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Volume 21
Issue 2 *Legal Profession Problems Symposium*


Article

1972

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Recommended Citation

Richard Sutton, *Billboard Regulations, and Aesthetics*, 21 Clev. St. L. Rev. 194 (1972)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol21/iss2/19>

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Billboard Regulations, and Aesthetics

Richard Sutton*

THE REGULATION OF OUTDOOR ADVERTISING has prompted a surprisingly prodigious amount of controversy and litigation. It has been challenged as a denial of free speech,¹ due process,² and equal protection;³ it has been upheld on nuisance⁴ and real property⁵ grounds, and sustained on the basis of public health,⁶ safety,⁷ morality,⁸ comfort and convenience,⁹ aesthetics,¹⁰ and the right to be let alone.¹¹

*B.A., Ohio Wesleyan University; fourth-year student, Cleveland State University College of Law.

¹ *Valentine v. Chrestensen*, 316 U.S. 52 (1942), which held that guarantees of free speech and press impose no restraint upon governmental regulation of purely commercial advertising. *See also* Comment, *Zoning, Aesthetics, and the First Amendment*, 64 COLUM. L. REV. 81 (1964).

² *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *O'Mealia Outdoor Advertising Co. v. Borough of Rutherford*, 128 N.J.L. 587, 27 A.2d 863 (Sup. Ct. 1942); *Mid-State Advertising Corp. v. Bond*, 274 N.Y. 82, 8 N.E.2d 286 (1937); *Ohio Valley Advertising Corp. v. Linzell*, 107 Ohio App. 351, 152 N.E.2d 380 (Ct. App. 1957), *aff'd*, 168 Ohio St. 259 (1958); *Ellis v. Ohio Turnpike Comm.*, 162 Ohio St. 86, 120 N.E.2d 719 (1954); *State ex rel. Central Outdoor Advertising Co. v. Leonhard*, 50 Ohio Op. 162, 124 N.E.2d 187 (C.P. 1952). For a discussion of fifth amendment compensation clause, *see* Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1965).

³ *Chicago v. Pennsylvania R.R.*, 41 Ill. 2d 245, 242 N.E.2d 152 (1968); *Ghaster Properties Inc. v. Preston*, 20 Ohio Op.2d 51, 184 N.E.2d 552 (C.P. 1962); *Central Outdoor Advertising Co. v. Village of Evendale*, 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954); Comment, *Outdoor Advertising Control Along the Interstate Highway System*, 46 CAL. L. REV. 796 (1958).

⁴ *New York State Thruway Authority v. Ashley Motor Court, Inc.*, 10 N.Y.2d 151, 176 N.E.2d 566 (1961); *Martin v. Williams*, 141 W.Va. 595, 93 S.E.2d 835 (1956); *People v. Rubenfeld*, 254 N.Y. 245, 172 N.E. 485 (1930), where it was said that one of the unsettled legal questions is the extent to which the concept of nuisance may be enlarged by the legislature to give protection to sensibilities that are merely cultural or aesthetic. To the effect that billboard advertising is not inherently a nuisance, *see* *Central Outdoor Advertising Co. v. Village of Evendale*, 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954); *Loth v. Columbia Theater*, 197 Mo. 328, 94 S.W. 847 (1906); Comment, *Zoning and the Law of Nuisance*, 29 FORDHAM L. REV. 749 (1961).

⁵ *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1943); *Kelbro Inc. v. Myrick*, 113 Vt. 64, 30 A.2d 257 (1943). An interesting theory that outdoor advertising is an excess use of an appurtenant easement of visibility vested in the highway authority is proposed in Wilson, *Billboards and the Right to be Seen from the Highway*, 30 GEO. L. J. 723 (1942).

⁶ *Thomas Cusack Co. v. Chicago*, 267 Ill. 344, 108 N.E. 340 (1915), *aff'd*, 242 U.S. 526 (1917).

⁷ *Paulus v. Smith*, 70 Ill. App.2d 97, 217 N.E.2d 527 (1966); *Wolverine Sign Works v. City of Bloomfield Hills*, 279 Mich. 205, 271 N.W. 823 (1937); *Perlmutter v. Greene*, 259 N.Y. 327, 182 N.E. 5 (1932).

⁸ *St. Louis Gunning Advertisement Co. v. St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911).

⁹ *Ghaster Properties Inc. v. Preston*, 176 Ohio St. 425, 200 N.E.2d 328 (1964).

¹⁰ *Berman v. Parker*, 348 U.S. 26 (1954); *State ex rel. Boozer v. Miami*, 193 So.2d 449 (Fla. Dist. Ct. App. 1967); *Ware v. Wichita*, 113 Kan. 153, 214 P.99 (1923); *Moore v. Ward*, 377 S.W.2d 881 (Ky. Ct. App. 1964); *New Orleans v. Pergament*, 198 La. 851, 5 So.2d 129 (1941); *General Outdoor Advertising Co. v. Dept. of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935); *State v. Houghton*, 144 Minn. 13, 174 N.W. 885 (1920); *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272 (1963); *Oregon City v. Hartke*, 240 Ore. 35, 400 P.2d 255 (1965).

¹¹ *General Outdoor Advertising Co. v. Dept. of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935). *See also* *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), where the court said that "... the radio can be turned off, but not so the billboard ..."

Enough legal theories have been propounded to sufficiently obscure the real issues and to provide the courts with ample authority to support any decision deemed, at the time, expedient. Controls imposed through ordinances and statutes upon the location of outdoor advertising devices have undergone a curiously awkward evolution, and though the trend toward upholding most types of billboard regulations is now clear, the reasoning often is not.

In view of the perplexing array of case precedents, inevitably resulting in a lack of adequate statutory guidelines, a need for clarification in this clouded area of the law becomes apparent. Much of the ambiguity stems from a prevalent judicial tendency to permit changes in the substance, yet to retain the traditional form of the law. Unlikely efforts to squeeze regulations neatly within well-recognized legal niches have proved successful, as most courts jealously guard against any perceptible extension of the police power.¹²

Even though the only true rationale behind the regulation of signs along public highways is to preserve and enhance the beauty of the environment, most jurisdictions have refused to recognize this purpose alone to be constitutionally legitimate and have relied instead upon circuitous grounds of questionable legal validity. It is no wonder that state legislatures have experienced difficulty in drafting regulations having a substantial connection with a constitutionally recognized pursuit, when the real purpose has not yet been legitimated.

Under the assumption that billboard regulations are socially desirable, an honest effort should be made to select and define proper ends, and to relate such ends with appropriate means. It is the contention of this paper that:

(1) courts must unequivocally recognize society's interest in preserving the natural beauty of the environment along transportation corridors as falling within the scope of state police power;

(2) state legislatures must control outdoor advertising devices through means reasonably adapted to accomplish well-defined and permissible purposes. Such regulation is best achieved through state and local zoning authorities.

A brief case history to illustrate the nature of the problem is next appropriate, followed by a suggested basis for upholding billboard legislation and a proposed approach for drafting future legislation.

History

One of the earliest treatments of the subject promulgated the notion that all statutory restrictions on the use of property are im-

¹² An analysis of the changing substance of billboard law within a static form is contained in Comment, *Regulations of Outdoor Advertising for Aesthetic Reasons: A Jurisprudential View*, 6 St. Louis U.L.J. 534 (1961).

posed when necessary for the safety, health, or comfort of the public; but a limitation without reason or necessity cannot be enforced.¹³ Following this traditionally narrow interpretation of police power, sign regulations were consistently struck down¹⁴ for nearly two decades.

Interestingly, the courts at this early stage were concerned with aesthetics, not as a serious basis for supporting billboard controls, but rather as a convenient way of disallowing them. Two Massachusetts cases¹⁵ voiced opposition to the surrender of property rights for purely aesthetic reasons. An early Illinois case¹⁶ pronounced a residential ordinance invalid because it prevented sights considered offensive merely to the aesthetic sensibilities of certain individuals. California¹⁷ likewise stated that a man may not be deprived of his property because his tastes are not like those of his neighbors; although in the same year the U.S. Supreme Court did recognize that considerations of taste and beauty may enter in as auxiliary claims.¹⁸ In 1910 it was stated that the promotion of aesthetics or artistic considerations could be a proper object of governmental care, although it was not held that such considerations alone would justify restrictions on the rights of private property owners.¹⁹ The recognition of aesthetics, at least as a supporting reason for billboard regulation, had thus materialized.²⁰

A year later, the tide in rejecting billboard ordinances on aesthetic grounds was reversed with the discovery of a comparatively painless method of bringing such controls under traditional police power requisities. A Missouri court had little hesitation in finding a valid exercise of the police power where billboards were liable to be blown down and injure pedestrians, gather refuse and paper, and were used as dumping places, as public privies, and as hiding places for criminals.²¹ Through similarly remarkable ingenuity, an Illinois court recognized regulations as falling well within public health,

¹³ Crawford v. City of Topeka, 51 Kan. 756, 33 P. 476 (1893).

¹⁴ City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 70 N.J.L. 285, 62 A. 627 (Ct. Err. & App. 1905); State v. Whitlock, 149 N.C. 543, 63 S.E. 123 (1908); Bryan v. City of Chester, 212 Pa. 259, 61 A. 894 (1905).

¹⁵ Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), *aff'd*, 214 U.S. 91 (1909); Commonwealth v. Boston Advertising Co., 188 Mass. 348, 74 N.E. 601 (1905).

¹⁶ Chicago v. Gunning System, 214 Ill. 628, 73 N.E. 1035 (1905). The Illinois Supreme Court later stated the prevalent view as, "... courts of this country have with great unanimity held that the police power cannot interfere with private property rights for purely aesthetic purposes." Heller Sign Works v. Physical Culture Training School, 249 Ill. 436, 443, 94 N.E. 920, 923 (1911).

¹⁷ Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909).

¹⁸ Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), *aff'd*, 214 U.S. 91 (1909).

¹⁹ Curran Bill Posting and Distributing Co. v. Denver, 47 Colo. 221, 107, P. 261 (1910).

²⁰ R. ANDERSON, AMERICAN LAW OF ZONING 441 (1968), suggests that aesthetic objectives are secondary or cumulative. Judge Pound stated in *Perlmuter v. Greene*, 259 N.Y. 327, 332, 182 N.E. 5, 6 (1932), "[b]eauty may not be queen, but she is not an outcast beyond the pale protection or respect. She may at least shelter herself under the wing of safety, morality, or decency."

²¹ St. Louis Gunning Advertisement Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911).

safety, morals, and welfare requirements in view of the liability of fire, dangerous construction techniques, probable display of obscene printing tending to demoralize and injure public morals, protection offered to disorderly and lawbreaking persons, incidents of crimes against women and children such as indecent exposure, deposits of breeding disease germs commonly found behind billboards, and the likelihood of dissolute and immoral practices carried on under the cover and shield furnished by billboards.²²

In 1915 a better-reasoned opinion stated that the real and sole value of the billboard lay in its proximity to public thoroughfares; hence, the regulation of billboards is not so much a regulation of private property as a control over the use of the streets.²³ This more enlightened approach did not, however, gain immediate acceptance; and concern for private property rights continued to pose a considerable obstacle to the attempted control of outdoor advertising devices.

The aesthetics debate meanwhile, had become increasingly prominent and set the stage for most subsequent litigation. By 1927 a New York court admitted that the point had been reached in the development of the police power where an aesthetic purpose needed but little assistance from a practical one in order to withstand attack on constitutional grounds.²⁴ Aesthetic motives were often held to be incident, but not the moving factor, behind regulations.²⁵ In 1935, however, a Massachusetts court, in completely reversing its previous stance,²⁶ held that considerations of taste and fitness may be a proper basis for action in granting or denying permits for the location of advertising devices.²⁷ This was perhaps the first unquestionable acknowledgment of aesthetics as a sole basis for sign regulations.

The majority of decisions in the past twenty-five years, while approving of aestheticism, have strained to find justification for a particular ordinance or statute elsewhere in the concept of public health, safety, or welfare.²⁸ The cases have by no means been in accord; a 1942 opinion echoed the earlier cry that aesthetic considerations are a matter of luxury and indulgence rather than of public

²² Thomas Cusack Co. v. Chicago, 267 Ill. 344, 108 N.E. 340 (1915), citing Chicago v. Gunning System, 214 Ill. 628, 73 N.E. 1035 (1905).

²³ Mercantile Advertising Agency, 32 Philippine R. 580 (1915), *appeal dismissed*, 248 U.S. 591 (1915).

²⁴ People v. Sterling, 128 Misc. 650, 220 N.Y. Supp. 315 (Sup. Ct. 1927).

²⁵ Wolverine Sign Works v. City of Bloomfield Hills, 279 Mich. 205, 271 N.W. 823 (1937); Perlmuter v. Greene, 259 N.Y. 327, 182 N.E. 5 (1932).

²⁶ Welch v. Swasey, 193 Mass. 304, 79 N.E. 745 (1907), *aff'd*, 214 U.S. 91 (1909); Commonwealth v. Boston Advertising Co., 188 Mass. 348, 74 N.E. 601 (1905).

²⁷ General Outdoor Advertising Co. v. Dept. of Public Works, 289 Mass. 149, 193 N.E. 799 (1935).

²⁸ Chandler, *The Attitude of the Law Toward Beauty*, 8 A.B.A.J. 470, 472 (1922). "Has the time not come when the courts will drop the mask of an exclusive concern for safety and health that in the case of billboards is not real, and frankly approve reasonable regulations of the use of property in the interest of beauty".

necessity.²⁹ In *Wolverine Sign Works v. City of Bloomfield Heights*,³⁰ the dissenting opinion strayed dangerously close to the truth in stating that:

[M]ost courts will not uphold such ordinances on aesthetic reasons alone, but many of the decisions, in order to uphold such ordinances, have supplemented these reasons with fantastic arguments that billboards are a menace to public safety, provide convenient places to harbor criminals, and furnish a rendezvous for immorality.

This analysis of the situation appears, in historical perspective, to be a correct one.

In the face of such uncertainty in the constitutional status of billboard regulations, Congress, in 1958, included in the Federal Aid Highway Act provisions designed to encourage and assist states in the control of outdoor advertising on the national system of interstate highways.³¹ Each state, although legally obligated to do nothing, could receive a bonus of one-half of one per cent in their applicable federal aid allotment on projects where outdoor advertising was controlled in accordance with the enunciated national policy.³² Through this process of mild persuasion, several states,³³ including Ohio, enacted regulations patterned after the national standards.

Approval of this legislation, however, by the state courts was not automatic. The Ohio statute³⁴ in *Ghaster Properties, Inc. v. Preston*³⁵ was held unconstitutional as a taking without compensation of valuable property rights, a denial of equal protection, and as lacking a reasonable relationship to a purpose within the scope of the police power. Two years later, upon appeal of the same case,³⁶ The Ohio Supreme Court succinctly overcame these objections, adding that although the federal subsidy may have been one of the incentives behind the act, that fact should not affect its validity. The Ohio high court upheld the statute on the basis of public safety, comfort, convenience, and peace of mind. It expressly avoided the question of whether the preservation of natural scenic beauty would in and of

²⁹ *O'Mealia Outdoor Advertising Co. v. Borough of Rutherford*, 128 N.J.L. 587, 27 A.2d 863 (Sup. Ct. 1942).

³⁰ 279 Mich. 205, 209, 271 N.W. 823, 825 (1937) (dissenting opinion).

³¹ 23 U.S.C. § 131 (a) (1966) states that it is in the public interest to encourage and assist the states to control the use of and to improve areas adjacent to the Interstate System by controlling the erection and maintenance of outdoor advertising signs, displays, and devices adjacent to that System.

³² 23 U.S.C. § 131 (c) (1965).

³³ As of 1969, however, only ten states had passed laws in compliance with the 1965 Beautification Act deemed satisfactory to the Federal Highway Administration. *Hearings on Highway Beautification Act of 1965 Before the Subcommittee on Roads of the House Committee on Public Works*, 91st Cong., 1st Sess., at 152 (1969).

³⁴ OHIO REV. CODE ANN. §§ 5516.01-.05, 5516.99 (Page 1958).

³⁵ 20 Ohio Op.2d 51, 184 N.E.2d 552 (C.P. 1962).

³⁶ *Ghaster Properties Inc. v. Preston*, 176 Ohio St. 425, 200 N.E.2d 328 (1964). This case suggests that in drafting a statute, the legislature could give proper weight to its effect in promoting the comfort, convenience and peace of mind of those who use the highways by removing annoying intrusions upon that use.

itself be a sufficient basis for the legislation, indicating that there are other factors which weigh heavily in the balance of legislative decisions.

Although aesthetics was not directly considered in *Ghaster*, a later Ohio case,³⁷ dealing with a statute regulating junkyards outside municipalities, held that:

. . . aesthetic considerations can support these statutes because interference with the natural aesthetics of the surrounding countryside caused by an unfenced or inadequately fenced junkyard is generally patent and gross, and not merely a matter of bad taste . . . The connection between general welfare and the need for regulation of the use of private property must be subject to continuous review by the courts . . . to determine whether the need for regulation in light of the general welfare has not yet ripened or has waned.

This court, however, was reluctant to provide an unlimited endorsement of aesthetics:

[t]his holding is not to be construed as a blanket approval of all regulation based upon aesthetics . . . Other jurisdictions have held that the legislatures may determine that a community should be beautiful . . . so large a step presupposes an exact definition of beauty which is acceptable to all tastes.^{37a}

Illuminated only by the foregoing standards of comfort, convenience, peace of mind, and patent and gross interference with natural beauty, the true basis for sustaining billboard legislation in Ohio, as in other states, remains nebulous. It therefore becomes necessary to more carefully define an objective and judicially determine the appropriateness of that objective.

A Basis for Legislation

Probably the most common ground for sustaining billboard regulations lies within the concept of the police power (an occasional supporting argument has been raised on real property principles,³⁸ but this view has not been widely accepted). A state's police power is broad,³⁹ and has no exact definition,⁴⁰ but its exercise is subject to a test of reasonableness.⁴¹ Courts have predictably differed on the question whether a given law does or does not come within the police power,⁴² but there is a strong presumption in favor of the validity of a law enacted under this comprehensive doctrine.⁴³ It

³⁷ *State v. Buckley*, 16 Ohio St.2d 128, 132, 243 N.E.2d 66, 70 (1968).

^{37a} *Id.*

³⁸ *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1943); *Kelbro Inc. v. Myrick*, 113 Vt. 64, 30 A.2d 527 (1943); *Wilson, Billboards and the Right to be Seen from the Highway*, 30 GEO. L. J. 723 (1942).

³⁹ *Berman v. Parker*, 348 U.S. 26 (1954).

⁴⁰ *Sax, Taking and the Police Power*, 74 YALE L. J. 36, 38 (1965).

⁴¹ *Moore, Regulation of Outdoor Advertising for Aesthetic Purposes*, 8 ST. LOUIS U.L.J. 191, 202 (1963).

⁴² *H. DAVIS, THE JUDICIAL VETO* 10 (1971).

⁴³ *Central Outdoor Advertising Co. v. Village of Evandale*, 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954).

is easily the least limitable of the powers of government and extends to all the great public needs.⁴⁴ The better reasoned cases have recognized billboard controls as falling within one of two specific elements of the police power: public safety and/or general welfare (viz. aesthetics).

Public safety is a somewhat tenuous ground for upholding legislation in that most studies show no conclusive relationship between regulation and the prevention of accidents.⁴⁵ Billboards, nevertheless, have been decried as a menace to safety by distracting the motorist, impairing his field of vision, and creating confusion with official signs.⁴⁶ The American Automobile Association has stated:

Traffic flow and safety is jeopardized when motorists must cope with uncontrolled competition of commercial advertising and official signs near interchanges on high speed expressways.⁴⁷

Regardless of the validity, as yet unproved, of this opinion, billboard control along highways in non-urban areas would seem to have an even less direct connection with public safety. Furthermore, there may be some merit in the claim that billboards help prevent "highway hypnosis",⁴⁸ a condition attributed to motorists travelling at a constant speed along vast stretches of monotonous roadway. Safety, as a legitimate public concern, may be sufficient to justify control of advertising devices under specific circumstances (e.g., near interchanges);⁴⁹ but the difficulty in relating most controls to a safety objective would diminish the efficacy of using public safety as a statutory guideline.

As suggested earlier, the only true purpose behind billboard legislation was to preserve the natural beauty of the environment. While most legal scholars agree that aesthetics alone should be a constitutionally permissible end,⁵⁰ they are generally apprehensive

⁴⁴ *Nebbia v. New York*, 291 U.S. 502 (1933).

⁴⁵ *Federal Advertising Corp. v. Hardin*, 137 N.J.L. 468, 60 A.2d 615 (Sup. Ct. 1948); *O'Mealia Outdoor Advertising Co. v. Borough of Rutherford*, 128 N.J.L. 587, 27 A.2d 863 (Sup. Ct. 1942). See also Cunningham, *Constitutional Law—The Police Power: Billboard Regulation Along the New York State Thruway: New York Public Authorities Law* 361a, 47 CORNELL L.Q. 647 (1962); Price, *Billboard Regulations Along Interstate Highway System*, 8 KAN. L. R. 81 (1959).

⁴⁶ Laggis, *The Role of Aesthetics in the Exercise of Police Power and its Application to South Dakota's Highway Beautification Statute*, 11 S. DAK. L. R. 157 (1966).

⁴⁷ *Hearings on H. R. 8678 Before the Senate Committee on Public Works*, 86th Cong., 1st Sess., at 2743 (1959).

⁴⁸ Comment, *Ohio Interstate Highway Advertising Prohibition Held Unconstitutional*, 25 OHIO ST. L. J. 99 (1964).

⁴⁹ E.g., North Dakota permits no advertising signs within one thousand feet of a grade crossing, and any sign deemed to be a traffic hazard, in the judgment of the Commission, shall be removed. N.D. CENT. CODE ANN. § 24-01-12 (1970).

⁵⁰ Norton, *Police Power, Planning, and Aesthetics*, 7 SANTA CLARA LAW 171 (1967); Simiele, *Constitutional Law—Ohio Billboard Statute—Unconstitutional*, 14 W. RES. L. REV. 819 (1962); Wilcox, *Aesthetic Considerations in Land Use Planning*, 35 ALBANY L. REV. 126 (1971); Williams, *Legal Techniques to Protect and to Promote Aesthetics Along Transportation Corridors*, 17 BUFFALO L. REV. 701 (1968). See also Laggis, *supra* note 46; Comment, *supra* note 3; Comment, *supra* note 48.

of the inherently subjective nature of the concept.⁵¹ Subjective standards, it is argued,⁵² should not be placed on an equal standing with general welfare of the people. Query: is "general welfare" an altogether objective standard?⁵³

The point has been tirelessly reiterated that the police power cannot be exercised for the exclusive purpose of gratifying and cultivating aesthetic tastes.⁵⁴ Even graver apprehension is manifested in the idea that personal freedom would be lost in the despotic will of the government.⁵⁵ Such objections appear far more subjective than the proposition they were designed to meet. It might be noted that the word "aesthetics" was first used to designate the science of sensuous knowledge, the goal of which is beauty, in contrast with logic, whose goal is truth.⁵⁶ Avoiding any laborious philosophical discussion, suffice it to say that aesthetic considerations can and have afforded practical standards for equitably determining the placement of outdoor advertising devices.

Florida has recognized the role of aesthetics in relation to tourism and has developed a commercial acceptance of aesthetics. In *Sunad, Inc. v. City of Sarasota*,⁵⁷ the court said that aesthetic considerations could be a just cause for regulating advertising signs in the city of Sarasota because it is a center of culture and beauty. New York has taken a similar approach in *Cromwell v. Ferriers*⁵⁸

The exercise of the police power should not extend to every artistic conformity or nonconformity. Rather, what is involved are those aesthetic considerations which bear substantially on the economic, social, and cultural patterns of a community. Advertising signs and billboards, if misplaced, often are egregious examples of ugliness, distraction, and deterioration.

Fears of a platonic imposition of the artistic and cultural sensibilities of a few could be substantially allayed by adopting a narrower

⁵¹ Basinski, *Constitutional Law—Ohio Billboard Statute—Valid Exercise of State Police Power*, 16 W. RES. L. REV. 431 (1965). The author is concerned about courts being the sole determiner of beauty, and about extensions of aesthetics into other fields. For the view that the majority of courts are cautious in expanding the concept of general welfare, see Cunningham, *supra* note 45 at 654.

⁵² DiCello, *Aesthetics and the Police Power*, 18 CLEVE.-MAR. L. REV. 384 (1969).

⁵³ H. DAVIS, *supra* note 43 at 13, states, "... we have welcomed the construction of the of the doubtful general welfare clause as authorizing a practically unlimited function of centralized government."

⁵⁴ *Federal Electric Co. v. Zoning Board of Appeals*, 398 Ill. 142, 75 N.E.2d 359 (1947); See also *Ghaster Properties, Inc. v. Preston*, 20 Ohio Op.2d 51,55, 184 N.E.2d 552, 557 (C.P. 1962), where the court said, "[c]ertain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats".

⁵⁵ *Curran Bill Posting and Distributing Co. v. Denver*, 47 Colo. 221, 107 P.261 (1910).

⁵⁶ *Merrit v. Peters*, 65 So.2d 861, 863-4 (Fla. Sup. Ct. 1953).

⁵⁷ 122 So.2d 611 (Fla. Sup. Ct. 1960). Two years later, a lower Florida court said, "[i]f motel price signs create a honky-tonk atmosphere that operates to drive tourists from Vero Beach motels, then the adverse effect on the city is economic." *Eskind v. City of Vero Beach*, 150 So.2d 254, 257 (Fla. Ct. App. 1962).

⁵⁸ 19 N.Y.2d 263, 225 N.E.2d 749 (1963).

concept of aesthetics. Society has a legitimate interest in protecting the natural beauty of its environment, not in dictating standards of culture and taste. The key to an acceptable standard may be *natural* beauty. In some areas of the countryside, no structure would be appropriate; in other areas, attractive signs may not deter from the surroundings.⁵⁹ Certainly a landscape pock-marked by strip mining could not be aesthetically damaged by the presence of certain signs. The specific restriction of aesthetic considerations exclusively to commercial advertising along public highways would not have to open a "Pandora's box" resulting in further proliferation of the concept into other fields. To the contrary, aesthetics has already been recognized in junkyard cases,⁶⁰ and the ramifications of extending this concept to advertising signs and billboards are relatively insignificant.

Courts need not be so saddled with ancient precedent that they close their eyes to change.⁶¹ In *Mid-State Advertising Corp. v. Bond*,⁶² it was expressed that:

[c]ircumstances, surrounding conditions, changed social attitudes, newly-acquired knowledge, do not alter the Constitution, but they do alter our view of what is reasonable. Restrictions upon the use of property which were deemed unreasonable in 1909, are regarded today as entirely reasonable and natural.

A major change is not even necessary to overrule former holdings since any such change in position may be attributed to the broadened scope of the police power resulting from alterations in public demands and attitudes.⁶³

A number of jurisdictions have already sanctioned aesthetics as a constitutionally permissible purpose.⁶⁴ The significance of preserving environmental beauty has been expressed by Lyndon Johnson,⁶⁵ and has apparently been realized by the Supreme Court, which said in *Berman v. Parker*:⁶⁶

⁵⁹ Florida Congressman Cramer stated that there are many areas of America which are industrial and nonbeautiful from a scenic standpoint, or which are obviously going to develop in the future from an industrial business standpoint that can provide needed information to the motorist. It was also argued in these hearings that much of rural land is not beautiful, is appropriate for signs, and is desperately needed for signs. *Hearings on Highway Beautification Act*, *supra* note 33 at 158.

⁶⁰ *State v. Buckley*, 16 Ohio St.2d 128, 243 N.E.2d 66 (1968); *Farley v. Graney*, 146 W.Va. 22, 119 S.E.2d 833 (1960).

⁶¹ *Preferred Tires, Inc. v. Village of Hempstead*, 173 Misc. 1017, 19 N.Y.S.2d 374 (Sup. Ct. 1940). Laggis, *supra* note 46, points out that the judicial task of extracting modern, useful opinions from maxims born of a drastically different socio-economic era has at times been most tenuous.

⁶² 274 N.Y. 82, 87, 8 N.E.2d 286, 288 (1937).

⁶³ Comment, *supra* note 12.

⁶⁴ For cases to this effect, see note 10 *supra*.

⁶⁵ "Association with beauty can enlarge man's imagination and revive his spirit. Ugliness can demean the people who live among it. What a citizen sees every day is his America. If it is attractive it adds to the quality of his life. If it is ugly it can

(Continued on next page)

[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capitol shall be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

It has been argued that relief of the eye from irritating color and motif should be as justified before the law as removing disagreeable noises from the ear.⁶⁷ Why should not "landscape pollution"⁶⁸ be of equal concern to the public as noise pollution? Governments may *condemn* land for public highways and parks explicitly for scenic reasons.⁶⁹ Why is not *regulation* of land permitted for the same reasons?

In short, despite any definitional problems associated with the open recognition of aesthetics as a part of the police power, it would seem to be the only way of logically and consistently upholding billboard controls while providing a justifiable purpose to which the adopted measures may bear a reasonable relationship.

An Approach

Once the purpose of billboard legislation has been unequivocally established and judicially approved, it becomes possible to select the optimum means of executing that purpose. Any regulation must be reasonably related to values recognized as legitimate elements of public interest,⁷⁰ and, particularly regulations enforceable by the police power, must be precise and specific as to the evils they are intended to prevent.⁷¹ Such regulations, as in Ohio, must bear a real and substantial relationship to the police power.⁷²

First, the regulatory purpose should be defined within the statute. The avowed object, for example, of the "Highway Beautification Act

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degrade his existence Beauty has other immediate values. It adds to safety whether removing direct dangers to health or making highways less monotonous or dangerous But a beautiful America will require the effort of government at every level, of business, and of private groups." 111 CONG. RECORD 2045 (1965) (Special message to Congress).

⁶⁸ 348 U.S. 26, 33 (1954).

⁶⁷ *Hav-A-Tampa Cigar Co. v. Johnson*, 149 Fla. 408, 5 So.2d 433 (1942).

⁶⁸ Williams, *supra* note 50 at 701.

⁶⁹ It has been held that the public use of roads is not limited to use as a mere business necessity or ordinary convenience, but also includes its use as a scenic highway for the public enjoyment, recreation, and health. *Rindge Co. v. Los Angeles*, 262 U.S. 700 (1923). The condemnation of land for public parks has long been recognized as a taking for public use for an admittedly recreational purpose. *Shoemaker v. United States*, 147 U.S. 282 (1893).

⁷⁰ Laggis, *supra* note 4 at 171.

⁷¹ DiCello, *supra* note 52 at 387.

⁷² *Leet v. City of Eastlake*, 7 Ohio App.2d 218, 220 N.E.2d 121 (Ct. App. 1966).

of 1965"⁷³ is to protect the public investment in such highways, promote safety and recreational value of public travel, and preserve natural beauty. Ohio has not enacted a preamble or purpose clause, but in light of the demonstrated difficulties in judicial construction of legislative intent,⁷⁴ it would seem highly desirable to so do.

Second, the intent of legislation should be regulation, *not* prohibition. Where property rights are concerned, an unyielding prohibition is far less likely to withstand constitutional attack than a reasonable regulation.⁷⁵ In the "Highway Beautification Act," the Congressional intent was to provide a loose framework whereby each state may enact suitable regulations.⁷⁶ To preserve a governmental balance of power, land-use control was to be placed in the hands of the states,⁷⁷ although most states have blindly followed the federal standards. Further regulations were to be established through agreement between the Secretary of Commerce and the individual states.⁷⁸ Such standards should be carefully adapted to that state's needs and constitutional barriers since they must weather legal attacks within that state.

To illustrate the inequity of maintaining a strict prohibition, consider an off-highway service station desiring to obtain an off-premises sign location in order to be visible from the roadway. According to section 5516.02 of the Ohio Revised Code:

No advertising device shall be erected or maintained within six hundred sixty feet of the edge of the right of way of a highway on the interstate system except the following:

....

(C) Advertising devices indicating the name of the business or profession conducted on such property or which identify the goods produced, sold, or services rendered on such property;

This station owner must either erect a sign high enough to be seen (which in itself may be aesthetically displeasing), or else purchase or lease a parcel of land from the business premises to the

⁷³ 23 U.S.C. § 131 (1965).

^{73a} *Id.* § 131 (a).

⁷⁴ For example, the court in *O'Mealia Outdoor Advertising Co. v. Borough of Rutherford*, 128 N.J.L. 587, 27 A.2d 863 (Sup. Ct. 1942); after failing to establish a relationship between a billboard ordinance and the public health, safety and general welfare, stated that it was possible the ordinance had been enacted for aesthetic reasons. No specific purpose was indicated in the ordinance, causing the court to grope for a proper legislative intent. *See also* Comment, *supra* note 48 at 102, for the importance of a preamble to define legislative intent.

⁷⁵ Restrictions on the power to prohibit are even more stringent than those on the power to regulate. *Ellis v. Ohio Turnpike Comm.*, 162 Ohio St. 86, 120 N.E.2d 719 (1954).

⁷⁶ It has been intimated, however, that such flexibility may be lacking and considerable disagreement has ensued between individual states and the Federal Highway Administration as to the proper interpretation of the national standards. *Hearings on Highway Beautification Act*, *supra* note 33.

⁷⁷ *Hearings*, *supra* note 47 at 2745.

⁷⁸ 23 USC § 131 (d) (1965).

advertising site—an often exorbitant procedure. Were it not for the strict regulation that signs be located on the premises, the business could undertake the far less costly measure of leasing a sign site along with an easement for entry purposes. It would not then be necessary to technically qualify for on-premises treatment. Zoning boards might prevent such needless economic waste in situations where no overriding support exists for the application of the general rule to a particular business.

The rigid distinction between accessory (on-premises) and non-accessory (off-premises) displays, presents other thorny problems. For example, once aesthetics is deemed the purpose behind controls, should it matter whether the sign is on or off business premises?⁷⁹ Signs advertising business conducted on the premises may be just as unsightly and objectionable as off-premises billboards. Several cases have held that this distinction is arbitrary and unreasonable;⁸⁰ others have rejected this argument with sometimes less than crystal clear reasoning.⁸¹

It has been the tendency of most courts to permit the accessory/non-accessory classification, probably on the basis of the owner's supposedly superior property rights.⁸² Against a heritage of property rights being held sacrosanct, many courts have gone overboard in seeking to protect them.⁸³ But the use of property is subject to control,⁸⁴ especially in commercial and industrial zoned areas. There is also no guaranteed right to commercially advertise,⁸⁵ nor is it an absolute incident of property rights since ownership of land does not include an unrestricted right to use such land for any purpose.⁸⁶ The privilege of advertising along public highways should be granted

⁷⁹ No, according to *Sunrad, Inc. v. City of Sarasota*, 122 So.2d 611 (Fla. Sup. Ct. 1960).

⁸⁰ *Triborough Bridge and Tunnel Authority v. Crystal* 2 App. Div.2d 37, 153 N.Y.S.2d 387 (Sup. Ct. App. Div. 1956); *Mid-State Advertising Corp. v. Bond*, 274 N.Y. 82, 8 N.E.2d 286 (1937); *Central Outdoor Advertising Co. v. Village of Evendale*, 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954).

⁸¹ *General Outdoor Advertising Co. v. Dept. of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935) (advertising for local cattle show not the same as permanent billboards); *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (Sup. Ct. 1952); *Criterion Service, Inc. v. East Cleveland*, 152 Ohio St. 416, 89 N.E.2d 475 (1949); *J&N Corp. v. Green Bay*, 28 Wis.2d 583, 137 N.W. 434 (1965).

⁸² It was also suggested in *Railway Express v. New York*, 336 U.S. 106 (1949); that there is a real difference between doing in self-interest and doing for hire. It is one thing to tolerate action from those who act on their own, and it is another thing to permit that action to be promoted for a price.

⁸³ An ordinance making the location of retail stores in exclusively residential areas unlawful without a majority consent of home owners was held invalid as a deprivation of valuable property rights. *People v. Chicago*, 261 Ill. 16, 103 N.E. 609 (1913).

⁸⁴ Broad powers as to highway planning, design and construction may be carried out as long as it bears a real and substantial relation to public safety. *Ghaster Properties, Inc. v. Preston*, 20 Ohio App.2d 51, 184 N.E.2d 552, (C.P. 1962).

⁸⁵ *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

⁸⁶ The Ohio General Assembly may prohibit a particular use if it comes within the police power. *Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425, 200 N.E.2d 328 (1964).

by legislatures based upon a sensible application of reasonable and consistent objectives.

It might be argued that a common sense distinction be drawn between types of advertisers on the basis of necessity. A motel located a few miles off a highway has a more equitable claim to a privilege to accost the traveler's attention than does a national brand name advertiser.⁸⁷ Similarly, public convenience should be weighed in cases where advertisements guiding the weary traveler to food, lodging, or fuel might be quite appropriate and beneficial. Considerations such as relative needs to advertise, and the public desire to be reached by advertising, could be balanced against concern for public safety and environmental beauty by zoning authorities charged with granting or denying permits for the location of all signs.⁸⁸

Legislation must provide ample freedom for the balancing of public interests with the rights of advertisers. North Dakota declared it to be in the public interest to reasonably regulate advertising along specified highways, while recognizing that both the convenience of travel and the interests of the economy as a whole require a reasonable freedom to advertise.⁸⁹ Such flexibility in weighing competing interests is best achieved through the use of state and local zoning boards, empowered to execute broad purposes in directing and planning the growth and appearance of urban and rural areas. The purposes of zoning go far beyond protection of public health, safety, and morality,⁹⁰ and the relevant considerations could be numerous.⁹¹ Another obvious advantage to this form of control is the absence of cost to taxpayers,⁹² as opposed to the compensation requirement exacted under the application of eminent domain.⁹³

⁸⁷ Comment, *Outdoor Advertising Control Along the Interstate Highway System*, 46 CAL. L. REV. 796, 811 (1958).

⁸⁸ Considerable leeway in this regard was given to local authorities by the Supreme Court in *Railway Express v. New York*, 336 U.S. 106 (1949), which held that equal protection may be based upon practical considerations from experience. It might also be noted that 23 U.S.C. § 131 no longer contains any distinctions based on types of signs. Since Ohio originally adopted exceptions based on sign types for the apparent purpose of complying with the federal standards, there now appears to be no sound basis for retaining these exemptions.

⁸⁹ N. D. CENT. CODE ANN. § 24-17-01 (1967).

⁹⁰ *Murphy, Inc. v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944).

⁹¹ A zoning authority, in granting or rejecting permits governing sign location, could consider the nature of the area or community, population patterns, preservation of scenic beauty, maximum safety, and other similar factors bearing a reasonable relationship to the police power. Powers, *Control of Outdoor Advertising—State Implementation of Federal Law and Standards*, 38 NEB. L. REV. 541 (1959). North Dakota has established state zoning boards having broad powers to protect and guide the development of non-urban areas, to designate land necessary for restoration, and to determine zoned or unzoned industrial areas. Such board may also acquire land under the power of eminent domain. N. D. CENT. CODE ANN. § 24-17-01 (1967).

⁹² Williams, *supra* note 50 at 703.

⁹³ Comment, *Aesthetic Considerations in Land Use Planning*, 35 ALBANY L. REV. 126, 140 (1970), suggests that the modern trend is to give considerable leeway to the use of the police power to bring it closer to the concept of eminent domain. The use of eminent domain involves problems of whether advertising rights are an interest entitled to compensation. On the further question of evaluation, see *Sowers v. Schaeffer*, 155 Ohio St. 454, 99 N.E.2d 313 (1951).

Several changes in the existing Ohio billboard law have recently been effected by the Ohio legislature.⁹⁴ This bill extends the basic provisions of section 5516.02 of the Ohio Revised Code (formerly applicable only to interstate highways) to primary highways and to commercial and industrial zones traversed by segments of the interstate system within the boundaries of incorporated municipalities.⁹⁵ Such regulations are to be effected through the issuance of permits by the Director of Highways. No standards for granting or denying permits, however, are mentioned; the only additional guideline is that the Director shall promulgate and enforce regulations consistent with *customary use* in outdoor advertising and *national policy*.⁹⁶ Neither of these two criteria appears sufficiently well-defined to afford an adequate framework in which the state of Ohio may intelligently regulate outdoor advertising. Why did not the General Assembly clearly acknowledge recognition of a public concern for the preservation of the natural state of the environment and develop more concise guidelines commensurate with that purpose?

One redeeming portion of the Ohio revision purports to sanction zoning authorities as an alternate method of carrying out the legislative intent,⁹⁷ although that precise intent is nowhere defined. This alternative may allow the type of flexible planning and regulation needed to accomplish the implied intent. Congress set the tone by providing that the states shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the states in this regard would be accepted for the purposes of the Act.⁹⁸ Thus, even if the Ohio act does not formulate plans for the creation of zoning boards having broad concern for the appearance of public highways, all may not be lost if existing boards are given sufficient leeway to plan and to regulate in lieu of executing the prohibitions contained therein.

Conclusion

As a practical matter, courts have shown a seemingly irreversible propensity to uphold billboard legislation, at least as applied to off-premises advertising. This may be fashionable and accepted, but it has been accomplished at the expense of creating unnecessarily vague,

⁹⁴ S.B. 361, 109th Gen. Ass'y, Reg. Sess. (1971-72), has amended §§ 5516.01-.02, 5516.99 of the OHIO REV. CODE, and enacted §§ 5516.06-.13 and 5531.07. The apparent thrust of the bill is to update and expand existing law in an overall effort to comply with the more liberal tenor of 23 U.S.C. § 131.

⁹⁵ OHIO REV. CODE § 5516.06 (as enacted Dec. 7, 1971). Primary highways are defined as an adequate system of connected main highways, selected or designated by each state through its state highway department, subject to approval by the Secretary of Commerce. Such system shall not exceed seven per cent of the total highway mileage of such state. 23 U.S.C. § 103 (1967).

⁹⁶ OHIO REV. CODE § 5516.09 (as enacted Dec. 7, 1971).

⁹⁷ OHIO REV. CODE § 5516.11 (as enacted Dec. 7, 1971).

⁹⁸ 23 U.S.C. § 131 (d) (1965).

inconsistent, and strained decisions. The history of billboard legislation is a prototype of the history of all land-use regulations calculated to improve or preserve the appearance of the community.⁹⁹ The seeds of environmental concern have been well planted and in the years ahead, improvement of the land's appearance may be one of the more significant social challenges. Growth of highways and environmental consciousness has accelerated the need for increased planning, which must occur within clearly established constitutional guidelines.¹⁰⁰

Therefore, not only is there adequate reason for encouraging aesthetic planning and control, but also the constitutional recognition of aesthetics in specific connection with the regulation of outdoor advertising along public roadways will serve to help clarify a hazy area of the law. If the preservation and enhancement of the natural beauty of our highways is in itself deemed a legitimate end, then legislatures and courts may more logically and honestly determine appropriate methods of serving that end. As long as courts fail to recognize aesthetics alone to be a basis for supporting billboard regulations, state legislatures, in shielding their true purpose, will continue to draft vague and confusing bits of law, thereby perpetuating a needless fiction.

⁹⁹ R. ANDERSON, *supra* note 20 at 509.

¹⁰⁰ "Today, the great density of our urban population, the numerous forms of industry and the general complexity of our civilization render it necessary for the state to take steps to preserve what remains of our nation's beauty, if it is not to perish in our times." Moore, *supra* note 41 at 203.