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The Highway Beautification Act: Cosmetic for the City?

Ruth R. Johnson

The Highway Beautification Act of 1965\(^1\) is part of a body of law dealing with federal assistance for highway construction.\(^2\) Classically, the federal-aid highway program is considered a partnership arrangement with the states designating and building the highways and the federal government providing a portion of the funds and overviewing to protect the national interest. The Highway Beautification Act calls upon the states to control outdoor advertising and junkyards and provides federal funds for landscaping and scenic enhancement. An analysis of its effect on the urban environment requires an understanding of what the program attempts to accomplish and the reasons for its existence.

**Bonus Program**

Like many other pieces of legislation, the Highway Beautification Act is neither the beginning nor the end of federal and state effort in these fields, it represents simply a step in the progression of such effort.

Federal interest in controlling outdoor advertising came to the fore in 1956. Construction of the interstate highway system commenced in that year\(^3\) and with it public opinion rose sharply concerning the need to control outdoor advertising signs along the planned 42,500 mile network. Thus, in 1958 Congress took action by providing a voluntary program under which states could enter into agreements with the federal government to control outdoor advertising along the interstate system and thereby become eligible for a bonus payment in the amount of one-half of one percent of the con-

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struction cost of the highway project. The program called for the control of outdoor advertising signs located within 660 feet of the edge of the interstate right-of-way. Within the controlled areas, four classes of signs were permitted, subject to national standards:

1. Directional and other official signs, e.g., "no hunting," "no fishing," "Welcome to Mayberry";
2. On premise signs which advertise the sale or lease of, or activities conducted upon the property where the signs are located;
3. Signs within 12 air miles of the advertised activity; and
4. Signs in the specific interest of the traveling public which include only public places operated by federal, state or local governments, natural phenomena, historic sites, areas of natural scenic beauty or outdoor recreation, and places for camping, lodging, eating, and vehicle service and repair.

In the opinion of many conservationists, however, two "loopholes" existed under the bonus program. During the Senate debates on the bill in 1958, Senator Norris Cotton (R-N.H.) offered an amendment, which was accepted, to exclude outdoor advertising controls along any portion of the interstate system right-of-way which was acquired prior to July 1, 1956. The effect of this amendment was to limit outdoor advertising controls to interstate highways constructed on new locations but, by the terms of the language, virtually every crossroad and interchange area was also excluded. Typically, the interstate system crosses public road rights-of-way which were acquired prior to July 1, 1956. Therefore, the portions of such older rights-of-way which coincide with any part of the width of the interstate right-of-way are not new locations. This exclusion is significant because interchange locations along the interstate system average one per mile in urban areas and one every four miles in rural areas.

In 1959, an amendment introduced by Senator Robert S. Kerr (D-Okla.) was adopted which has the effect of requiring the exclusion of segments of the interstate system which traverse commercial and industrial zones within the boundaries of incorporated municipalities as those boundary lines existed on September 21, 1959 (the date of enactment of the amendment), and other areas where the land use as of September 21, 1959, was clearly established by state law as industrial or commercial. Prior to this amendment, state agreements could provide for the exclusion of similar areas in the discretion of the Secretary of Commerce (now Transportation). These

two excluded areas have become commonly known as the "Kerr" and "Cotton" areas.

The federal bonus law did not specify the methods to be used by a state in effecting the required outdoor advertising controls. Thus, the states could elect to control signs by: (1) an exercise of police power similar to land use controls established under zoning laws, or (2) by an exercise of the power of eminent domain such as the purchase of negative easements, or (3) by a combination of both, using a vested rights theory for existing signs. Any state which acquired advertising rights by purchase or condemnation could receive federal reimbursement for 90 percent of the cost, provided such cost did not exceed five percent of the cost of the interstate right-of-way within the project.

When the program expired on June 30, 1965, 25 states had entered into bonus agreements. Of this number only three states elected to use the power of eminent domain to control signs. Seven states made provision for the purchase or condemnation of certain existing signs along with police power controls, and the remainder selected police power measures only. One of the reasons for the overwhelming selection of police power techniques by these states stems from the fact that there has been a continuing battle to regulate outdoor advertising signs by state and local communities for over 70 years under nuisance or zoning enactments, which are police power measures.

Although most of the states have faced court challenges of their outdoor advertising control laws during this 70 year span, only six of the 25 bonus states have court decisions on the constitutionality of their statutes enacted specifically to comply with the bonus program. These states are Kentucky, New Hampshire, Washington, Ohio, Wisconsin, and Georgia. New York, a bonus state, had a substantially similar statute applicable to its state thru-

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8. Nebraska, New Jersey, and North Dakota.


10. State Hwy. Dep't v. Branch, 222 Ga. 770, 152 S.E.2d 372 (1966); Moore v. Ward, 377 S.W.2d 881 (Ct. App. Ky. 1964); In re Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964); Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968), cert. denied, 393 U.S. 1112 (1969); Fuller v. Fiedler Dane Co., 19 Wis. 2d 422, 120 N.W.2d 700 (1963). In the Wisconsin case the lower court had ruled that outdoor advertising signs were intrusions upon the highway and that the sign owner derived no property right from the owner of such property, but had held the regulation unreasonable on other points.
way tested during this period and, therefore, will be included in this discussion. Significantly, each of these states used police power methods to control the erection and removal of outdoor advertising signs. Typically, the plaintiffs in these cases contended that the controls serve only aesthetic objectives and, therefore, do not have any substantial relationship to health, safety, morals, or the general welfare, which are the proper objectives for an exercise of police power. Consequently, plaintiffs argued that the removal of nonconforming signs violates the due process clause of state and federal constitutions because the statutes authorized a taking of property without just compensation.

The state courts, with the exception of Georgia, upheld the constitutionality of these statutes on all points. The Georgia court found the state law unconstitutional on its face as a "legislative exercise in futility," stating that "[i]ts sole purpose is to dictate, control and limit uses of private property for public purpose, without a semblance of provision for first paying for such taking or damaging." The Georgia court did not discuss the state's police power or even attempt to analyze or distinguish between the power of eminent domain and police power.

The remaining six state courts dealt with the issue of aesthetics by ruling that it is within the public welfare to promote natural beauty surrounding the highways. Typical of the courts' pronouncements is the statement made by the Kentucky court:

> Closely allied to the enjoyment factor is the promotion of the scenic beauty surrounding the highways. Aesthetic considerations are of sufficient potency for the legislature to find a public necessity for this type of legislation.

With regard to the proposition that these statutes authorize the taking of property without just compensation, the courts uniformly took the position that outdoor advertising signs are a use of the public highway. This concept, in effect, views the abutting owner's claim as a permissive easement which may be withdrawn without compensation, a concept which grew out of the following court statement made in the early 1900's:

> Suppose that the owner of private property—should require the advertiser to paste his posters upon the billboards so that they would face the interior of the property, instead of the exterior. Billboard advertising would die a natural death if this were done, and its real dependency not upon the unrestricted use of private prop-

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The Highway Beautification Act of 1965

In February of 1965 President Johnson transmitted a message to Congress on the natural beauty of our country. This message pointed out that the bonus program would expire on June 30, 1965, and that the President was not satisfied with its effectiveness. At that time the program had been in effect for seven years and only 20 states had entered into bonus agreements. Based partly on the President's announcements concerning highway beautification, five additional states entered into the bonus program just before it expired, bringing the total to 25 states.

In May of 1965, the first White House Conference on Natural Beauty was convened. In response to its recommendations, the President transmitted draft legislation to the Congress on highway beautification.\textsuperscript{20} The Act as passed by Congress on October 22, 1965, contains three major titles and its stated purpose is to protect the public investment in the interstate and federal-aid primary highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.\textsuperscript{21}

**Title I**

Under Title I of the Act, outdoor advertising controls are extended to the federal-aid primary system which means that in addition to controlling approximately 42,500 miles of the interstate system, the controls now extend to approximately 268,000 miles of federal-aid highways. In recognition of the vast impact such a program would have on the sign industry, Congress provided that states must provide just compensation for certain sign removals.\textsuperscript{22} As under the 1958 program, actual control of outdoor advertising remains in the hands of the states. However, the federal law abandoned the “carrot approach” for the “stick approach” by requiring the states to make provision for effective control of outdoor advertising within 660 feet of the right-of-way of these highways or lose ten percent of their federal-aid highway funds. Effective control means that only the following signs are permitted:

1. Those located in commercial or industrial zones or in unzoned commercial or industrial areas. These areas and the size, lighting, and spacing requirements to be applied to such areas are determined by agreement between the Secretary of Transportation and the state. This provision recognizes existing and future commercial and industrial zones and areas without limitation and in that respect is looser than the comparable “Kerr area” under the bonus program. However signs in such areas are no longer excluded from control.

2. Directional and other official signs, excluding those pertaining to natural wonders, scenic, and historic attractions. These signs are subject to size, lighting, and spacing requirements promulgated by the Secretary.

3. On-premise signs which are not subject to any control under the Act.

\textsuperscript{22} Such signs include: (1) signs lawfully in existence on October 22, 1965; (2) those lawfully on any highway made a part of the Interstate or primary system on or after October 22, 1965, and before January 1, 1968 (the effective control date); and (3) those lawfully erected on or after January 1, 1968. Id. § 131(g) (Supp. V, 1970).
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The 1965 Act eliminated the pre-1956 "Cotton area" exclusion and specified that a bonus state could remain eligible to receive bonus payments provided it maintained the control required under the new law or the bonus agreement, whichever was more strict. This had the effect of requiring a bonus state to control the interstate system in accordance with a combination of the two laws and to control the primary system in accord with the 1965 Act to remain eligible for bonus payments. In 1968 Congress amended this section so that a bonus state could remain eligible for bonus payments if it continued to carry out its bonus agreement, but it was not exempted from the 1965 Act requirements. This amendment has the effect of allowing a bonus state to receive bonus payments even if it is subject to the ten percent penalty for noncompliance with the 1965 Act. However, if a bonus state elects to comply with both programs, it must carry out its bonus agreement along the interstate system except where the 1965 Act imposes more stringent requirements. Thirty-three states, and the District of Columbia and Puerto Rico, have enacted some form of legislation in response to the 1965 Act. It is interesting to note, however, that ten of the bonus states have not taken legislative action to comply.

The outdoor advertising control provisions of the 1965 Act have not, as yet, produced any major decisions by the courts. The only litigation questioning the constitutionality of the federal law is the pending case of Lamm v. Volpe before the federal district court in Denver, Colorado. This suit was brought by a state legislator who is seeking a court determination that the states cannot be penalized ten percent of their federal-aid funds for failure to provide just compensation for sign removals. It is contended that mandatory just compensation under the 1965 Act unconstitutionally limits the powers of states to legislate the method of removing signs.

Title II

Similar to the outdoor advertising control provisions, Title II of the Act re-

23. Id. § 131(j).
quires the states to make provision for the effective control of junkyards within 1,000 feet of the right-of-way of interstate and federal-aid primary highways or lose ten percent of their federal-aid highway funds. Effective control means that all junkyards within these areas must be screened or otherwise removed from sight unless they are located in zoned or unzoned industrial areas. The unzoned industrial areas are to be determined by the state subject to the approval of the Secretary of Transportation. Within such industrial areas junkyards may be established without regard to the screening or removal requirements. They are, in effect, exempt from control. Just compensation is mandatory for the removal, relocation, or disposal of certain junkyards which cannot be effectively screened. Federal funds will participate in 75 percent of the state's compensation, landscaping, and screening costs.

It is important to point out that the Highway Beautification Act of 1965 did not introduce the concept of screening or removing junkyards from view along the highway. At the time federal legislation was being considered, the Bureau of Public Roads sent a questionnaire to each state highway department to determine the extent of existing authority to control junkyards. It was learned that 23 states had statutes controlling the location or screening of junkyards on a statewide basis. In addition, 46 states could control junkyards in municipalities or other political subdivisions by zoning, licensing, or other legal methods; and 28 states had some legal method of controlling junkyards outside of municipalities.

In response to the Highway Beautification Act, 40 states have taken legislative action to control junkyards, and two states and the District of Columbia have adequate provisions under prior enactments. The case law history of junkyard controls reveals that typically such controls have been invoked under the state's police power, and, like outdoor advertising controls, have been challenged on the basis of improper exercise of the police power to achieve aesthetic objectives. While the earlier cases recognizing the common law rule against aesthetics were somewhat divided

29. (1) Such junkyards include those lawfully in existence on October 22, 1965; (2) those lawfully along any highway made a part of the Interstate or primary system on or after October 22, 1965, and before January 1, 1968 (the effective control date); and (3) those lawfully established on or after January 1, 1968. 23 U.S.C. § 136 (j) (Supp. V, 1970).


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on whether a screening requirement was purely for aesthetic purposes, the recent cases discard this old concept by upholding such statutes on the basis of promoting scenic beauty surrounding the highways.

Since a junkyard may comply with these laws by screening where possible outside of industrial areas, junkyard locations are not severely limited. By contrast, locations for signs both within and outside commercial and industrial areas are restricted by the outdoor advertising control laws. In addition, since there are many more signs in existence than there are junkyards, the outdoor advertising control provisions are far more controversial than the corresponding junkyard controls. Therefore, as these laws are implemented, a greater number of court challenges can be expected to involve sign controls.

Title III

Federal legislation in the field of landscaping and roadside development had its genesis in the Federal-Aid Highway Act of 1938, which authorized such work as a part of the normal costs of highway construction. The 1940 Act added the concept of nearby land acquisition for preservation of natural beauty within the highway corridor. It also introduced the use of 100 percent federal funds for this latter purpose. Normally, federal-aid highway funds are available to pay a share of the states' costs rather than 100 percent of such costs. However, until the enactment of the Highway Beautification Act of 1965 very little was accomplished by the states in connection with scenic easements or similar land acquisition. Few states availed themselves of the opportunity of acquiring scenic strips outside the right-of-way at the expense of the federal government because the federal scenic acquisition funds would have come out of the sums apportioned to the states for highway construction. Thus, any funds used for scenic purposes became a total loss for mileage purposes.

33. See, e.g., Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964); Deimeke v. State Hwy. Comm'n, 444 S.W.2d 480 (Mo. 1969); State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959); State v. Buckley, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968); Oregon City of Harke, 240 Ore. 35, 400 P.2d 255 (1965); Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960). In Burnham v. State Hwy. Dep't, 224 Ga. 543, 163 S.E.2d 698 (1968), the court dismissed the aesthetics argument since the state legislature was authorized by constitutional amendment to zone land adjacent to the highway for the control of junkyards and existing junkyards were to receive just compensation. The constitutional amendment was a direct result of the court's action in the outdoor advertising case of State Hwy. Dep't v. Branch, 222 Ga. 770, 152 S.E.2d 372 (1966).
34. § 1(c), 52 Stat. 633.
Title III of the Highway Beautification Act is subdivided into two parts. The first section provides that the Secretary of Transportation may approve the costs of landscaping and roadside development as a part of the construction costs of federal-aid highways. Under the second section, states are given the equivalent of three percent of their total federal-aid apportionment for landscaping and roadside development within the rights-of-way and for acquiring and improving adjacent strips of land. These funds provide for the restoration, preservation, and enhancement of scenic beauty, the acquisition and development of publicly owned rest and recreation areas, and the construction of sanitary and other facilities within or adjacent to the highway right-of-way. Funds under the latter section are not to be matched by the states and they come from the general fund of the Treasury rather than the Highway Trust Fund. Moreover, for the first time, they are given in addition to the state's regular apportionment.

This last phase of the three title program has involved most of the federal funds appropriated to date, and has received the least publicity, even though it has proven to be the most successful aspect of the Highway Beautification Act of 1965. Title I of the Highway Beautification Act amended 23 U.S.C. § 131, Title II added 23 U.S.C. § 136, and Title III amended 23 U.S.C. § 319, yet the three titles have consistently been tied together as if they had been codified into one section of law. Each section contains its own funding authorizations and can be administered independently. However, since the three titles are considered a single package, Title I's controversial sign controls have had an adverse effect on the funding of Title III's landscaping and scenic enhancement programs.

Only minor legal problems have been encountered in the construction of safety rest areas and essential landscaping within the accepted right-of-way. The acquisition of scenic easements easily hurtled the constitutional question of whether such takings were for a public purpose. In a leading Wisconsin decision on this point, Kamrowski v. State, the court stated:

The learned trial judge succinctly answered plaintiff's claim that occupancy by the public is essential in order to have public use by saying that in the instant case, "the 'occupancy' is visual." The enjoyment of the scenic beauty by the public which passes along the highway seems to us to be a direct use by the public of the rights in land which have been taken in the form of a scenic easement, and not a mere incidental benefit from the owner's private use of the land.

With regard to aesthetics, the court further declared: "Whatever may be the

36. 31 Wis. 2d 256, 142 N.W.2d 793 (1966).
37. Id. at 261, 142 N.W.2d at 797.
law with respect to zoning restrictions based upon aesthetic considerations, a stronger argument can be made in support of the power to take property, in return for just compensation, in order to fulfill aesthetic concepts, than for the imposition of police power restrictions for such purpose.”

Restudy of the Highway Beautification Act

Largely due to the controversy surrounding the highway beautification program, and particularly outdoor advertising controls, funds were not authorized or appropriated for fiscal years 1968 and 1969 to carry out the three titles of the program. On June 24, 1969, Secretary of Transportation John A. Volpe announced, in his testimony before the Senate Subcommittee on Roads, that the Department would restudy the highway beautification program and possibly recommend modifications. At that time there was a lot of talk that the program would be cut back extensively so that it would be less costly and controversial. At about the same time, environmental issues started to reach the foreground with such controversial examples as the selling of public offshore property to private developers, and the Santa Barbara oil well spill-out. Most Americans for the first time started to learn the meaning of the word “ecology.” This concern led to the passage of the National Environmental Policy Act of 1969. With this rapid turn of events, the restudy of the Highway Beautification Act was influenced and the recommendations made to the Congress reflect this increased concern for the environment.

A proposed bill would change the flat ten percent penalty provision for noncompliance with outdoor advertising and junkyard controls to a graduated scale of from one to ten percent depending on the number of years of noncompliance. The penalty would be applicable only after the state legislatures have had an opportunity to comply with the Act. The 660 foot control limit for outdoor advertising and the 1,000 foot control limit for junkyards would be eliminated and the limit of visibility substituted. A recent inventory indicating that 1,830 jumbo signs were counted beyond the 660 foot control line is partly responsible for this change. Moreover, the former practice of screening junkyards up to 1,000 feet from the right-of-way was senseless when they were still visible and extended beyond this distance.

38. Id.
41. As of this writing, the House and the Senate Subcommittees on Roads are considering the restudy report and the proposed amendments to the program as a part of the Federal-Aid Highway Act of 1970.
Sign removal would not be required until the federal share of just compensation is available and then on a schedule agreed to by the Secretary of Transportation and the state. The directional and other official signs category would be broadened to include signs of specific interest to the traveling public such as gas, food, and lodging, similar to the 1958 bonus law. On-premise signs would be studied and a report submitted to Congress, together with recommendations, by January 1972. The program would be funded at a level to accommodate required sign removals within five to six years. The present junkyard control law limits federal participation in state costs to landscaping and screening and limits federal participation in removal costs to just compensation granted to owners of junkyards. The proposed bill would extend federal participation to include the states’ cost of removal, relocation, and disposal in order to be more flexible and equitable to the states. The costs of developing publicly owned and controlled information center buildings would be added to the development of rest and recreation areas and sanitary facilities under Title III of the Beautification Act. All other provisions of the Highway Beautification Act would remain the same.

Review of the Effectiveness and Direction of the Act Concerning Urban Areas

At this point, we can more closely evaluate the highway beautification program and its effect upon urban areas. Obviously, the Highway Beautification Act has limited goals. Its primary thrust is aimed at protection of rural areas—the natural beauty of the countryside.

Allowing signs in commercial and industrial areas, and junkyards in industrial areas, is simply a recognition of existing local zoning ordinances. Almost half of the federal fund appropriated for landscaping and scenic enhancement have been used for the construction of safety rest areas which are located outside of cities, and virtually all acquisition of land for scenic preservation has been outside of cities. Although it might appear that the federal law falls short of protecting urban segments of federal-aid highways, the federal role in urban areas has traditionally been one of providing leadership in conjunction with local zoning and urban development efforts. In rural areas however, few land use controls exist and small, rural communities can hardly afford the cost of protecting scenic areas; particularly when such areas are in demand for land development.

Traditionally, it has been felt that the cities are adequately equipped to, in effect, “fend for themselves” and should be encouraged to do so. All major cities with the exception of Houston, Texas, have comprehensive zoning in effect. They have larger budgets, full-scale land use controls, sophisticated
planning processes, and a capability to enact all forms of local legislation under their home-rule charters. By contrast, their counterparts in rural areas must await action by the state legislature for authority to act on many similar measures. The legislative history of the 1958 bonus outdoor advertising control law reveals that one of the reasons for exempting commercial and industrial zones within incorporated municipalities was not to interfere with home rule.\textsuperscript{43} It was indicated that signs were already subject to control in the cities and federal control was, therefore, unnecessary. Typically outdoor advertising signs are limited by local regulation to commercial and industrial zones within most incorporated municipalities. Thus, the Highway Beautification Act attempts to reconcile the urban—rural problem by representing both the potential and the limits of federal control. In the cities, it should serve as encouragement to local government to assume a position of leadership in this area.

Unfortunately, the fact that many cities have not done the job they are capable of doing is also indicated by the 1965 Act. For the first time size, lighting, and spacing requirements applicable to signs in commercial and industrial areas are to be determined by agreement between the Secretary of Transportation and the individual states. This radical departure from the previous practice of excluding size, lighting, and spacing requirements from control proved to be the most controversial item in the Highway Beautification Act. The outdoor advertising industry objected strenuously. The Act called for such criteria to be determined “consistent with customary use” and the industry alleged that customary use would vary from city to city and, therefore, should not have statewide application. The industry also feared that the federal government would promulgate national standards in this regard rather than individual state-by-state agreements. The state highway departments were not anxious to assume the increased administrative burden of controlling signs in heavily built-up cities and towns. Thus, on May 24, 1967, then Secretary Boyd, in a letter to the Chairman of the House Subcommittee on Roads, clarified the manner in which this section of law would be administered.\textsuperscript{44} He stated that the states could certify that either the state authority or a bona fide local zoning authority has made a determination of customary use in the zoned commercial and industrial areas. A determination of customary use will be considered as an acceptable basis for standards as to size, lighting, and spacing in the commercial and industrial areas within the geographical jurisdiction of that state or local authority. The effect of this statement is to exempt from the terms of the agreement any political sub-

\textsuperscript{43} 104 CONG. REC. 5105 (1958).
\textsuperscript{44} S. REP. NO. 542, 90th Cong., 1st Sess. 6-7 (1967).
division which controls size, lighting, and spacing of signs in such zones when so certified by the state. In 1968, the Act was amended to incorporate these changes which had already been accomplished administratively. The pertinent provision reads as follows:

Whenever a bona fide State, county or, local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority.\(^5\)

Conservationists are also opposed to the commercial and industrial area provisions because they feel that there is no protection for future commercial and industrial expansion. They contend that a freeze or cut-off date should have been put into the federal law so that signs could not be erected in future commercial and industrial zones. This is merely one example which illustrates the difficulty of imposing federal requirements in urban areas. The Act is also criticized because on-premise signs are exempt from control. Critics contend that roadside businesses, in particular, have a tendency to erect signs which shout for attention and are, therefore, often more garish and unsightly than the off-premise billboard. Wherever extensive commercial and industrial zones exist, these businesses do compete for attention. Naturally this occurrence is predominant in urban areas. In response to this criticism, the proposed amendments would provide for a federal study of the on-premise sign problem in relation to the goals of the Highway Beautification Act. Obviously, federal controls in this area would be equally difficult and controversial.

All of this controversy, however, misses the point. Critics expect federal legislation to cure, or not cure (depending on the point of view) the deficiencies of zoning as it exists today in our urban areas. Whether zoning requirements are adequate or inadequate in relation to environmental and aesthetic issues is a problem which should be dealt with by the authors and administrators of zoning policy. It is here at the grass-roots level that specific problems dealing with local land use can be most effectively handled.

One writer has summed up zoning history in a rather caustic over-simplified fashion, but it bears repeating to put the problem into proper perspective:

Perhaps on that historic day in 1926 when five of the nine Supreme Court judges voted in favor of the City of Euclid, Ohio, it was one of those times when the courts led us down the wrong path. Perhaps if it had gone the other way we would have been forced into devising more subtle and less discriminatory ways of regulating the

use of land . . . perhaps we would have invented performance standards twenty-five years earlier. But in any event, Euclid won and virtually every city quickly divided itself up into two kinds of districts: the nice parts of town, and the remainder. In the nice parts of town strict regulations were employed to keep out anything that would attract, or even be reminiscent of, those people from the other parts of town. The other parts of town, however, were put in what I would call “garbage can districts” in which anything and everything was permitted, except a few industries that were thought to be so offensive that their odor might even permeate the nice neighborhoods. You know the list: abattoirs, bag cleaning, ink manufacturers, etc.

The courts quickly agreed that signs could be excluded from the nice parts of town, although they had to invent a number of varieties of legal mumbo-jumbo to accomplish it. But the courts could see no justification for regulation of signs in the garbage can districts because, after all, who cared what happened there anyway? So if I may overgeneralize a bit, but not much, an accommodation was gradually reached between the sign industry and local governments across the country. The signs were kept out of the nice districts and were left to flourish elsewhere. That way billboards were, like the slums, never seen by the nice people unless they happened to ride a railroad train . . . and then they pulled down the shades.46

It is becoming harder and harder to “pull down the shades” as society becomes more crowded and it is also becoming obvious that perpetuating “garbage can districts” is as antiquated as yesterday’s parlor car.

How far federal legislation could or should go in this field is a matter of speculation. As mentioned before, the Highway Beautification Act was intended primarily to protect the rural countryside—the view from the road as we travel across the country on our nation’s major highways. However, since the public has a tendency to ask the federal government to pick up the ball when there is local inaction, the highway beautification program has begun to venture into these areas. Ultimately, a vigorous federal program may provide the impetus for local self help and the result could lead to a healthy combination of federal, state, and local efforts to arrive at some innovative approaches to the urban problem.

The trend today is toward rapid change. Society is no longer willing to put up with the degradation of the environment in the name of progress—or, as it often means, for the sake of the fast buck. Citizens no longer feel that you

can't "fight city hall." This is evidenced by increased indignation, protest, and an increasing number of lawsuits concerning environmental issues.

Attitudes are changing toward land use also, as can be seen by the advent of exclusive zoning and high-quality industrial parks and shopping centers. Thus, it may not be long before the garbage can district is a thing of the past.

Courts are reflecting this changing attitude by recognizing human values in addition to economic values. They are rapidly discarding the traditional view concerning land use regulation for aesthetic objectives and are upholding legislation aimed at improving the appearance of the community and the preservation of scenic and historic values. The following statement of Mr. Justice Douglas in Berman v. Parker has been credited with the rapid development in this field of law:

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It 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. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

In the past ten years progress has been made at the state and local levels in the form of legislation and regulation to preserve and protect the environment, but it has been only recently that these issues have become a dynamic force. The time is ripe for a long hard look at the urban area—the heavily built up sections of town, the garbage can districts, the ghetto, and the highways interlacing these areas—to devise solutions to upgrade these long forgotten "black eyes" in the community.

Too often, we view the urban mess as a problem which we cannot do much about and therefore we concentrate on new development—the prospective

47. See cases cited notes 10, 11, 26 and 33, supra.
50. Id. at 33. Hawaii has incorporated this philosophy into its constitution. HAWAII CONST. art. 8, § 5.
view. It is still widely believed that we must protect residential areas and undeveloped areas but that there is no aesthetic, cultural, historical, or other value worth protecting in commercial and industrial areas. When older residential or apartment areas merge or border on commercial and industrial areas, the "nice" people move out, property values go down, and the areas are forgotten until they become so blighted that we tear them down and start all over with urban renewal.

Another phenomenon in the urban area appears in the highway approaches to the inner city. Often the first sight a visitor has of a city is of its most decayed area. This is largely attributable to the fact that when these cities were developing, the now blighted areas were the outlying districts where the very obnoxious land user, such as the ink manufacturer, had to locate. Under the common law doctrine of nuisances, such obnoxious land uses could be abated even if they were in existence prior to the time the neighborhood developed around them.\footnote{See, e.g., Bradley v. People, 56 N.Y. 72 (1866); Myers v. Malcolm, 6 N.Y. 292 (1844); Elkins v. State, 19 Tenn. 109 (1841).} Thus, these land uses moved as far out as possible to protect their investments; in some cases the move was the result of a court edict.\footnote{See, e.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915); Rhodes v. Dunbar, 57 Pa. 274 (1868).} Another plague of the highway approaches to our cities is commercial strip development. Main approaches to a city are a favorite location for highway-oriented businesses due to the heavy volume of traffic along these roads. Where this strip development stretches into the surrounding counties or townships, it often represents an economic boon to the local community, but an eyesore in the hodge podge way it develops. Route 1 between Washington, D.C., and Baltimore is a classic example. This route is dotted with motels, restaurants, drive-ins, and service stations, mostly deteriorated since construction of the newer Baltimore-Washington Parkway. Intermingled with these businesses are gift shops, antique shops, outdoor shops, billboards, cemeteries, whiskey manufacturers, brick and block manufacturers, junkyards, shopping centers, the University of Maryland, lumber yards, trailer parks, clothing manufacturers, apartments, homes, a United States agricultural center, and more.

\textit{A New Approach}

One answer to such urban problems would be to adopt a new approach at the state and local levels. This could be accomplished by a shift in the emphasis, direction, and goals of state and local programs, including local zoning provisions, so that commercial and industrial areas could be pro-
ected and improved. At the state level, this could be accomplished by require-
ing that comprehensive land use planning be coordinated among local
governments, particularly among adjoining communities. Land use plans
should be discouraged from perpetuating the garbage can districts repre-
sented by cumulative zoning and should encourage the newer zoning tech-
niques. Along highways, the state could encourage multiple use concepts,
including the use of air space, to foster better utilization of the land and to
protect established communities and neighborhoods. These are but a few
concepts which could be incorporated in a positive way into the planning
process.

State enabling legislation with regard to planning, zoning, and subdivi-
sion regulation, which forms the framework for local control in this area, could be
modernized to provide greater flexibility in dealing with commercial and in-
dustrial areas. For example, such legislation could specifically authorize
amortization techniques that gradually eliminate nonconforming uses and
structures. If aesthetic and environmental regulation such as sign and junk-
yard controls were applied to commercial and industrial areas, amortization
could be used to correct past indifferences. At present only four states have
specifically authorized amortization in their enabling legislation.\(^5\) While
local communities in states without specific legislation have used this ap-
proach with court approval,\(^5\) most communities are still hesitant to use it
without specific authority. Enabling legislation could also set guidelines for
the development of performance standards. This legal technique is a de-
parture from the practice in zoning to simply set minimums and maximums in
land development. Most developers, for economic reasons, go as far as the
"law will allow," and the result is stereotyped, unimaginative land use pat-
terns or discordant development. Performance standards, however, reward
high quality development and thus promote imaginative uses of land. Aes-
thetic and environmental considerations taken into account in developing
these standards have considerable potential in commercial and industrial
areas—for example blending land uses into the environment, architectural
improvement, and open space promotion. Control of on-premise signs could
be effectively achieved by providing rewards for signs which do not shout
with banners, streamers, flashing, moving, or blinking lights, and the like.

Architectural controls could also be applied through zoning in certain cir-


Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929); Grant v. Mayor & City
Council, 212 Md. 301, 129 A.2d 363 (1957); Harbison v. Buffalo, 4 N.Y.2d
553, 176 N.Y.S.2d 598, 152 N.E.2d 42 (1958); Seattle v. Martin, 54 Wash. 2d
541, 342 P.2d 602 (1959).
This tool would have to be used cautiously since it has the inherent potential to thwart innovation and variation. It is effective, for example, to preserve historic parts of a city. The courts of Louisiana and New Mexico have upheld ordinances relating to architectural controls in historic parts of a city on the basis that the beauty of the city attracted tourists.55

Many of the concepts and legal tools adapted to protect rural, residential, and scenic areas could be evaluated and adapted to commercial, industrial, and heavily built up urban areas. Two of these come immediately to mind—the scenic highway concept and tax incentives.

The scenic highway concept controls land uses within the highway corridor by a combination of police power and eminent domain.56 Land or interests in land, such as scenic easements, are acquired in areas of scenic beauty which should be permanently preserved. Zoning and other land use regulations are imposed on the remaining land to promote desirable land uses and to prevent uses which are not in harmony with the setting. It doesn't take much imagination to conceive of an urban scenic or historic highway utilizing these techniques. Some of our man-made beauty is just as worthy of protection as natural beauty—e.g., city skylines, dramatic city entrances, historic areas, distinctive older sections of towns, and other interesting urban sites which are slowly disappearing and disintegrating.

It is such a waste to allow historic, scenic, and interesting mills, factories, markets, and shops to crumble—buildings that are landmarks of another era—while we concentrate so hard on preserving historic homes and mansions, and places of momentous occasions. Contrast this situation with the charm of San Francisco. From the cable cars to the revitalization of old canneries and factories, one gets the impression that the citizens of San Francisco are proud of their city's history and would never discard a part of it. In many other cities, if you look through the old business and industrial districts, there is a charm which is simply hidden in the maze of discordant and delapidated land uses fused together. It is amazing how many rivers, streams, and other estuaries are likewise hidden in such areas. City and state highway departments in coordination with urban renewal agencies could make great strides in preserving scenic or historic urban highway corridors.

Tax incentives such as preferences or deferrals were conceived to preserve open spaces which are rapidly dwindling with urban expansion.57

Typically, property taxes are based on the highest and best use of the land and thus farms located on the fringes of urban or suburban development sell off to developers because of the high tax burden. In effect, then, this technique offers a reduced tax in return for environmental protection. Similar measures might be adapted to preserve smaller open spaces in urban areas. Because of high land values and high property taxes, particularly in business areas, property owners tend to utilize as much of such property as possible. Thus, a tax incentive could serve to encourage open space land uses, that is, less than optimum development, such as the creation of private mini-parks, malls, pedestrian ways, the planting of greenery, and similar measures. It might prove interesting to evaluate the legal and practical aspect of utilizing such a technique to preserve and protect the urban environment generally.

The most obvious techniques are those aimed directly at the problem they are intended to correct. Sign and junkyard ordinances can be enacted at the local level to accomplish results in an urban area. These local ordinances have added merit in that they can be much more sophisticated than the corresponding state laws and can be used to supplement the state laws. Urban highway corridor zoning is another direct measure which can be utilized with a new twist. The highway corridor concept is an attempt to prevent strip commercial development and otherwise protect the highway environment. In urban areas it can be most useful to encourage multiple use of the highway right-of-way and its airspace. Manhattan's Franklin D. Roosevelt Drive, where United Nations offices, restaurants, and gardens have expanded over the roadway, is a good example of what might be done.

Any shift in emphasis from the traditional rural-residential protection to a total environmental protection effort—covering the emerging urban-commercial and industrial area needs—will depend upon citizen action and support. In many communities sign ordinances have been adopted to control on and off premise advertising solely as a result of the efforts of local improvement associations. Since the Highway Beautification Act specifically provides that state and local control may be more restrictive than called for under the Act, citizen interest and effort at both state and local levels will determine whether outdoor advertising and junkyard control laws barely meet or far exceed federal requirements. By the same token concerned citizen effort can encourage broader use of landscaping and scenic enhancement programs in urban areas. Indeed, a local environmental effort can blend very readily within the framework of existing federal provisions.

Many new ideas are on the horizon. The Federal Highway Administration is working with cities to seek new and bold uses of the joint development concept to achieve maximum use of scarce urban land. Highway planners are
likewise calling for creativity and imagination in urban highway design.\textsuperscript{58} Emphasis is being placed on the use of tunnels, tiers, and platforms in highway building to accommodate urban needs such as commercial activity, open space, views, parks, playgrounds, and cultural institutions. Some planners suggest that urban highways be designed for lower automobile speeds so that they will require narrower rights-of-way. Along curves and ramps, lower speeds result in the use of less space for turns which permits more flexibility in blending the highway into the existing environment. Needless to say, the federal landscaping and scenic enchantment provisions can and will be incorporated into these new concepts.

More importantly however, landscaping and scenic enhancement can be used for "curative" purposes along existing urban highways. Federal funds under Section 319 can be used to improve the appearance of the roadside within and outside the right-of-way along proposed and existing highways. Here then, is a chance not only to upgrade a highway corridor located in a dingy setting but also to protect open space and views surrounding existing highways. In some cases simply planting a few trees and shrubs would do the job; other cases would require more extensive efforts. In 1966 the Bureau of Public Roads set forth a list of priorities for this type of work.\textsuperscript{59} The four priority projects were: (1) landscaping and roadside development along existing rural sections of highway where reconstruction is not in prospect; (2) landscaping along approaches to cities; (3) additional rest and recreation areas; and (4) landscaping and roadside development along existing urban highways.

Contrary to an often voiced belief, the federal government and the Federal Highway Administration have always encouraged state and local programs which utilize new and innovative approaches to the urban problem. In 1962 for example, Congress enacted a law which requires comprehensive transportation planning, utilizing all modes of transport in urban areas of over 50,000 population.\textsuperscript{60} In 1968, the public hearing requirement for federal-aid highway projects was amended to include mandatory consideration of economic and social effects of the proposed highway, its impact on the environment, and its consistency with the goals and objectives of urban planning.\textsuperscript{61} Administratively the Federal Highway Administration developed a new approach under this law by requiring a double hearing process—a corridor

\textsuperscript{58} \textsc{Dep't of Transportation, Urban Advisors to the Federal Highway Administrator, The Freeway in the City} (1968).
\textsuperscript{59} Circular Memorandum to Regional and Division Engineers (Apr. 7, 1966).
\textsuperscript{61} \textit{Id.} § 128.
public hearing and a public hearing on the design of the highway.\textsuperscript{62} Relocation assistance was added to the federal law in 1968,\textsuperscript{63} and the preservation of parklands became law in 1966.\textsuperscript{64}

In the total picture, the Federal Highway Administration employs not only professional engineering specialists, but also landscape architects, urban specialists, planners, sociologists, economists, and, of course, lawyers. This in turn has fostered the utilization of similar specialists at the state and local levels. All of these people work as a team to assure that the highway influence on its surroundings is not a blighting or divisive one. Their goal is to make the highway a part of the overall planning program so that it will harmonize with its surroundings and thus stabilize or enhance community values.

We are living in a dynamic era of change brought about by public concern. This same public concern is also beginning to unveil the fact that the authors and administrators of our federal highway program are not the inhuman monsters they are characterized to be. The theory that the federal bulldozer is pushing everybody out of the way in its zeal to provide more and more concrete ribbons is a slowly deteriorating concept.

The highway beautification program, despite all of its controversy stands as a monument to human concern for our environment and a forerunner of things to come.

\textsuperscript{64} Id. § 138.
This article is adapted from a report prepared for the United States Department of Housing and Urban Development under an Urban Planning Research and Demonstration contract awarded to Barton-Aschman Associates of Chicago. The report was first published in January 1968, and the portion reprinted here remains one of the few treatments of the legal aspects of joint development and multiple uses of the highways.

The joint project concept involves both public and private development of the land and air space adjacent to, above, and below transportation corridors. Multiple uses of highway rights-of-way can provide a means of integrating transportation corridors with total community planning. There are legal limits, however, to maximum use of highway rights-of-way. Statutory, as well as case law precedents, have established guidelines as to what constitutes public and private property uses. This article describes how far the law has travelled in this area.

Although the joint project concept would help to alleviate the environmental problems of neighborhood fragmentation and scenic deterioration caused by the highway, it offers no solution to the problems of air and noise pollution. Yet the feasibility of residential, recreational, and business uses of transportation corridors should depend ultimately on their tolerance to noise and fumes. The absence of any discussion in this article of the problems of noise and air pollution as they relate to joint development and multiple uses is an indication of the relatively recent concern for clean air and reasonably tranquil urban streets and highways.