imposed on the property owner are reasonable, in view of the public benefits to be derived—i.e., the former are not out of all proportion to the latter. And, as a related point, the regulations are not a lot broader than necessary.

5. The rules laid down are reasonably clear and definite—or, to state it conversely, no opportunity for practically unlimited discretion is left to an administrative agency.

6. When different regulations are imposed in different types of situations, the classification and the differences involved are based upon legitimate considerations, reasonably related to the statutory purpose. When some categories are exempled, the problems involved therewith are less serious, or may require quite different treatment.

7. To some undefined extent, regulations may be modified in the light of administrative simplicity and convenience.

Moreover, in relation to all of the above, there is a presumption in favor of the validity of any duly adopted measure. 10

On Aesthetics

There has been a prodigious amount of discussion on whether aesthetics is a proper goal of public regulation. I suggest that all this really misses the point. Most courts have long been willing to recognize aesthetics as an appropriate goal; the problem is elsewhere. For most courts are seriously concerned with the problem of the adequate definition of rules of law, so as to avoid unlimited administrative discretion. And quite rightly—for there are real problems in defining what is beautiful v. ugly, good taste v. bad taste. This is probably the only point in planning law which is so familiar that most of us can even say it in Latin—de gustibus non disputandum est.

There is, then, no special presumption in law against aesthetic regulations, and no need to make a more convincing showing of necessity in connection therewith. There is merely a warning signal, to look carefully and see that the rules are defined with sufficient clarity to be administrable.

To trace the story, then, briefly. The modern attitude to police-power regulations has spread gradually—first from Federal to State courts, and then, more slowly and over strong resistance, even to matters of aesthetics. The original strictest statement of doctrine on this point, that property rights cannot be regulated for aesthetic purposes, 11 soon ran strongly against the felt necessities of the times; for even in the first generation after the Robber Barons began to turn rather quickly to Culture and Beauty, And so the strict statement gradually gave way to the rule that aesthetic considerations may also be taken into account in drafting police-power regulations, so long as other (non-aesthetic) considerations also provide some support for the restrictions involved.

Once this door was open, all sorts of things went right through; elaborate legal fiction began to luxuriate, as courts attempted to uphold regulations which are really aesthetic.

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10 Whether it makes sense to accord the same presumption to the S.E.C., and to a small-town board of zoning appeals, is another question.
11 See for example Passaic v. Paterson Bill Posting, Advertising and Sign Painting Co., 71 New Jersey Law 75, 58 Atlantic 343 (1904), reversed, 72 New Jersey Law 285, 62 Atlantic 267 (1905); but compare Cream City Bill Posting Co. v. Milwaukee, 158 Wisconsin 86, 147 North Western 25 (1914).
The classic example is of course the argument in favor of regulating billboards, because after all they might blow over and hit somebody, or because immoral and terrible things might go on behind them. In more recent case law, a strong trend is apparent towards increasing recognition of the aesthetic factor. This trend is apparent in several lines of cases.

**Signs**

To start with signs, the exclusion of advertising signs from all commercial districts has been widely upheld. So have the restrictions on signs along new Interstate highways and retroactive provisions requiring the removal of signs, after a fairly short period of amortization. Moreover, the Vermont doctrine—that sign regulation is not so much an aesthetic restriction on private property as a regulation of an easement of view, imposed upon the public highway as a servient tenement—has been noticeably spreading.

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10 See Thomas Cusack Co. v. Chicago, 267 Illinois 344, 108 North Eastern 340 (1914), affirmed, 242 U.S. 526 (1917); St. Louis Gunning Advertisement Co. v. St. Louis, 235 Missouri 99, 137 South Western 929 (1911), appeal dismissed, 231 U.S. 761 (1913). The classic statement of this whole doctrine is in Perlmutter v. Greene, 259 New York 327, 332, 182 North Eastern 5, 6, by Chief Justice Pound: "Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, or decency."

11 See for example Murphy v. Westport, 131 Connecticut 292, 295, 40 Atlantic 2d 177, 178 (1944) ("and generally speaking there has been a growing tendency to regard the power more broadly"); Borough of Point Pleasant Beach v. Point Pleasant Pavilion, Inc., 3 New Jersey Superior 222, 225, 66 Atlantic 2d 40, 41 (1949) ("Much can be said for the view implicit in his opinion (Chief Justice Maltbie in Murphy v. Westport) that it is in the public interest that our communities, so far as feasible, should be made pleasant and inviting and that primary considerations of attractiveness and beauty might well be frankly acknowledged as appropriate, under certain circumstances."); Stoner McCray System v. Des Moines, 247 Iowa 1313, 1319, 78 North Western 2d 843, 847 (1956) ("We note a trend to foster under the police power the aesthetic and cultural side of municipal development—to prevent a thing that offends the sense of sight in the same manner as a thing that offends the sense of hearing and smelling."); Jefferson County v. Timmel, 261 Wisconsin 39, 61, 51 North Western 2d 516, 529 (1952) (the rule is "undergoing development"—citing American Jurisprudence). I purposely omit the famous Douglas rhetoric in Berman v. Parker, 348 U.S. 26 (1954), partly because this was a superficial discussion which glossed over some serious problems—but primarily because what is an appropriate subject for action by eminent domain is not necessarily equally appropriate for regulation under the police power, without compensation.

12 See for example Murphy v. Westport, 131 Connecticut 292, 40 Atlantic 2d 177 (1944); United Advertising Corp. v. Raritan, 11 New Jersey 144, 93 Atlantic 2d 362 (1952); United Advertising Corp. v. Metuchen, 42 New Jersey 1, 198 Atlantic 2d 447 (1964).


15 Kelbro v. Myrick, 113 Vermont 64, 30 Atlantic 2d 527 (1943); and see Perlmutter v. Greene, 259 New York 327, 182 North Eastern 5 (1932); Wilson, Billboards and the Right to be Seen from the Highway, 30 Georgetown Law Journal 723 (1942).

Architectural Control

To turn to quite different problems, the protection of fine old historic areas has now been thoroughly established19 as a valid technique, with police-power regulations establishing architectural controls over changes in the exterior appearance of buildings. The courts have even upheld some rather dubious ordinances directed against houses which look alike, or look different—or even both at once!20

Open Space

Not all the relevant case law has involved regulations which were upheld. In a striking recent series of cases, police-power regulations (usually by zoning) have required that privately-owned land be kept in open use, one way or the other. Most decisions have held that such regulations were invalid, in the specific fact situations involved.21

Scenery

Except for the billboard cases, none of the above litigation has much directly to do with the protection of scenery along highways. This is not surprising; the simple reason is that we have only just begun to think about providing such protection. Some suggestions have been made about possibilities for special zoning districts—for "scenic zones", presumably as a kind of open space zoning, or for very restrictive roadside service zones, to provide for needed services in special small zoning districts, widely spaced. But there has been little serious work on such problems—and so few ordinances,22 little experience with them, and no case law.

So far, the only cases directly in point involve the use of eminent domain, and so compensation. The value of scenery was resoundingly endorsed in an old Supreme Court condemnation case, way back in 1923;23 and the Wisconsin Court has just strongly seconded the motion, in a recent case involving the acquisition of "scenic easements."24 In the present context, we may be confident that scenery would be regarded as quite as important as historic buildings; on this point, there is not a shadow of a doubt whatever.

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22 See the extracts from two California County zoning ordinances (Santa Clara County, and proposed Monterey County) reprinted in A Plan for Scenic Highways in California, cited in footnote 31 below.
23 Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923).
Taking a look, then, at the recent case law, a few general points stand out. The formula that aesthetic considerations may be recognized, as long as other factors are also present, is still repeated in many decisions. Yet there has been a marked restlessness with the traditional (and slightly ridiculous) legal fictions, and something of a shift away from these. In particular, in areas where tourism is important, the aesthetic factors have been found to coincide with strong economic ones. Finally, a number of cases have given fairly direct recognition to the aesthetic factor, as an equally valid basis for police-power regulations.

I wish I could report that everyone has been equally straightforward; yet apparently confusion dies hard. In some cases discussion of aesthetic factors is still carried on in such vague phrases as "the character of the community"—which normally refers either to aesthetic factors or to social homogeneity—"general welfare", and the protection of property values. Moreover, the repeated attempts to make aesthetic regulations valid, without upholding them directly, continue to contribute to the widespread confusion on the proper purposes of zoning. Sometime aesthetics is regarded as a part of that broad catch-all phrase "the general welfare", but occasionally as something else again. Again, aesthetics is sometimes regarded, correctly, as one of those factors whose existence may affect property values; yet in other cases these two are treated as if they were independent variables. The clearest example of this is the rule in some states that police-power restrictions may not (and, in other states, may) be justified by considerations of aesthetics or of property values, either singly or in a combination of the two—i.e., that some other factor must be present, along with one or both of these, to make a regulation valid. Finally, the ironic result of all this confusion has been that aesthetic restrictions directed against the ugliest kind of things, particularly billboards, have traditionally encountered real legal difficulties—while much more extreme regulations which are essentially aesthetic have often been upheld without difficulty.

From all the above, a few principles may be distilled. First, obviously the case for aesthetic regulation is much strengthened in those situations where preservation of scenery plays a substantial part in the local economy. Second, in the Metuchen case, the New Jersey Court in effect adopted a "lowest common denominator" approach—i.e., whatever may be said about more complex and difficult issues, at the very least the

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26 Murphy v. Westport, 131 Connecticut 292, 40 Atlantic 2d 177 (1944); Opinion of the Justices to the Senate, 333 Massachusetts 773 and 783, 128 North Eastern 2d 557 and 563 (1935). Moreover, the relation of signs to traffic safety remains a moot and debated point. See the discussion in both courts in United Advertising Corporation v. Metuchen, 76 New Jersey Superior 301, 184 Atlantic 2d 441 (1962), affirmed, 42 New Jersey 1, 198 Atlantic 2d 447 (1964).


30 A point finally recognized in the recent leading case from New Jersey, United Advertising Corporation v. Metuchen, 76 New Jersey Superior 301, 184 Atlantic 2d 441 (1962), affirmed, 42 New Jersey 1, 198 Atlantic 2d 447 (1964).
police power may be used to exclude those uses which by universal consensus are recognized as ugly.\textsuperscript{30}

\textbf{TOWARDS A LEGAL TECHNOLOGY}

The courts have now cleared the way for action; the question is now not so much "What can we do?", but rather "What should we do?"—a more difficult question, and a more interesting one. Relatively little serious thinking has been done along these lines—apart from some interesting work in California,\textsuperscript{31} and particularly in Wisconsin.\textsuperscript{32} What is needed now is to consider an approach, rather than to try to jump to solutions.

As originally conceived, this paper was concerned with the role of the police power in highway aesthetics. I have broadened the topic, and changed the emphasis, for three reasons. First, we are concerned with more than highways. Second, an approach focussed upon police-power techniques contains a clear implication as to a basic approach—what can we do, without paying anything for it? Even a quite reconstructed old New Deal Democrat can be forgiven for wondering whether this is the best way to set about this problem, i.e., to consider whether the whole financial burden for protecting scenery can be dumped upon those property owners who own nice views. Finally (and perhaps most important), in dealing with a complex and subtle problem like this, I simply don't know how to figure out the proper role for any one single legal technique. The first step is to analyze the components of the problem—just exactly what scenic values are we trying to protect?—and then to consider what legal tools are most appropriate to deal with each of these.

When one comes to consider how to protect and to promote scenic values in transportation corridors, three main types of approaches are available—one focussed upon the right-of-way itself, and two concerned primarily with matters outside the right-of-way. These three approaches are:

1. Through highway routing and design.
2. Through public acquisition and development of land and vistas in the corridor.
3. Through regulation of private activities and uses of land in the corridor.

In discussing these, my examples (and to some extent the analysis) will be concerned primarily with the North-East, the area with which I am familiar.

\textbf{Highway Design}

The most promising possibilities for promoting aesthetic values in transportation corridors lie in the realm of highway routing and design. The reason for this is simple enough. We are already spending astronomical amounts on new highways; the Interstate System alone is probably the largest public works program in history, with federal grants ranging up towards three billion a year; and it seems unlikely that this whole program (and the taxing system which supports it) will be dismantled in 1972. The extra cost for a quality product in all this would be relatively small.

Before turning to any serious discussion of new (or reconstructed) highways in scenic corridors, several points should be clarified. The most obvious point is that not all potential corridors should be developed with major transportation facilities; policy will necessarily vary as between different types of areas. At one extreme, in

\textsuperscript{30}United Advertising Corporation v. Metuchen, 42 New Jersey 1, 198 Atlantic 2d 447 (1964).

\textsuperscript{31}See A Preliminary Plan for Scenic Highways in California (1962) and A Plan for Scenic Highways in California (1963) (particularly the selection from the Planning Manual reprinted at p. 33 ff.), both prepared by a Citizens' Advisory Committee, an Interdepartmental Coordinating Committee, and the State Public Works Department—and Aesthetic Considerations in Planning and Design of Scenic Highways (1964), by the Department of Public Works.

some scenic areas the best policy is to leave them as they are, as wilderness\footnote{See United States v. Perko, 108 Federal Supplement 315 (D. Minn., 1952), affirmed, 204 Federal 2d 446 (C.C.A. 8th, 1953), certiorari denied, 346 U.S. 832 (1953); McMichael v. United States, 355 Federal 2d 283 (C.C.A. 9th, 1965).} to be enjoyed by those who are willing to get out of their cars and proceed on foot.\footnote{Or by horse, or canoe. A similar point applies in the analogous case of untouched rural beauty, which may be seen by car along a narrow gravel road.} At the other extreme are long-established major transportation corridors (or new routes under construction), with substantial scenic values; and here the question is the type of special treatment needed to protect scenic values, and to enhance them. In addition, most states contain potential scenic corridors, which are located neither along established transportation routes nor in the path of new routes which would be developed for purely transportation reasons; and the question arises here whether a special scenic route might be built in some of these, primarily to permit enjoyment of scenery.\footnote{The obvious existing example is the Blue Ridge Parkway in Virginia. The Federal Government has just released a major report on A Proposed Program for Roads and Parkways, proposing a large-scale expansion of such facilities.}

In considering the development of major transportation facilities in scenic corridors, several basic principles may be laid down.

1. The first—and by far the most important—is to take the highway past the views. If a highway bypasses the views worth seeing, there is not much point in spending time worrying about how to protect scenery; about all that is left to do is to figure out the reasonable distance between rest stops with comfort stations. This point may seem obvious enough, but I can assure you that in some circles it is not—and particularly in the circles that count most. For what is involved is nothing less than a major revolution in the traditional methods of highway layout—which are to settle upon a route, and then to see whether any scenic values that happen to turn up along that route are worth preserving. Now, in selecting a highway right-of-way, the availability of scenic vistas is of course only one of the criteria to be taken into account—along with relative distance, cost, relocation, grades, etc. Yet it is one of the most important criteria; and, in order to have any serious significance, it must be introduced at the earliest planning stage, before a decision is reached on the right-of-way—say for example by making an inventory of potential scenic experiences in the corridor, and analyzing the relative advantages and disadvantages in taking the right-of-way past each of these.\footnote{Traditionally the courts have kept out of controversies on route selection, but there are some indications that this policy may be modified. See for example State Highway Commission v. Danielsen, 409 Pacific 2d 443 (Montana, 1965), a decision based upon the specific wording of a Montana statute. Even if the courts do take a more active role in this area, it does not appear likely that they would undertake to weigh the aesthetic factor against others.}

2. Once the general location of the right-of-way is settled, a second obvious point arises. The detailed lay-out of a route should be related to its immediate surroundings, landscape and otherwise\footnote{Among the best examples of this are current planning studies for the Interstate system in the urban areas of Baltimore and San Francisco.}—again, rather than laying out a route first, and then trying to apply some cosmetic treatment later. This involves such matters as fitting the highway to the terrain, keeping everything in scale with the terrain, avoiding major earth scars (“terricide”), etc.

3. It’s all very well to take a highway past fine views, but not much is gained if you still can’t see them. It is not difficult to keep vistas open—all that is needed is regular cutting, primarily of cheap second-growth trees—but frequently this just isn’t done. As a rough guess, in some States perhaps one-third of the best opportunities for scenic-highway improvements require nothing more than this—i.e., can be dealt with for the price of a chain saw and an operator.
4. Finally, as for specific design techniques themselves, let me give just a few examples of what I mean here. (Into each sentence below, read "So far as possible.") The principles are simple enough. Not all roads have to be engineered for maximum speed. The road should be designed so as to aim the eye at the view. A basically curvilinear layout should be adopted, partly to provide opportunities for this—but also because this will be far better for maintaining the driver's attention, by providing a constantly moving point of concentration. The wider the right-of-way, the better: at times the road may become in effect two separate routes, with a variable median strip. Rest stops should of course be provided at the best viewpoints. In considering other potential views, it must be remembered that at high speeds only large masses are visible, and particularly masses more or less perpendicular to the highway. Terrain and native vegetation should be preserved—although quite dramatic use can be made of leaving rock outcrops.

All this depends upon a basic question—who, in a car, can really look at the views? If a highway is to be designed to provide views for the driver, this is naturally a much more difficult problem than if our concern is with the passengers. The answer depends upon travelling habits, i.e., upon the statistics on passenger-car occupancy for different kinds of highways. Along freeways, the figures range about 1.5 persons per car—i.e., in every other car (but only then) there is a passenger who can really look around. On the other hand, driving in (and to) recreational areas involves a very different situation, with 3 or more persons per passenger car; and so in such areas the driver is relatively less important.

In the Highway Corridor

Turning to problems involving the rest of the corridor, we come to a series of questions which are more interesting legally, even though they may be somewhat less important practically. The principal question here is a thorny one—the proper division of function between police-power techniques ("zoning" and otherwise), and acquisition of the fee or of less-than-fee rights in land—in a word, when should we pay?

I wish I could reel off a few quick and snappy rules on how to deal with this. But unfortunately—unless one is given to rhetorical generalization—this is not a question which can be analyzed and discussed sensibly, except in the specific terms of a program to deal with an actual situation. Moreover, any decision on this division of function will necessarily depend upon several different sets of factors—value-judgments on the importance of various scenic values, constitutional considerations, reasonable treatment of property owners and particularly equal treatment as between different property owners, economical use of public funds, the practicalities of administration, etc.

If we had a number of schemes worked out along these lines and in effect, generalizations could be drawn from these, and particularly from experience thereunder. If these exist, I have not been able to find out about them. I shall therefore restrict my attention to two schemes with which I have some familiarity—the Federal Highway Beautification Act of 1965, and the proposals for rural scenic preservation which Allen Fonoroff and I prepared for Governor Hoff of Vermont.

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80 This whole matter has been brilliantly explored in Tunnard and Pushkarev, Man-Made America: Chaos or Control (1963), part 3.
81 Except in country which is absolutely flat, or when going through cities with a gridiron street system.
82 With the distance between the paved strips widening out at curves.
84 Protecting Roadside Scenery in Vermont, in Vermont Scenery Preservation (Montpelier, 1966). The problem of urban scenery was put off until later.
Vermont

To start with Vermont. The most important part of our report was a careful analysis of the major scenic values in the State, and their classification into a series of categories. Once these were so classified, the legal problem—to find the most appropriate legal tool to deal with each part—was relatively simple. The report therefore set forth a proposed allocation of function as between three types of legal techniques—acquisition of the fee, police-power regulations, and acquisition of less-than-fee rights. I am summarizing all this briefly below.

The first category includes the finest scenic values in the State—as for example the major passes through the Green Mountains (Brandon and Middlebury), the lovely Gulf at the upper reaches of the White River (Williamstown, Northfield and Granville), and so on. We recommended that these should all be acquired in fee simple. Over a period of years, public acquisition will be financially feasible; and this is no place to take any chances by fancy experimenting with new legal techniques. The important thing is to get these areas into public ownership, if only to keep them as is.

For a second group of scenic values, police-power measures are appropriate, for several reasons. Each of these represents something quite special, more or less unique. Moreover, in most instances it is possible to describe these situations in generalized terms, and so to write workable regulations. For this type of special treatment, three types of scenic areas were selected—two kinds of scenic corridors, and a set of scenic sites; and listed obnoxious uses were forbidden in such areas. These areas are:

1. The Interstate System as a whole, following the traditional routes of travel (which originated as trails through the woods in Colonial times), and providing an extraordinary variety of scenic experiences in a relatively short time.
2. Perhaps a dozen intermediate-traffic secondary routes, each following a corridor with remarkable scenic beauty, for distances ranging from 10 miles to over 100 miles.
3. A group of special scenic features, characteristic of the State and scattered all over it—as for example the remaining covered bridges, or the many small cemeteries which dot the landscape.

For the third category of scenic values, a different approach was proposed—the acquisition of less-than-fee rights, leaving the land in private ownership. The prime example of this is the typical Vermont scene, such as fills the pages of Vermont Life.

43 These are of course only proposals, most of which have not yet gone through the crucible of the legislative process. (But see Vermont Laws 1966 (Special Session), No. 67, 10 Vermont Statutes Annotated, Sections 261-265). Naturally it is easier to maintain a certain logical consistency at this stage.
45 The list includes the obvious things—garages and filling stations, used car lots, motels, restaurants (except in a converted residential building), junk yards and dumps, billboards, open storage, etc.
46 The route followed by Rogers' Rangers in Northwest Passage (by Kenneth Roberts, 1937) in part follows the same paths.
47 Incidentally quite a lot of this is rather well laid out, from the aesthetic viewpoint.
48 Some scenic values of this type may be appropriate for such special treatment in some instances, but not in others, depending on local conditions—as for example marshes and streambeds, other sites of special ecological significance, the approaches to historic towns, etc.; and so a mechanism was provided for designating the instances in which these should be given protection.
49 Often referred to as "scenic easements." The choice of phrase is not fortunate; for easements, far from being an exciting new legal tool, are among the hoariest of the old common-law legal categories, with no inherent advantages and with various quite irrelevant built-in legal limitations. (E.g., unless such an easement is tied to other land owned in fee, it may be impossible to transfer it from one public agency to another).
or of any magazine article on the State. This is a landscape superbly adapted to human
use and enjoyment—with open fields often running part way up the hillsides, and so with
infinitely varying patterns of woods, fields and walls, streams, and buildings, of sun
and shadow and sky, of form, color, texture, and light—and with striking seasonal dif-
f erences, as the brilliant foliage in the fall, and snow in winter. The main problem
here is to preserve the traditional pattern, and particularly to maintain the open fields
in their traditional use; and so permanent public ownership is neither necessary nor
desirable. Moreover, in so widespread a situation, police-power controls would be
on rather dubious constitutional grounds, and would probably be unworkable as well.
On the other hand, a vigorous program of acquiring less-than-fee rights would provide
the necessary flexibility to ensure just the necessary minimum of public control. For
example, to ensure scenic preservation in these situations, the public should acquire
and hold such legal rights as the following:

1. That the traditional pattern of open fields and forests should be maintained,
   perhaps with minor modifications, and that the fields should be kept mowed to prevent
   scrub growth.
2. That, where economically feasible—including the consideration of appropriate
   subsidies—active farming be continued.
3. That no ugly or obnoxious structures or activities (such as those mentioned
   above) be placed anywhere within the view—and, perhaps, that other types of structures
   will be subject to design control.
4. That no structures at all will be placed at specified strategic spots, where they
   would block the view, and that trees and shrubs will be kept pruned for the same
   purpose.
5. Perhaps, that cutting of trees (or of specified trees) will be subject to mutual
   consent.
6. In appropriate instances, that the public will have a limited right of entry.

For these purposes, all sorts of legal arrangements can be made available—

1. Purchase of those rights which are desired in a given situation.
2. Purchase of the fee, and resale (with a preference to the original owner)—which
   would give the public the residual rights, and so the benefit of the doubt, whenever
   any question arises.
3. Purchase of the fee and lease-back.
4. Purchase, subject to a right of occupancy for life.
5. Tax concessions, in return for land-use covenants, or contracts for specified
   terms.

And so on.

The same less-than-fee device is also appropriate in a quite different type of situa-
tion. Glorious views often open up for a very short distance along a Vermont road,
say 50 feet or more. In such a case there is no need to purchase the fee; in fact, again,
it's better not to, so that the area can continue with its traditional use and maintenance.
Moreover, it is obviously impossible. for purely administrative as well as legal rea-
sons, to have a zoning map applying regulations to an occasional strip 50 or 100 feet
long, every few miles along a highway. What is necessary here is to acquire two sets
of rights—(a) that the farmer should not build any structures at that particular spot,
and (b) that someone (either he or public officials) should keep trees from blocking the
view.

\*\* Again, one thinks of the deep pocket. Is there no way in which considerations of scenic preservation
   can be introduced as criteria into decisions on the staggering sums paid as federal subsidies for
   "agricultural adjustment" and cropland retirement?

\*\* Although the National Park Service has found that such rights are very difficult to enforce in fact.
The Federal Act

For a really sharp contrast, let us consider briefly the Federal Highway Beautification Act of 1965.\textsuperscript{52} Without wishing to minimize the political difficulties in getting such legislation passed, I think this may be fairly described as an object lesson in what not to do. True, this legislation does provide some considerable gains, partly in increased authority to spend for scenic enhancement\textsuperscript{53} and partly in new restrictions affecting private land. The latter are significant in two types of areas along the Interstate and primary systems—those which are zoned agricultural or residential, and those which are unzoned and have no commercial or industrial establishments of any type. Billboards and junkyards are forbidden to locate in such areas; and a procedure is established for their eventual removal therefrom.\textsuperscript{54} Moreover, any State which does not conform to the Federal standards will actually be penalized, by losing 10% of its Federal highway-aid funds—an arrangement which is likely to be more effective\textsuperscript{55} than the feeble bonus arrangement adopted in 1958.\textsuperscript{46} These are obviously real gains\textsuperscript{57}—but at a very high cost.

Consider what happened to the part on billboards. First, the basic purpose of the statute,\textsuperscript{58} was badly garbled by an amendment (in another sub-section) which refers also to the promotion of "the orderly development of outdoor advertising:"\textsuperscript{59} and on this basis the billboard lobby has actually been arguing\textsuperscript{60} that the law should be transformed into a large-scale Federal effort to make billboards—not scenery—more easily visible!

Second, all commercial and industrial zones and areas are exempted from control\textsuperscript{61} apparently on the theory that the natural sites for billboards include the most attractive landscaped research laboratories, the finest shopping centers, and in fact any areas permitting any form of commercial use.\textsuperscript{62} The exemption is far too broad: billboards may be appropriate in heavy commercial strips, and perhaps even harmless in

\textsuperscript{52} 79 Stat. 1028 (1965), 23 U.S.C. Sections 131, 136, and 319. There is a certain unhappy irony in the belated arrival of serious Federal interest in this problem. President Kennedy, highly cultured and with a lively interest in things artistic, never got to this problem, presumably because so many higher priorities seemed more pressing; and so it was during his administration that a large percentage of the actual rights-of-way for the Interstate System were selected and laid out, mostly along conventional lines. Yet President and Mrs. Johnson have now made highway beautification into a major national issue. It is sad to think how much was lost by the delay.

\textsuperscript{53} But the funds no longer come from the Highway Trust Fund.

\textsuperscript{54} Junkyards are excluded from commercial areas, but permitted in industrial, and may be screened instead of removed.

\textsuperscript{55} Unless the regulations are so weak that it doesn't much matter.

\textsuperscript{56} See 72 Stat. 96 (1958). Only about half the States (mostly in the North-East and on the Pacific Coast) followed up on those arrangements.

\textsuperscript{57} A useful minor provision is intended to encourage the development of information centers at rest areas.

\textsuperscript{58} "...to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." The same wording appears in the part on junkyards.

\textsuperscript{59} But adding—"while remaining consistent with the purposes of this section," which at least clarifies which purposes are to be controlling. This sub-section refers to the commercial-and-industrial exemption, discussed below.

\textsuperscript{60} One might note in passing that they have been represented in these proceedings by the most distinguished law firm in Washington.

\textsuperscript{61} Compare footnote 13 above.

\textsuperscript{62} "Effective control" of billboards is also defined so as to exclude from regulation not only all direction and other official signs, but also (a) all signs of any kind located more than 600 feet from the right-of-way, (b) all such signs located within 600 feet, but invisible from "the main travelled way," (c) all business signs anywhere, and (d) all signs advertising the sale or lease of the land where they are located. The presumption is that none of these will detract from "natural beauty."
some industrial areas—but hardly in the other situations mentioned above. This exemption is bad enough; but the regulations prescribed by the Federal authorities to implement such legislation, as they now stand, have actually succeeded in making it much worse. This is particularly true in the definition of the unzoned "commercial and industrial areas" which are exempted from control. Now obviously there is a lot of room for reasonable debate as to how much commercial and industrial frontage is necessary to stamp an area with those characteristics. Clearly, a good case could be made for 51% as the breakpoint—or for 60%, or perhaps even 35% in some instances (i.e., if the rest is vacant land). The proposed Federal standards are in quite another ball park. As first proposed, the Federal definition included all areas within a stated distance of two commercial or industrial establishments, no matter how small—and then, in the revision after public hearings, the requirement was reduced to one such establishment.

Third, compensation is to be provided for all non-conforming billboards to be removed—an equally bad surrender on a major point of principle. For it has been widely accepted in current practice that the police power may be used without compensation to require removal of non-conforming signs, after a reasonable amortization period; and so this new Federally-sanctioned system of compensation for non-conforming signs, with joint Federal and State contributions, will often run directly contrary to established local practice to the contrary. Moreover, now that compensation must be paid for the removal of whatever signs have been declared non-conforming, there is a natural temptation for the Federal authorities to concentrate on making available funds stretch further—and so to draft weak regulations really designed to minimize the number of signs which are non-conforming.

Finally, another amendment apparently requires that regulations under the Act must accept the customary size, spacing and lighting of billboards; and the billboard lobby is now arguing that the customary size should be again increased, up to 1200 square feet, nation-wide. Some control!

At least the second and third items above represent major victories for the billboard lobby, on points which have long ranked high among their many goals. We may with confidence except these provisions to be cited with enthusiasm, in arguments against more restrictive policies locally—i.e., the exclusion of billboards from some commercial and industrial districts, and the amortization of non-conforming signs; and the clause protecting State and local rights to impose more restrictive regulations is drawn a bit ambiguously. It will therefore be some time before we can find out how much damage has been done by this legislation, and to compare the damage with the gains. Under the Act, one of the Secretary of Commerce’s duties is to make "...a comprehensive study of ... the effectiveness of such programs and the public and private benefits realized thereby, and the alternate or improved methods of accomplishing the objectives of this Act." Such a report is due this month, and we await it eagerly. Meanwhile, it is not surprising that several of the public-service-oriented civic organizations have withdrawn their support from the Act.

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63 Yet the billboarders are still pressing for a further relaxation of this definition in other respects. (Obviously there is not much room left to give ground any further on this point.) Many other regulations were also loosened up in the redraft: for example, the permitted size of signs was raised from 300-400 to 750 square feet.

64 Note that the requirement for removal is phrased in the negative—"shall not be required to be removed until July 1, 1970."

65 For case law, see footnote 16.

68 Section 302.