

Roberts. There could be no impairment of visibility in respect to traffic on Roberts north of Holbrook since all traffic had been cut off by the freeway under circumstances involving no substantial impairment of access. The theory supporting an easement of reasonable view of the property from the abutting streets -- "that places of business may be established along the highway and parties traveling along the highway may thus be attracted to the places of business and become customers" -- simply did not exist in the last set of circumstances. In short, there now being no traffic to the owner's property from the north there were no persons in respect to whom the visibility of the property could be said to be impaired. (People v. Wasserman, 50 Cal.Rptr. 95, March 1966)

186-2 WISCONSIN SUPREME COURT RULES STATE CAN CONDEMN SCENIC EASEMENTS,
THEREBY RESTRICTING USE OF LAND, UPON PAYMENT OF JUST COMPENSATION

The State highway commission decided to acquire, in the name of the State, so-called scenic easements, across land of various owners, to a depth of 350 feet from the Great River Road, which was a highway that ran along the Wisconsin shore of the Mississippi River. The owners did not accept the monetary offers and brought action to contest the right of the highway commission to condemn such easements. A trial court dismissed their complaint, where-upon they appealed to the supreme court which affirmed the judgment.

In most instances the land involved was being used for agricultural purposes. The description of the scenic easement proposed to be taken from the owners of one tract of land (which was typical, although some of the easements varied in detail) stated that the highway commission, having determined that it was necessary to preserve and protect, for scenic purposes the natural beauty of the areas adjoining the highway and to prevent any future developments which might tend to detract therefrom, had ordered the acquisition of an easement, in the name of the State, and right in perpetuity to restrict the future use and development of the land involved. The restrictions were as follows: (1) No dump of ashes, trash, rubbish, sawdust, garbage or offal, or any other unsightly or offensive material could be placed upon the restricted area. Existing use for any such purpose had to be discontinued except where such use was incidental to the present occupation and use of the land, and when it conformed to applicable State and local requirements. (2) No signs, billboards, outside advertising structures or advertisements of any kind could be hereafter erected, displayed, placed or maintained upon or within the restricted area. Existing use for any such purpose had to be terminated by a specified date, except that one sign of not more than eight square feet in size could be erected and maintained to advertise the sale, hire or lease of the property, or the sale and/or manufacture of any goods, products or services incidental to a permitted occupation or use of the land. (3) No trees or shrubs could be destroyed, cut, or removed from the restricted area, except as might be incidental to a permitted occupation or use of the property, or required for reasons of sanitation and disease control, and except for selective cutting of timber by methods prescribed by written permit from the highway commission. (4) Lots used, leased or sold within the restricted area for residential purposes had to have a frontage on the adjacent highway of not less than 300 feet for each residence.

Land within the restricted area could be used for the following purposes:
(1) General crop or livestock farming including construction, erection, maintenance and repair of buildings incident to such use, and construction, maintenance

or establishment of recommended soil conservation structures or practices, and normal farm improvements. (2) Telephone, telegraph, electric or pipelines or microwave relay structures for the purpose of transmitting messages, heat, light or power. (3) Single-family residential use. (4) Any use not specified which existed upon or within the restricted area as of the time of recording the condemnation petition, including normal maintenance and repair of existing buildings, structures and appurtenances but such use should not be expanded nor should any structures be erected or structural alterations be made within the restricted area.

The easement included the right of the State and its agents to enter upon the restricted area only for the purpose of inspection and enforcement of the terms of the easement, but the public did not have the right to enter that area for any purpose.

The landowners contended that "scenic easements" could not constitutionally be taken from them by the State even though just compensation be determined and paid. Their basic attacks appeared to be that public enjoyment of scenic beauty of certain land was not a public use of such land and that there were not sufficient standards limiting the action of the commission.

The supreme court stated that there was a considerable body of legislative history which clarified the concept of "scenic easement" and it listed incidents in which the legislature permitted the taking of such easements. It further stated it was clear that the legislature had determined that the protection of scenic resources along highways was a public purpose, had set the policy of acquiring scenic easements along particular routes, in order to protect such resources, and had delegated to the State highway commission the function of deciding the exact terms of the easements to be acquired, and of exercising the power of eminent domain to acquire them.

The concept of the scenic easement sprung from the idea that there was enjoyment and recreation for the traveling public in viewing a relatively unspoiled natural landscape, and involved the judgment that in preserving existing scenic beauty as inexpensively as possible, a line could reasonably be drawn between existing, or agricultural (and in these cases very limited residential) uses, and uses which had not yet commenced but involved more jarring human interference with a state of nature.

To the landowners' argument that a scenic easement did not permit the public nor any public agency to enter and occupy the lands in person, the appellate court agreed with the trial court that the "occupancy" was visual. The enjoyment of the scenic beauty by the public which passed along the highway seemed to the supreme court to be a direct use by the public of the rights in land which had been taken in the form of scenic easements, and not mere incidental benefits from the owners' private use of their land.

The owners also contended that the decision, made by the legislature, to preserve scenic resources, and the decision, made by the highway commission, to take scenic easements, upon certain terms, involved purely esthetic considerations and that such considerations were illusory, whimsical and highly controversial. The legislative decision was, therefore, meaningless in terms of public interest and the commission had no standard to follow.

The court stated that it was aware of the doctrine that zoning restrictions imposed under the police power could not be based solely on esthetic considerations. It noted, however, that it had expressed doubt whether this was any longer the law. In any case, the imposition of restrictions on use of the land involved in the instant case was not an exercise of police power since the State was taking a portion of the owners' property rights and just compensation would be paid for what was taken.

The court stated that whatever might be the law with respect to zoning restrictions based upon esthetic considerations, a stronger argument could be made in support of the power to take property, in return for just compensation, in order to fulfill esthetic concepts, than for the imposition of police power restrictions for such purposes. More importantly, however, the court thought that the concept of preserving a scenic corridor along a parkway, with its emphasis upon maintaining a rural scene and preventing unsightly uses, was sufficiently definite so that the legislature could be said to have made a meaningful decision in terms of public purpose, and to have fixed a standard which sufficiently guided the highway commission in performing its task.

The fact that the owners' land was being subjected to a scenic easement while no such easement was being condemned over property belonging to a railroad and to persons living in an urban area did not deny the condemnees equal protection of the laws. Once it had been determined that the use of which property rights were taken was a public use, and that the taking was necessary for such use, neither a property owner whose property was taken in return for just compensation nor a property owner whose property was not taken was in a position to claim that he was denied equal protection of the laws. The amount and character of land to be taken for a public project and the need for a particular tract to complete a plan rested in the discretion of the legislative branch. (Kamrowski v. State, 142 N.W.2d 793, June 1966)