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Illegal Billboards: Why the General Assembly Should Revise the Outdoor Advertising Control Act to Comply with North Carolina Easement Law

*I think that I shall never see
A billboard lovely as a tree.
Indeed, unless the billboards fall,
I'll never see a tree at all.
-Song of the Open Road by Ogden Nash*

In August 1999, the North Carolina General Assembly enacted temporary legislation to quell the flurry of billboard construction along North Carolina highways.¹ The law imposed a one-year moratorium on permits issued for new construction of outdoor advertising on Interstate Highway 40 from the Orange-Alamance county line to the Wilmington city limits.² Pressured by former Governor Jim Hunt, the legislature extended the moratorium an additional year during the following session.³

1. Act of Aug. 10, 1999, ch. 436, § 1, 1999 N.C. Sess. Laws 1771, 1771-72; *see also* Scenic America, *Fight Billboard Blight: Billboards by the Numbers* (2000) (finding that the \$1.8 billion outdoor advertising industry controls over 500,000 billboards across the country and is expanding at a rate of 5,000 to 15,000 per year), at <http://www.scenic.org/fact12.htm> (last accessed May 7, 2002) (on file with the North Carolina Law Review); Brian Feagans, *Billboard Moratorium Set to End*, MORNING STAR (Wilmington, N.C.), June 28, 2001, at 1A (“The ban came after a flurry of advertising popped up along the 155-mile stretch of interstate between Durham and Wilmington. More than a third of the segment’s 98 billboards were permitted in 1998 and 1999.”).

2. 1999 N.C. Sess. Laws at 1771-72. The legislature also directed the Joint Legislative Transportation Oversight Committee to study whether this ban on construction should be extended permanently and the Department of Transportation’s policy of allowing billboard owners to enter the state’s property to destroy vegetation obscuring their advertising. *Id.* The North Carolina General Statutes define “Outdoor Advertising” as

any outdoor sign, display, light, device, figure, painting, drawing, message, plaque, poster, billboard, or any other thing which is designed, intended or used to advertise or inform, any part of the advertising or information contents of which is visible from any place on the main-traveled way of the interstate or primary system, whether the same be permanent or portable installation.

N.C. GEN. STAT. § 136-128(3) (2001).

3. Act of July 11, 2000, ch. ___, § 2, 1999 N.C. Sess. Laws ___, ___, *available at* http://www.ncleg.net/SessionLaws/2000_/sl20000101/default.htm (on file with the North Carolina Law Review); *see also* Feagans, *supra* note 1, at 1A (stating that the General Assembly extended the 1999 moratorium in 2000 after some “arm twisting” by former governor Jim Hunt, which caused thirteen legislators to change their vote); Gary D.

The moratorium issue resurfaced during the 2001 session when the Senate passed a bill that would have made the ban permanent and increased the ban's coverage from Wilmington to the Tennessee border.⁴ The proposed legislation stalled in the House Committee on Environmental and Natural Resources and expired at the end of the 2001 session without reaching the floor for a vote.⁵ The legislature will likely confront this unresolved issue again in the 2002 session.⁶

The time has come for the General Assembly to abandon the current regulatory structure that is based on an ineffective federal mandate. The legislature should not only extend the ban on new billboard construction permanently, but should redraft the regulations so that removal efforts are more effective, with the ultimate goal of eliminating all nonconforming billboards along North Carolina's highways. The General Assembly should repeal the Outdoor Advertising Control Act and codify state easement law as it pertains to outdoor advertising. This legislative action would allow the state, without running afoul of state or federal statutory and constitutional requirements, to prevent new sign construction and remove existing signs without compensating owners.

This Comment addresses outdoor advertising regulation and proposes a method for the State of North Carolina to regulate billboards using North Carolina easement law while, at the same time, adhering to the requirements of federal law. This Comment first presents a brief overview of the current federal and state statutory law governing outdoor advertising regulation. It then discusses North Carolina easement law and finds that the easement appurtenant "right to be seen" of the sign by the traveling public governs billboard regulations. Finally, this Comment challenges the North Carolina

Robertson, *I-40 Future Up In the Air as Billboard Ban Expires: Advocates Want to Make Moratorium Permanent, But Group of Pro-business Lawmakers Wants to Kill It*, THE HERALD-SUN (Durham, N.C.), June 29, 2001, at B8 (noting then Governor Jim Hunt's involvement in changing the minds of several House members).

4. See S. 1098, 2001 Gen. Assem., 2001 Session (N.C. 2001); Eric Dyer, *Senate Endorses Billboard Ban*, NEWS & RECORD (Greensboro, N.C.), Aug. 26, 2001, at B1; Feagans, *supra* note 1, at 1A.

5. See Robertson, *supra* note 3, at B8 (discussing the expiration of the moratorium on billboard construction along highway 40); *Record Legislation Session, Back in May*, THE HERALD-SUN (Durham, N.C.), Dec. 9, 2001, at A10 (discussing the conclusion of the North Carolina legislature's eleven-month session).

6. In fact, the legislation is eligible for consideration in the 2002 Short Session. See Memorandum from Dianna W. Jessup, Staff Attorney, Research Division, on Bills Eligible for Consideration by the General Assembly During the 2002 Regular Session of the 2001 General Assembly (the "Short Session") 1, B-8 (May 8, 2002), at http://www.ncleg.net/ncgadocuments/eligiblebills_/billseligiblefo/default.htm (last accessed on Aug. 3, 2002) (on file with the North Carolina Law Review).

General Assembly to abandon the existing statutory scheme⁷ and codify state easement law as the means to control outdoor advertising.⁸ It also addresses and dismisses possible constitutional and statutory challenges to the proposed legislation. This Comment concludes by finding the abutting landowner's "right to be seen" as an easement appurtenant. Thus, billboard regulation is governed by principles of property law, which allow North Carolina to remove nonconforming outdoor advertising without compensating the owner of the sign or the land upon which it sits.⁹

Protecting the aesthetics of the land surrounding our nation's highways has long been of interest to policymakers. Concerns over environmental and aesthetic impacts of the highway on the surrounding land motivated the federal government's initial attempts at highway beautification.¹⁰ The Federal-Aid Highway Act of 1958,¹¹

7. See ALLETTA BELIN ET AL., A LEGAL HANDBOOK FOR BILLBOARD CONTROL 22 (1976) (arguing that lobbying efforts of the outdoor advertising industry strongly influenced the existing statutory scheme).

8. This Comment takes the position that removal of outdoor advertising along North Carolina's highways is a desirable goal. Although this Comment does not discuss the arguments for and against billboard regulation, it is interesting to note some of the main arguments presented by both sides. Proponents of regulation generally favor removal of billboards for aesthetic and environmental reasons. See, e.g., *Enough Billboards Along Our Highways*, MORNING STAR (Wilmington, N.C.), June 29, 2001, at 10A (favoring "a more scenic and pleasant drive" to letting the "parasites" continue to build signs that "litter" the land); Robertson, *supra* note 3, at B8 ("The Sierra Club and other conservation groups . . . say [I-40's] 700 billboards are ugly and mar the state's natural beauty."). The powerful advertising industry combats this claim by stating that "aesthetics are subjective", BARRY D. TEATER, BILLBOARD REGULATION IN NORTH CAROLINA 12 (1984) (quoting lobbyist Betty Mann who is vice president for corporate development and legal counsel at the Raleigh-Durham Division of Naegele Outdoor Advertising Companies), and "[i]f you want to see beauty and scenery and stuff, you get off the main roads." *Id.* at 13 (quoting R.O. Givens of R.O Givens Advertising Co.). Critics of laws banning billboards also cite the utility in providing tourists with information and businesses with a cheap form of advertising. *Id.* at 14. A 1997 study found that over seventy-six percent of the respondents viewed billboards as useful and that ninety percent of travelers rely on the signs to find gas, food, lodging, and attractions. Tony Adams, *Billboards Help Out Travelers*, MORNING STAR, July 20, 2001, at 9A. Further, critics refute the arguments that billboards are hazardous to the safety of the traveling public or to the environment. TEATER, *supra*, at 16-18.

9. See, e.g., Ruth I. Wilson, *Billboards and the Right to be Seen from the Highway*, 30 GEO. L. J 723, 724-29 (1942) (discussing billboard regulation under property law as analyzed by *Perlmutter v. Greene*, 182 N.E. 5 (N.Y. 1932)).

10. Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463, 468-77 (2000); BELIN, *supra* note 7, at 19. Congress's first action was the Federal-Aid Highway Act of 1938, which allowed for the landscaping of the highway and development of roadside business. BELIN, *supra* note 7, at 19. For a more extensive history of federal billboard regulation, see generally Albert, *supra*, at 462, which discusses the current state of the Highway Beautification Act and uses its history to explore Congress's limits under the Spending

and later, the Highway Beautification Act of 1965¹² represent Congress's first attempts to control outdoor advertising by encouraging state regulation.¹³ These Acts set guidelines for the states to follow in drafting their own regulations and provide incentives to regulate pursuant to these guidelines.¹⁴ Although widely criticized,¹⁵ the Highway Beautification Act provides the foundation for all state statutory schemes regulating outdoor advertising.¹⁶

The federal Highway Beautification Act of 1965 was a product of President Johnson's Great Society initiatives.¹⁷ The purpose of the Highway Beautification Act was "to protect the public investment in . . . highways, to promote the safety and recreational value of public travel, and to preserve natural beauty."¹⁸ The Act levies a ten percent penalty on federal highway funds against states that fail to make provisions for "effective control" of outdoor advertising.¹⁹ "Effective

Clause. Although beyond the scope of this Comment, much has been written about the validity of regulation premised on aesthetic values. *See, e.g.*, Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697, 746 (1995) ("Judicial tolerance of aesthetic goals standing alone creates an atmosphere in which the visual resource, and the role it plays in shaping the community, is freely explored."); Harold L. Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439, 442 (1986) ("Indeed, an absolute ban on all public issue billboards or signs for aesthetic or traffic reasons would be no more justifiable than an absolute ban on leafletting to prevent littering . . ."); Stephanie L. Bunting, Note, *Unseen Politics: Aesthetics, Sign Ordinances, and Homeowners' Speech in City of Ladue v. Gilleo*, 20 HARV. ENVTL. L. REV. 473, 474 (1996) ("Despite this support for aesthetic regulation, land use laws are not immune to constitutional challenges, and aesthetic zoning in particular presents significant First Amendment concerns.").

11. Federal-Aid Highway Act of 1958, Pub. L. No. 85-767, 76 Stat. 902 (1958).

12. Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028 (codified as amended in scattered sections of 23 U.S.C.).

13. BELIN, *supra* note 7, at 19.

14. *Id.* The Federal-Aid Highway Act provided an incentive, or bonus, to states that chose to regulate. *Id.* Congress abandoned this scheme in the Highway Beautification Act, choosing instead to impose a penalty on states that fail to regulate. *Id.* The Highway Beautification Act exclusively controls federal regulation of outdoor advertising. *Id.* at 24.

15. *See, e.g.*, Albert, *supra* note 10, at 464 (criticizing the Act as leaving "behind an unfunded program of billboard removal, together with a financial penalty to be levied on states that might decide to use their police power to amortize billboards out of existence"). *See generally* CHARLES F. FLOYD & PETER J. SHEDD, HIGHWAY BEAUTIFICATION: THE ENVIRONMENTAL MOVEMENT'S GREATEST FAILURE (Westview Replica Ed., 1979) (discussing the issues surrounding the adoption of the Highway Beautification Act and why it failed to fulfill its purpose).

16. *See* BELIN, *supra* note 7, at 24 (examining the federal foundations of regulating billboard advertising along highways).

17. *Id.* at 19; Albert, *supra* note 10, at 463.

18. 23 U.S.C. § 131(a) (2000).

19. § 131(b); *see also* § 104 (providing for the apportionment of highway funds to states).

control” means restricting all advertising within 660 feet of the highway, and in rural areas this restriction is extended beyond 660 feet for signs visible from the highway and erected for the purpose of being seen from the highway.²⁰ The definition of “effective control” provides for only a few exceptions.²¹ Directional and official signs, such as those marking natural, scenic, and historic attractions, are exempt as long as they comport with national standards on size, number, spacing, and lighting.²² Furthermore, signs can be used for the sale or lease of the land upon which the sign stands and to advertise activities conducted on the land.²³ Unless the sign falls into one of these or one of the other minor exceptions,²⁴ “effective control” requires their removal to avoid the ten percent penalty on highway funds.²⁵

The most controversial aspect of the Highway Beautification Act is the just compensation requirement.²⁶ The Act expressly mandates that the federal and state governments pay the owner just compensation upon removal of signs that were lawfully erected, but

20. § 131(c).

21. *Id.*

22. § 131(c)(1).

23. § 131(c)(2)–(3). As discussed further below, the origin of this exemption has its roots in the public policy considerations relating to easement law and land use generally. See *infra* notes 82–85 and accompanying text.

24. See § 131(c)(4)–(5), (d), (f), & (o) (exempting landmark signs, “free coffee” signs, signs of customary use, signs providing specific information in the interest of the traveling public, and where removal would cause substantial economic hardship in an area). As might be expected, the legislation targets rural areas. Section 131(d), for example, exempts from these provisions signs in zoned or unzoned commercial or industrial areas. According to Congressional hearings, this would have meant that approximately seventy-one percent of off-premises signs would have to be removed in rural areas. BELIN, *supra* note 7, at 35 n.11. Although beyond the scope of this Comment, it is interesting to note that this exemption could hinder many of the cities across the country, including those in North Carolina, such as Durham, from making significant efforts to revitalize their inner cities. See, e.g., Mark Binker, *Council Looks at Vibrant Oklahoma City; The Privately Funded Trip Appears Geared Towards Selling Members on That City's Aggressive Approach to Redevelopment*, NEWS & RECORD (Greensboro, N.C.), July 30, 2002, at B1 (discussing trip where six city council members flew to Oklahoma City and other cities to study economic development plans); Ronnie Glassberg, *Barnes Recovery Awaited, Longtime Residents Anxious for Neighborhood to Regain Charm That it Held in Decades Past*, THE HERALD-SUN (Durham, N.C.), Feb. 17, 2002, at A1 (discussing Barnes Avenue project estimated to cost between \$8.5 and \$10.4 million); Chris Serres, *Local Media Giant Expanding Its Reach*, THE NEWS & OBSERVER (Raleigh, N.C.), Mar. 2, 2002, at D1 (noting Capital Broadcasting's assistance in redevelopment in Durham since it built the baseball stadium in 1995).

25. § 131(b)–(c).

26. See BELIN, *supra* note 7, at 21 (“Predictably, the provision in subsection (g) requiring ‘just compensation’ upon removal of certain signs has elicited the most vehement criticism of the law.”).

which the Act makes unlawful.²⁷ Under the statute, the federal government is obligated to pay seventy-five percent of such compensation, and the state is responsible for the remaining twenty-five percent.²⁸ The lack of federal funds available to pay the billboard owners, however, has been the biggest obstacle to the implementation of this Act.²⁹ Because the federal government has not reimbursed states for the federal government's share, states have been hesitant to remove nonconforming signs for fear of having to pay the entire cost of just compensation.³⁰ The states stand to lose federal funding if they do not comply, however, as the Act provides the framework that state regulation must follow to avoid the ten percent loss of highway funds, and requires that states take measures for "effective control" and pay just compensation for the removal of lawfully erected signs.³¹

In 1967, the North Carolina General Assembly enacted the Outdoor Advertising Control Act (OACA) to comply with a Congressional mandate, enforced through the strong arm of the Spending Clause.³² Drafted to comply with the federal act, OACA regulation parallels the provisions for effective control detailed in the Highway Beautification Act.³³ The OACA contains the same prohibition of signs within 660 feet of the highway's right-of-way, with exceptions for directional and official signs, as well as signs advertising on-premises activities.³⁴ Like the federal statute,³⁵ it extends the restrictions beyond 660 feet in rural areas.³⁶ To enforce the provisions of the OACA, the legislature vested power in the

27. § 131(g).

28. *Id.*

29. See BELIN, *supra* note 7, at 21–23 (arguing that the "just compensation" requirement has made removal of billboards impossible); Albert, *supra* note 10, at 502–06 (discussing the inadequate funding of the billboard removal program).

30. See KATHERINE E. SLAUGHTER, A ROAD WITH A VIEW: A LEGAL HANDBOOK ON BILLBOARD REGULATION IN NORTH CAROLINA 24 (Southern Environmental Law Center 1989) (finding that Congress has not appropriated funds to pay the federal share of compensation since 1981).

31. See *infra* notes 146–76 and accompanying text.

32. See SLAUGHTER, *supra* note 30, at 23 (finding that North Carolina drafted the legislation and signed the Federal-State Agreement in January of 1973 to carry out the intent of the federal Highway Beautification Act); see also Outdoor Advertising Control Act, N.C. GEN. STAT. §§ 136-126 to 136-140.1 (2001).

33. SLAUGHTER, *supra* note 30, at 27 ("Because the North Carolina Outdoor Advertising Control Act tracks the federal law, it is flawed in the same ways as the Highway Beautification Act.").

34. N.C. GEN. STAT. § 136-129 (2001).

35. 23 U.S.C. § 131(b) (2000).

36. N.C. GEN. STAT. § 136-129.1 (2001).

Department of Transportation to issue permits and regulate signs in compliance with the law.³⁷

Although drafted to comply with the federal mandate and combat the proliferation of billboards on North Carolina highways, the effects of OACA have been sparse, especially since Congress cut federal funding in 1981.³⁸ Congress's decision to cut funding, and the states' resultant hesitation to regulate in compliance with the HBA, undercuts the effectiveness of the HBA. Thus, the current regulations are not fulfilling OACA's stated purpose to promote safe highways and preserve and enhance the natural beauty for travelers.³⁹ The General Assembly should abandon the current regulatory structure that is based on an ineffective federal mandate. It should permanently ban new billboard construction and redraft current regulations regarding existing structures to make removal efforts more effective so that the ultimate goal of eliminating billboards along North Carolina highways can be attained. North Carolina can justify removal of such signs based on the principles of property law, specifically the law of easements.

Although federal law attempts to control highway beautification, state property law controls the acquisition of property upon which the highways are built and, as a result, the regulation of advertising thereon. Congress authorized the creation of an interstate highway system to support commerce and for use in national and civil defense.⁴⁰ It delegated the task of implementing the system, however, to the individual states, and state law controls the acquisition of real property needed to build interstate highways.⁴¹

Because state laws govern the acquisition of property used to build interstate highways,⁴² it is necessary to examine North Carolina

37. § 136-130.

38. See TEATER, *supra* note 8, at 26 ("With no more federal money on its way here, [North Carolina] discontinued its billboard removal program soon after the federal funding was cut back."); see also *supra* note 32 and accompanying text.

39. See N.C. GEN. STAT. § 136-127 (2001).

40. 23 U.S.C. § 101(b) (2000).

41. 23 C.F.R. 710.203(b)(1) (2001); see also N.C. GEN. STAT. § 136-89.50 (2001) (giving North Carolina Department of Transportation the power to acquire land for Federal Aid Primary System); *United States v. Certain Parcels of Land*, 209 F. Supp. 483, 484 (1962) (noting that participating states have the "responsibility . . . for the routing, planning, right-of-way acquisition and construction of the interstate highways, subject to the prior approval of the Secretary of Commerce of routes, plans and construction projects").

42. North Carolina's powers of eminent domain for purposes of building roads are codified in section 136-19 of the General Statutes of North Carolina. Section 136 grants the North Carolina Department of Transportation the power to "designate, establish,

property law to determine the extent to which the state can regulate the implementation of the federal highway program. Whichever method the state uses to acquire the land, North Carolina courts have determined that the state's interest is so enduring that it constitutes a fee simple interest in the property.⁴³ Even when the state acquires a fee simple interest in land for purposes of building a highway, the state only acquires the land immediately adjoining the highway for purposes of upkeep. Billboards are built on the land of the abutting landowner, not the state's land. The value of a billboard depends on the ability of the traveling public to view its contents. The advertiser, therefore, uses the sign's proximity to the public road to attract travelers. As will be explored *infra*, the "right to be seen" is in the nature of an appurtenant easement owing its existence merely to the fact that the land abuts the highway. The right to be seen, however, is limited in scope. Due to the limitations on this right, billboard use is limited by property law. The easement appurtenant nature of the "right to be seen" should be the impetus for revising North Carolina's billboard regulation.

Because the state acquires a fee simple interest in the property upon which the highway is built, North Carolina easement law governs the abutting landowner's right to use the highway.⁴⁴ An easement is a "nonrevocable right to use or enjoy land of another person for a special purpose not inconsistent with a general property right in the [land's] owner."⁴⁵ The easement right is nonpossessory and limited in purpose.⁴⁶

abandon, improve, construct, maintain and regulate controlled-access facilities as a part of the State highway system, National System of Interstate Highways, and Federal Aid Primary System . . ." § 136-89.50. The state acquires land to build interstate highways through purchase agreements, donations from landowners, dedication, prescription, or condemnation. *Hughes v. N.C. State Highway Comm'n*, 2 N.C. App. 1, 6, 162 S.E.2d 661, 664, *rev'd on other grounds*, 275 N.C. 121, 165 S.E.2d 661, 664 (1968).

43. *See N.C. State Highway and Public Works Comm'n v. Black*, 239 N.C. 198, 202-03, 79 S.E.2d 778, 782 (1954) (finding that the state acquires the land for highway purposes completely and indefinitely and "the difference between an easement of this nature and extent and a fee simple estate in the land covered by the right of way is negligible"); *Statesville v. Bowles*, 6 N.C. App. 124, 129, 169 S.E.2d 467, 470 (1969) (holding a jury instruction valid because the easement taken by the state was for all practical purposes a fee simple because the state has "the complete and perpetual right to occupy and use the land to the total exclusion of the owner of the fee"); *see also Duke Power Co. v. Rogers*, 271 N.C. 318, 321, 156 S.E.2d 244, 247 (1967) (finding error in a jury charge regarding an easement granted to a power company because it applied the incorrect rule usually applied in a situation where the state acquires land for highways or railroads where the "value of the easement is virtually the value of the land it embraces").

44. *See supra* note 43 and accompanying text.

45. 1 JAMES A. WEBSTER JR., *WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA: POSSESSORY ESTATES AND PRESENT INTERESTS IN REAL PROPERTY* § 15-1

North Carolina recognizes two types of easements: easements in gross and easements appurtenant. An easement in gross is an interest in, or right to use, the land of another that is personal and usually ends at the easement holder's death.⁴⁷ In contrast, an easement appurtenant is attached to the land, passes with the land, and has the purpose of benefiting the land.⁴⁸ For an easement appurtenant to exist, there must be two tracts of land—a dominant estate and a servient estate—owned by two different parties.⁴⁹ The dominant estate benefits from the easement rights, and the servient estate is burdened.⁵⁰ As discussed *infra*, the ability to regulate billboard advertising with property law analysis derives from the property rights accompanying easements appurtenant.⁵¹ A few qualities of easements appurtenant prove essential to the analysis of billboard regulation.

First, the owner of the dominant estate must limit the use of the easement to that “which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated.”⁵² In using the easement as contemplated, the dominant owner is limited to activities connected with the use and enjoyment of the dominant estate.⁵³ The dominant owner, therefore, cannot use the easement for purposes unconnected with the dominant estate.⁵⁴ This issue arose in *Sparrow v. Dixie Leaf Tobacco*

(5th ed. 1999) [hereinafter WEBSTER].

46. *Id.*

47. *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963). An example of such an easement would be a landowner granting a friend the right to come upon the land to fish and hunt.

48. *See id.*

49. WEBSTER, *supra* note 45, § 15-3.

50. *Id.*

51. *See infra* notes 74–85 and accompanying text.

52. *Keller v. Cochran*, 108 N.C. App. 783, 784–85, 425 S.E.2d 432, 434 (1993) (citation omitted).

53. *See Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185–86 (1963) (“An easement appurtenant is incident to an estate, and inheres in the land, concerns the premises, [and] pertains to its enjoyment . . .”); *City of Statesville v. Bowles*, 6 N.C. App. 124, 130, 169 S.E.2d 467, 471 (1969) (finding the law well settled that the easement can be used only for those activities that directly or incidentally advance the purpose for which the dominant estate was acquired); *see also Sparrow v. Dixie Leaf Tobacco Co., Inc.*, 232 N.C. 589, 594, 61 S.E.2d 700, 703 (1950) (finding the use of a building for tobacco storage and redrying was a misuse of the easement); *Keller*, 108 N.C. App. at 784–85, 425 S.E.2d at 434 (citation omitted).

54. For example, if an easement were granted so that the dominant estate could use water on the servient estate for purposes of irrigating the crops on the dominant estate, the owner of the dominant estate would not have the right to use the servient estate for fishing.

Company,⁵⁵ where the Atlantic and North Carolina Railroad Company owned an easement appurtenant to the plaintiff's property.⁵⁶ According to the North Carolina Supreme Court, the easement was limited to those activities "reasonably necessary for or convenient to the operation of the railroad," not for tobacco redrying and storage.⁵⁷ North Carolina easement law is clear that the owner of an easement appurtenant must use the easement rights "as may be necessary to a reasonable and proper enjoyment of [the holder's] premises."⁵⁸

Further, the easement "is limited to the land it was created to serve and cannot be extended to other land or other landowners"⁵⁹ The easement appurtenant is attached to the dominant estate and is not a personal interest of the property owner.⁶⁰ Accordingly, the easement could not be used to access land adjacent to the dominant estate, even if owned by the same landowner; the easement can only benefit the dominant estate.⁶¹ In *Frost v. Robinson*,⁶² for example, the defendant jointly owned an easement for a driveway serving four different lots.⁶³ The court held that the defendant's purported transfer of this easement to another neighbor was invalid because the easement appurtenant was created solely to serve the initial four lots.⁶⁴ An easement appurtenant, therefore, cannot be used by other landowners or other property for purposes unconnected with the use and enjoyment of the dominant estate.

Finally, because an easement appurtenant is attached to the dominant estate, it is impossible to transfer the rights of the easement without also transferring the dominant estate.⁶⁵ The rights of the easement exist only if the same person owns the easement and the dominant estate.⁶⁶ In *Wood v. Woodley*,⁶⁷ the defendant's neighbor

55. 232 N.C. 589, 61 S.E.2d 700 (1950).

56. *Id.* at 592, 61 S.E.2d at 702.

57. *Id.* at 592, 61 S.E.2d at 703.

58. *Hine v. Blumenthal*, 239 N.C. 537, 546, 80 S.E.2d 458, 465 (1954).

59. *Frost v. Robinson*, 76 N.C. App. 399, 400, 333 S.E.2d 319, 320 (1985).

60. *Id.*

61. *Hales v. Atl. Coast Line R.R. Co.*, 172 N.C. 104, 107, 90 S.E. 11, 12 (1916).

62. 76 N.C. App. 399, 333 S.E.2d 319 (1985).

63. *Id.* at 399, 333 S.E.2d at 320.

64. *Id.* at 400, 333 S.E.2d at 320.

65. See *Skvarla v. Park*, 62 N.C. App. 482, 486, 303 S.E.2d 354, 357 (1983) ("An appurtenant easement is an incorporeal right attached to the land; it is incapable of existence apart from the dominant estate, and it passes with the transfer of title to the land.").

66. *Yount v. Lowe*, 288 N.C. 90, 97, 215 S.E.2d 563, 567 (1975).

67. 160 N.C. 17, 75 S.E. 719 (1912).

attempted to grant the defendant the right to use the defendant's neighbor's right of way.⁶⁸ The North Carolina Supreme Court held the attempted conveyance invalid, as the neighbor "had no power to convey to [the defendant] either a right of way in gross or a right of way appurtenant" apart from conveying the entire dominant estate.⁶⁹ Thus, under North Carolina property law, an easement appurtenant "cannot be conveyed separate from the land to which it is appurtenant."⁷⁰

To formulate billboard regulation based on property law, the property interests of both the state and the outdoor advertiser must be balanced under North Carolina easement law. The first step under this approach is to determine the interest that the abutting landowner and advertising companies have in building and maintaining outdoor advertising signs. To this end, a well-known adage parallels the inquiry: *If a tree falls in the woods, and no one hears it, does it make any noise?* Similarly, if a billboard is built off a road, so that no one can see it from the public thoroughfare, does it have any value? Clearly the resource being exploited by the billboard owner is the view by the traveling public upon the state's road.⁷¹ This interest is an easement appurtenant, where the property containing the billboard is the dominant tract and the highway is the servient tract.⁷²

If the value of the billboard lies in its view by the public, it is important to determine whether there is a "right to be seen" under North Carolina law. The only case in North Carolina to discuss the "right to be seen" of billboards from public highways is *Adams Outdoor Advertising v. North Carolina Department of Transportation*.⁷³ On the theory that obstruction of a billboard from the highway constituted a taking requiring compensation, the plaintiff, an advertising company, sued the state for planting trees and vegetation obstructing the view of its billboard.⁷⁴ In refusing to recognize a taking based upon the "right to be seen," the North Carolina Court of Appeals analogized the case at hand to *Wofford v.*

68. *Id.* at 18, 75 S.E. at 720.

69. *Id.* at 19, 75 S.E. at 720.

70. *Frost v. Robinson*, 76 N.C. App. 399, 400, 333 S.E.2d 319, 320 (1985).

71. *See Gen. Outdoor Adver. Co. v. Dep't of Pub. Works*, 193 N.E. 799, 808 (Mass. 1935) ("The only real value of a sign or billboard lies in its proximity to the public thoroughfare within public view.")

72. *See McNeill v. N.C. State Highway Comm'n*, 4 N.C. App. 354, 359, 167 S.E.2d 58, 61 (1969).

73. 112 N.C. App. 120, 434 S.E.2d 666 (1993).

74. *Id.* at 121, 434 S.E.2d at 667.

North Carolina State Highway Commission,⁷⁵ which discusses the abutting landowner's easement interest in accessing the road from his property.⁷⁶ The court viewed the "right to be seen" from the state road as analogous to the "abutting owner's easements of light, air, and access" to the state road.⁷⁷ This decision is significant in two respects: 1) it recognized that the sign owner's property interest at stake is the view of the billboard by the public traveling on a state road, and 2) the holding is partly based on easement law concerning the abutting landowner's interest in state roads.⁷⁸

Because the interest is in the right to be seen, which involves easement principles, billboard use depends on property law governing easements. The opinion in *Adams Outdoor Advertising* analogizes the abutting landowner's "right to be seen" to his right of access to the abutting highway.⁷⁹ Further analysis suggests that an abutting landowner's right to be seen by the traveling public is an easement appurtenant, and therefore its use must comply with North Carolina easement law. As seen in *Wofford*, a North Carolina landowner has a right of access to state roads abutting his property.⁸⁰ The interest that creates this right is the easement appurtenant attached to his land at the burden of the state's road.⁸¹ Following the *Adams Outdoor*

75. 263 N.C. 677, 140 S.E.2d 376 (1965). In *Wofford*, the plaintiffs sued because a highway was closed, turning their street into a cul-de-sac, and making it more difficult for both them and their visitors to get to and from their property. *Id.* at 679-80, 140 S.E.2d at 378. The court held that this was an incidental interference with their right of access and not compensable. *Id.* at 684, 140 S.E.2d at 381.

76. *Adams Outdoor Adver.*, 112 N.C. App. at 124, 434 S.E.2d at 668.

77. *Id.* (quoting *Smith v. State Highway Comm'n*, 257 N.C. 410, 414, 126 S.E.2d 87, 90 (1962)).

78. A number of other jurisdictions recognize the abutter's right to be seen by travelers upon state roads. *See, e.g.*, *Gen. Outdoor Adver. Co., v. Dep't of Pub. Works*, 193 N.E. 799, 808 (Mass. 1935) (finding the right to be seen is not a "natural right" but rather a private seizure of a benefit at the burden of the public); *Outdoor Adver. Ass'n v. Shaw*, 598 S.W.2d 783, 788 (Tenn. Ct. App. 1979) (holding that the "State may with impunity interfere with the view of the motorist to adjacent property so long as the interference is the result of a bona fide program of highway beautification"); *Kelbro, Inc. v. Myrick*, 30 A.2d. 527, 530 (Vt. 1943) ("This right of reasonable view has been generally recognized by the weight of authority and has been protected in numerous cases where encroachments on streets or sidewalks obscured the visibility of signs, window displays or show cases."); *see also* BELIN, *supra* note 7, at 11-17; Wilson, *supra* note 9, at 724-29; Timothy E. Travers, Annotation, *Validity and Construction of Provision Prohibiting or Regulating Advertising Sign Overhanging Street or Sidewalk*, 80 A.L.R.3d 687, § 2(a) (1977).

79. *Adams Outdoor Adver.*, 112 N.C. App. at 124, 434 S.E.2d at 668.

80. *See Wofford*, 263 N.C. at 681, 140 S.E.2d at 380 (finding that the abutting landowner has a private right of reasonable access to the abutting highway known as an easement appurtenant).

81. *See S. Furniture Co. of Conover, Inc. v. Dep't of Transp.*, 133 N.C. App. 400, 404,

Advertising analogy to its logical conclusion, the abutting landowner has a right to be seen that is of the nature of an easement appurtenant.

Public policy considerations also support the conclusion that the landowner's right to be seen by the traveling public is based on an easement appurtenant interest. Abutters' easements are grounded in the courts' view that "public policy favors the improvement and development of land adjoining the public highways."⁸² These are not bargained-for rights; rather they are implied by law, similar to rights for adjacent and subjacent support of land.⁸³ The law implies these rights because "the beneficial use and enjoyment of the land along the highway so completely depend upon the owner having these rights."⁸⁴ Without giving landowners the opportunity to use the roads that abut their property, most, if not all, land would be useless because there would be no means to get from one tract of land to another without crossing the state's road.⁸⁵ The same policy considerations support a right to have the public view the abutting property so that the public can be properly notified if a doctor, grocer, dry cleaner, or even a lawyer is on the premises with goods or services available. The construction of a highway alone risks making surrounding land worthless without allowing the right of egress. It also risks destroying businesses that have always used a sign to notify their customers of the locations of their respective businesses. This ability to post a sign with a right that it be seen from the road is necessary for businesses to mark their presence. Certainly, such a

516 S.E.2d 383, 386 (1999) (finding that North Carolina law is "well settled" and the abutting landowner has a special legal right to access and use the public road); *Dep't of Transp. v. Crain*, 89 N.C. App. 223, 226-27, 365 S.E.2d 694, 697 (1988) (holding that the abutting landowner has a special easement right of access to the public road that the general public lacks); *Emanuelson v. Gibbs*, 49 N.C. App. 417, 421, 271 S.E.2d 557, 559 (1980) (finding that the abutting landowner has an easement appurtenant right to access the public road).

82. *Wilson*, *supra* note 9, at 739.

83. *Id.*

84. *Id.* at 40.

85. The issue was phrased nicely by Judge Vredenburg of the New Jersey Court of Appeals:

When people build upon the public highway, do they inquire or care who owns the fee of the road-bed? Do they act or rely upon any other consideration except that it is a public highway, and they the adjacent owners? Is not this a right of universal exercise and acknowledgment in all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they would soon become tenantless? It is a right essential to the very existence of dense communities. . . . It is a right founded on such urgent necessity that all laws and legal proceedings take it for granted.

Wilson, *supra* note 9, at 731 (quoting *Barnett v. Johnson*, 15 N.J. Eq. 481, 487-89 (1863)).

right to notify the public is necessary for the improvement and development of land along highways.

To assist North Carolina in developing a system for regulating billboards, an analysis of other states' regulatory schemes is useful. The regulatory system in Vermont, for instance, provides an apt comparison because of its great success in abolishing off-site advertising⁸⁶ on its public roads.⁸⁷ The Vermont courts have upheld billboard regulation recognizing that the abutting landowner has a "right to be seen" interest in the nature of an easement appurtenant.⁸⁸ In *Kelbro v. Myrick*,⁸⁹ the plaintiff, an outdoor advertising company, sought an injunction restraining the State of Vermont from removing the company's billboards.⁹⁰ The court first determined that "[i]n its essence the right that [was] claimed [was] to use the public highway for the purpose of displaying advertising matter."⁹¹ The court found this right to be a private right arising from the ownership of land abutting a public highway similar to the right of access—regardless of whether the state or the landowner actually owned the fee in the land upon which the highway was built.⁹² These rights are in the nature of appurtenant easements governed by the law of easements,⁹³ where the abutting property is the dominant estate and the highway the servient estate.⁹⁴ The court further held that this right did not include

86. A model ordinance proposed by Katherine E. Slaughter of the Southern Environmental Law Center defines an "Off-site Sign" or "Off-site Advertising" as: "Any sign that is used to attract attention to an object, person, product, institution, organization, business, service, event or location that is not located on the premises upon which the sign is located. This definition does not include governmental traffic, directional, or regulatory signs or notices of the federal, state, county or city government or their public agencies." SLAUGHTER, *supra* note 30, at 31.

87. BELIN, *supra* note 7, at 15.

88. See *Micalite Sign Corp. v. State Highway Dep't*, 236 A.2d 680, 681 (Vt. 1967); *Kelbro, Inc. v. Myrick*, 30 A.2d 527, 529-30 (Vt. 1943). As discussed further below, see *infra* note 165 and accompanying text, the Vermont legislature drafted billboard regulation to comply with the federal Highway Beautification Act that severely limited the utility of the law on the "right to be seen." See *Vermont v. Brinegar*, 379 F. Supp. 606, 614 (D. Vt. 1974).

89. 30 A.2d 527 (Vt. 1943).

90. *Id.* at 528.

91. *Id.* at 529.

92. *Id.* ("While the cases involving such [private] rights relate, mainly, to questions of ingress and egress, light and air, and lateral support, neither logic nor sound legal principle exclude the recognition of other rights equally valuable to an abutting owner.")

93. The court did not actually decide whether or not the right was an actual interest but conceded that "whether they are true easements in the strictest sense they are at least rights in the nature of appurtenant easements . . ." *Id.* at 529-30.

94. *Id.* at 530.

the right to advertise for a business conducted off-premises.⁹⁵ Therefore, there was no right at stake, and the state could remove the sign.⁹⁶

The nature of the rights involved, considerations of public policy, and the persuasive rationale of Vermont's courts compel the conclusion that billboard advertising in North Carolina should be controlled by state easement law. Applying this framework, the abutting property is the dominant tract and the highway is the servient tract, as it receives certain benefits, such as direct access and right to be seen.⁹⁷ The state acquires a fee simple interest in the property condemned and the completed highway does not require the use of any surrounding land; therefore the state's land cannot be considered the dominant tract.⁹⁸

Because the law of easements governs billboard use, there are certain limiting principles that apply to such advertising. First, owners of an easement appurtenant must use the easement rights only "as may be necessary for the reasonable and proper enjoyment of their premises."⁹⁹ The abutting landowner's right to be seen from the public road is not unlimited. Further, the easement interest is not a separable personal interest; rather it is a private interest that must pertain to the reasonable and proper use of the land.¹⁰⁰ This requirement is exemplified by a landowner who owns a large tract of land used to harvest timber. If the only use for this land is growing and cutting trees for harvest, then presumably a billboard could not advertise for the finished lumber product, even if the same landowner owns the mill that processes the harvest into lumber.¹⁰¹ The landowner could, however, advertise the sale of the unfinished product to the traveling public in the hopes of catching the eye of an owner of a processing mill or a member of the general public in need of firewood. In such a scenario, the landowner would be using the right to be seen for the necessary and reasonable use and enjoyment

95. *Id.*

96. *Id.*

97. *McNeill v. N.C. State Highway Comm'n*, 4 N.C. App. 354, 359, 167 S.E.2d 58, 61 (1969) (finding that the North Carolina Highway Commission is the owner of the servient estate).

98. *See supra* note 43 and accompanying text.

99. *Hine v. Blumenthal*, 239 N.C. 537, 546, 80 S.E.2d 458, 465 (1954); *see also supra* notes 52-58 and accompanying text.

100. *See supra* notes 52-58 and accompanying text.

101. *See supra* notes 52-58 and accompanying text.

of his property—that is, to make a profit in the sale of the timber harvested on the land.¹⁰²

An easement appurtenant cannot be used by other landowners or for other property for purposes unconnected with the use and enjoyment of the dominant estate.¹⁰³ Accordingly, the right to be seen cannot be used for the benefit of other landowners or other land. Continuing the above timber example, the landowner would not have the right to construct a billboard that advertised the mill that purchases the bulk of his timber. For that matter, he could not advertise for the shopping mall a mile down the road from his property. Advertising off-site businesses would benefit other landowners for purposes that are not connected with the use and enjoyment of his property.

An appurtenant easement “cannot be conveyed separate from the land to which it is appurtenant.”¹⁰⁴ This principle is perhaps the most important in billboard regulation because most outdoor advertising signs are owned by advertising companies who lease the land upon which the signs are built. The right to be seen, however, cannot be conveyed to an advertising company or anyone else who wishes to advertise on the abutting land. The owner of the land used for timber harvesting, therefore, could not transfer this right to the owner of the shopping mall down the street. Only the owner of the land abutting the public road can assert the right to be seen, for his own purposes to advertise activities on his land.

Together, these principles make it possible to eliminate virtually all outdoor advertising in North Carolina. The abutting landowner can only construct an advertisement that is necessary for the reasonable use and enjoyment of his land. Such a restriction is consistent with both federal and state statutes that expressly exempt outdoor advertising for activities conducted on the premises of the abutting land.¹⁰⁵

Pursuant to this interpretation of easement law, the North Carolina General Assembly should redraft the outdoor advertising regulations to more effectively control billboards along public

102. *See supra* notes 52–58 and accompanying text.

103. *See supra* notes 59–64 and accompanying text.

104. *Frost v. Robinson*, 76 N.C. App. 399, 400, 333 S.E.2d 319, 320 (1985); *see also supra* notes 65–70 and accompanying text.

105. *See, e.g.*, 23 U.S.C. § 131(c) (2000) (defining “effective control” to exempt signs advertising the sale or lease of the land or activities conducted upon the land); N.C. GEN. STAT. § 136-129 (2001) (exempting signs that advertise the sale or lease of the land, temporary signs for roadside crop sales, and activities conducted on the property).

highways. First, the billboard moratorium for new construction should be extended permanently. Furthermore, the new legislation should vest in the Department of Transportation the power to remove nonconforming signs immediately, with no amortization period or compensation.¹⁰⁶ Ideally, the term “nonconforming sign” should include all signs, except for official and directional signs, and signs advertising activities on the land upon which they stand.¹⁰⁷ The legislature could, however, provide for other exceptions as long as it obeys the strictures of the Equal Protection Clause of the United States Constitution.¹⁰⁸ Finally, the legislation should provide for tight restrictions regarding the use of conforming signs to minimize their burden on the public highway.¹⁰⁹ Because of the structure of North Carolina easement law, the legislature can enact such legislation without violating either the federal or state constitutions, or the Highway Beautification Act.¹¹⁰

There has been an abundance of litigation concerning whether the takings clause presents an obstacle to the states’ ability to regulate billboard construction.¹¹¹ The takings clause of the Fifth Amendment of the U.S. Constitution provides that “private property [shall not] be taken for public use . . . without just compensation.”¹¹² The Amendment’s prohibition applies to the states through the Due

106. See *infra* notes 111–45 and accompanying text.

107. See *supra* notes 100–03 and accompanying text.

108. As pertaining to billboard regulation, conforming to the strictures of the Equal Protection Clause has not proven to be much of a problem because courts will only look to see that there is a rational basis for the distinction. See, e.g., *A-S-P Assoc. v. Raleigh*, 298 N.C. 207, 226–28, 258 S.E.2d 444, 457–58 (1979) (upholding a local ordinance that forbade billboards in land designated as a historic district); *Schloss v. Jamison* 262 N.C. 108, 118, 136 S.E.2d 691, 698 (1964) (quoting *Rockingham Hotel Co. v. N. Hampton*, 146 A.2d 253, 255 (N.H. 1958)) (concluding that separately classifying signs advertising businesses conducted upon the premises where the signs are located as a permitted use is a reasonable classification not depriving the plaintiff of equal protection); *Summey Outdoor Adver., Inc. v. County of Henderson*, 96 N.C. App. 533, 540, 386 S.E.2d 439, 444 (1989) (“Based upon the foregoing [equal protection analysis], we find that the off-premise/on-premise classification is a constitutionally valid basis for regulation of outdoor advertising signs.”); *County of Cumberland v. E. Fed. Corp.*, 48 N.C. App. 518, 525–26, 269 S.E.2d 672, 677 (1980) (holding that billboard restrictions based on commercial zoning ordinances are not unreasonable and therefore do not deny equal protection of the law).

109. See *Keller v. Cochran*, 108 N.C. App. 783, 784–85, 425 S.E.2d 432, 434 (1993).

110. See *infra* notes 111–76 and accompanying text.

111. See, e.g., *Outdoor Sys., Inc. v. Mesa*, 997 F.2d 604, 609 (9th Cir. 1993); *Ga. Outdoor Adver. Inc. v. Waynesville*, 900 F.2d 783 (4th Cir. 1990); *Naegle Outdoor Adver. v. Durham*, 844 F.2d 172, 173, 178 (4th Cir. 1988); *Major Media of the Southeast, Inc. v. Raleigh*, 792 F.2d 1269, 1273, 1274 (4th Cir. 1986).

112. U.S. CONST. amend. V.

Process Clause of the Fourteenth Amendment.¹¹³ The central issue is whether the state regulation constitutes a “taking” for public use. The United States Supreme Court recognizes two broad types of takings: possessory taking, where there is an actual physical interference with the property,¹¹⁴ and regulatory taking, where the government action leaves no economic use of the property.¹¹⁵ Billboard regulation qualifies as a regulatory taking.¹¹⁶ Under this construction courts will find a regulatory taking if the legislation “does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.”¹¹⁷ In determining the economic viability of the land, it is essential to first consider the interest that the government interfered with in the first place.

Identifying the interest at stake was key to the holding of a leading federal regulatory takings case, *Outdoor Systems, Inc. v. City of Mesa*.¹¹⁸ In that case, the plaintiff advertising company leased small tracts of land, constructed billboards on the land, and leased the advertising space.¹¹⁹ The city enacted a municipal code that conditioned building permits on the removal, without compensation, of all nonconforming¹²⁰ billboards on the land where construction was to be commenced.¹²¹ The advertising company claimed that this code effected an “impermissible taking of property.”¹²² The court recognized two different property interests involved—the landowner’s and the billboard owner’s—and proceeded to consider them separately.¹²³ The court found that the landowner would continue to have an “economically viable use” in developing the land without the billboard and rejected as *de minimis* the contention that it would lose the revenue from the billboard lease.¹²⁴ The court held the

113. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 606 (2001) (citing *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897)).

114. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

115. See, e.g., *Penn. Coal v. Mahon*, 260 U.S. 393, 415 (1922).

116. See, e.g., *Naegele Outdoor Adver.*, 844 F.2d at 178 (remanding to the district court to determine whether the ordinance denied the plaintiff “economically viable use” of the property).

117. *Id.* at 175–76 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

118. 997 F.2d 604 (9th Cir. 1993).

119. *Id.* at 608.

120. Mesa’s sign code prohibited all commercial off-site signs. *Id.*

121. *Id.* at 609.

122. *Id.*

123. *Id.* at 617.

124. *Id.*

municipal government's act "insufficient to constitute a taking where the land may still be put to an economically viable use."¹²⁵ In analyzing the billboard owner's interest, the court found it necessary to "look to state law to determine 'what property rights exist and who is entitled to recover for a taking.'"¹²⁶ The court found that under Arizona law, the advertising company did not have a vested property right to continue the use of a nonconforming sign, and, therefore, there was no taking.¹²⁷ The court held that the city's code did not facially violate the Takings Clause of the Fifth Amendment.¹²⁸

In applying the Takings Clause analysis outlined above to the suggested North Carolina legislation, it is clear that the deprivation of an easement appurtenant interest does not provide justification for finding a taking that requires just compensation. Generally, courts have had no difficulty finding billboard regulation to be a legitimate state interest; consequently, the analysis usually focuses on whether the regulation left the property economically useless.¹²⁹ North Carolina has a legitimate interest in regulating outdoor advertising.¹³⁰ Therefore, the issue is whether any provision would render either the

125. *Id.*

126. *Id.* (quoting *Milens of Cal. v. Richmond Redev. Agency*, 665 F.2d 906, 909 (9th Cir. 1982)).

127. *Id.* ("As there is no property right under Arizona law to continue a nonconforming use once that use is altered, it cannot be an unconstitutional taking to require a nonconforming billboard to be removed once the land on which it stands changes use.").

128. *Id.* at 618.

129. See BELIN, *supra* note 7, at 40 ("Most courts have taken the view that regulation and removal of billboards is a valid exercise of the police power because it bears a 'reasonable and substantial relation' to health, safety, morals, or general welfare of the community."); see, e.g., *Outdoor Sys.*, 997 F.2d at 611, 616 (finding that prohibiting commercial off-site signs "advanced[d] the cities' twin goals of esthetics and safety" and recognizing that "'economically viable use' has yet to be defined with much precision"); *Ga. Outdoor Adver. Inc. v. Waynesville*, 900 F.2d 783, 787 (4th Cir. 1990) (finding that the prohibition of all off-premises advertising a proper exercise of police power and "the crucial inquiry centers on the second prong of the test: whether the ordinance denies [plaintiff] economically viable use of its property"); *Naegele Outdoor Adver. v. Durham*, 844 F.2d 172, 174, 177 (4th Cir. 1988) (concluding that "the location of the billboard in commercial and industrial areas does not preclude the city from relying on aesthetics to justify its exercise of police power" but remanding for further factual inquiry because a "determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest . . . [that] necessarily requires a weighing of private and public interests' ") (citation omitted).

130. The state's interest in promoting "the safety, health, welfare and convenience and enjoyment of travel . . . and to promote safety on the highways, to attract tourists and promote the prosperity, economic well-being and general welfare of the State," N.C. GEN. STAT. § 136-127 (2001), bears a "'reasonable and substantial relation' to the health, safety, morals, or general welfare of the community." BELIN, *supra* note 7, at 40.

landowner's or billboard owner's interest economically useless. This conflict necessitates considering the interest at stake.

First, a provision banning construction of new billboards does not constitute a taking of private property for public use. Despite the fact that the land would arguably retain an economically viable use,¹³¹ the landowner does not have a legitimate private interest in constructing a billboard. Under the law of easements, the owner of the easement appurtenant cannot use the right to be seen for a use unconnected to the land. Therefore, the landowner could not construct a billboard advertising activities off the premises. Furthermore, the landowner could not lease this right to be seen to an advertising company without leasing the land itself.¹³² Even still, the right to be seen could not be used for purposes unconnected with the land. Because the regulation would not interfere with a vested right, the landowner would not have a takings claim against a state that banned the construction of new billboards that advertise activities unconnected with the land.

Second, a provision permitting the removal of nonconforming signs does not constitute a taking of private property for public use. Nonconforming signs, by definition, involve a use that is inconsistent with the landowner's easement appurtenant interest.¹³³ Their removal, therefore, would not involve a taking of a legitimate property right and thus could not constitute an unconstitutional taking.¹³⁴ The prior use would "have to be classed as an excess use of the privilege, permitted only by indulgence," while new enforcement provisions would "merely limit or withdraw a favor . . ."¹³⁵

Finally, a provision restricting conforming signs does not constitute a taking of private property for public use. The only caveat, however, is that restrictions on conforming signs to further the state's interest in safe and beautiful highways cannot go "too far."¹³⁶

131. As was the case with the defendant landowner in *Outdoor Systems, Inc.*, the land would still have some economically viable use and the regulation would not eliminate the "fundamental attribute of ownership." *Outdoor Sys.*, 997 F.2d at 617 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980)).

132. This leasing situation is rare, because most of these leases are not in fact leases of the land with a right of possession, but rather a right to use the view. See *Wilson, supra* note 9, at 745-46 (stating that the lessee's interest is generally a mere license or, in some cases, an easement, but these agreements rarely grant the right of possession).

133. See *supra* notes 107-08 and accompanying text (discussing the proposed revisions that should be considered by the General Assembly).

134. See *Outdoor Sys.*, 997 F.2d at 617.

135. *Wilson, supra* note 9, at 748.

136. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

Because a conforming sign would involve activities conducted on the premises, restrictions that are too severe could inhibit the property's economic use. A takings analysis is an "essentially ad hoc, factual inquir[y]."¹³⁷ As such, the determination of a violation necessitates weighing the following factors on a case-by-case basis: "(1) The 'economic impact of the regulation on the claimant,' (2) the 'extent to which the regulation has interfered with distinct investment-backed expectations,' (3) the 'character of the governmental action.'"¹³⁸ The legislature should study the effects of such regulation before restricting conforming signs.

In addition to complying with the Fifth Amendment to the Constitution, the suggested legislation must conform to North Carolina constitutional requirements. Interestingly, North Carolina is the only state without an express constitutional requirement of compensation upon a public taking. Nevertheless, North Carolina courts have inferred such a requirement.¹³⁹ The analysis under North Carolina law parallels that used for the federal constitution. *Finch v.*

137. *Naegele Outdoor Adver., Inc. v. City of Durham*, 844 F.2d 172, 174 (4th Cir. 1988) (quoting *Pennell v. City of San Jose*, 485 U.S. 1 (1988)).

138. *Id.* at 176 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

139. *See Stillings v. City of Winston-Salem*, 63 N.C. App. 618, 621 n.1, 306 S.E.2d 489, 492 n.1 (1983), *rev'd on other grounds by* 311 N.C. 689, 319 S.E.2d 233 (1984). Both section 17 and section 19 of the North Carolina Constitution have been used to imply this requirement. *See, e.g., Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14 (1989) ("[A]lthough the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation, this Court has inferred such a provision as a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution."); *In re Annexation Ordinances*, 253 N.C. 637, 651-52, 117 S.E.2d 795, 805 (1961) (holding that "where additional territory is annexed in accordance with the law, the fact that the property of the residents in such area will thereby become subject to city taxes levied in the future, does not constitute a violation" of due process of law under Article I, section 17 of the North Carolina Constitution); *Eason v. Spence*, 232 N.C. 579, 583, 61 S.E.2d 717, 721 (1950) ("Under Article I, Section 17, of the State Constitution, no person can be deprived of his property except by his own consent or the law of the land. The law of the land and due process of law are interchangeable terms."); *Parker v. Stewart*, 29 N.C. App. 747, 747-48, 225 S.E.2d 632, 633 (1976) (holding that Article 1, section 19 of the North Carolina Constitution "provides that no person may be deprived of his property except by the law of the land or expressed another way, except by due process of law."); *see also WEBSTER, supra* note 45, § 19-1 (5th ed. 1999) (stating that North Carolina does not have an express constitutional provision requiring compensation, but that one is clearly implied). Article 1, section 19 of the North Carolina Constitution provides "No person shall be . . . disseized of his freehold, . . . or in any manner deprived of his life, liberty, or property, but by the law of the land." Article 1, section 17 of the North Carolina Constitution provides: "Slavery is forever prohibited. Involuntary servitude, except as a punishment for crime whereof the parties have been adjudged guilty, is forever prohibited."

*City of Durham*¹⁴⁰ sets out the test that North Carolina courts use to determine whether the state is required to compensate for a taking.¹⁴¹ Like the federal law, North Carolina uses a two-part test.¹⁴² The first part is known as the “ends-means” test, which involves a determination of whether the object of the legislation is within the scope of the state’s police power and whether the means chosen are reasonable.¹⁴³ The second part parallels the “economically viable use” test under federal analysis for determining whether the regulation “has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted”¹⁴⁴ North Carolina state courts have acknowledged that the federal and state tests are equivalent.¹⁴⁵ Because the analysis is the same as that under the United States Constitution, none of these proposed legislative provisions would violate the North Carolina Constitution. The new provisions are therefore permissible under both the federal and state constitutions.

Similarly, the proposed legislative scheme would not contravene the federal Highway Beautification Act. The Highway Beautification Act provides for a penalty of ten percent of apportioned federal highway funds for states that fail to provide for “effective control” of outdoor advertising.¹⁴⁶ This penalty represents a significant sum of money, and, therefore, the state legislature has a strong interest in complying with the Act.¹⁴⁷ The crucial determination is the meaning

140. 325 N.C. 352, 384 S.E.2d 8 (1989).

141. *Id.* at 363–64, 384 S.E.2d at 14–15; *see also* *Summy Outdoor Adver., Inc. v. County of Henderson*, 96 N.C. App. 533, 541–43, 386 S.E.2d 439, 444–45 (1989).

142. *See Finch*, 325 N.C. at 363, 384 S.E.2d at 14.

143. *Id.* Basically, this “ends-means” test is similar to a rational basis analysis.

144. *Id.* at 363–64, 384 S.E.2d at 15.

145. *See, e.g., McNeill v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990) (stating that federal court interpretations of the Due Process Clause in the United States Constitution are “persuasive,” but not controlling, in construing North Carolina’s “law of the land” clauses); *Guilford County Dep’t of Emergency Servs. v. Seaboard Chem. Corp.*, 114 N.C. App. 1, 12, 441 S.E.2d 177, 183 (1994) (finding the federal and state tests consistent and analyzing state and federal constitutional claims together); *State v. McCleary*, 65 N.C. App. 174, 180, 308 S.E.2d 883, 888 (1983) (“The Fifth and Fourteenth Amendments to the United States Constitution, together with the Law of the Land Clause of Article I, [section] 19 of the North Carolina Constitution, provide that no person shall be deprived of life, liberty or property without due process of law.”).

146. *See supra* notes 26–31 and accompanying text.

147. For example, North Carolina’s total apportionment in 2001 by the Federal Highway Administration was \$808,207. Federal Highway Administration Highway Statistics 2000, Table FA-4 (May 2002), available at <http://www.fhwa.dot.gov/ohim/ohimstat.htm> (last accessed August 14, 2002) (on file with the North Carolina Law Review).

of “effective control” and its relation to the just compensation requirement.

The principle case addressing effective control and the compensation requirement is *Vermont v. Brinegar*,¹⁴⁸ in which the court held that “ ‘effective control’ . . . includes the requirement that just compensation be paid to those persons affected by the removal of outdoor advertising signs, and a failure or refusal to pay just compensation subjects a state to a [ten] percent reduction in its Federal-aid highway fund allocation.”¹⁴⁹ The court conducted an extensive analysis of the issue, starting with a textual argument based on the use of the word “section” in 23 U.S.C. § 131(c) in directing the manner in which signs should be limited under the Act, rather than “subsection.”¹⁵⁰ According to the court, Congress’s choice of the word “section” expressed its intention that § 131(c) does not alone define “effective control.”¹⁵¹ Accordingly, the provisions of subsection (g) must also be met to provide for “effective control.”¹⁵²

The court further discussed the legislative history to clarify the meaning of the text.¹⁵³ Relying on Congressional floor debates¹⁵⁴ and Congress’s rejection of a 1972 amendment that would have clarified the supposed ambiguity and eliminated the mandatory nature of the compensation provision,¹⁵⁵ the court concluded that legislative history did not contradict its interpretation of § 131.¹⁵⁶ The court further relied on decisions of the Attorney General¹⁵⁷ and the Secretary of

148. 379 F. Supp. 606 (D. Vt. 1974); *see also* Nat’l Adver. Co. v. Ashlord, 678 F.2d 106, 108 (1982) (citing *Brinegar* in holding that a state must provide “effective control” or else lose ten percent of funds).

149. *Id.* at 615.

150. *Id.* at 610; *see also* 23 U.S.C. § 131(c) (“Effective Control means that such signs, displays or devices [covered by the Act] . . . shall, pursuant to this section, be limited to [various exemptions].”).

151. *Brinegar*, 379 F. Supp. At 610.

152. *Id.*

153. *Id.* (noting that the court would consider the legislative history because there was some doubt as to the meaning intended).

154. *Id.* at 611 (quoting 111 CONG. REC. 23,874 (1965)) (stating that in the Senate floor debate over the bill, the sponsor of the Act said a ten percent penalty would be levied against a state that for any reason failed to pay its share of the compensation requirement).

155. *Id.* at 611–12 (citing 118 CONG. REC. 34,150–51(1972)) (“[T]he House rejected the amendment, thus supporting the inference that Congress did not believe the Act to be ambiguous and that it intended a [ten] percent reduction in Federal highway funds to result from a failure to pay just compensation to those affected by the removal of outdoor advertising.”).

156. *Id.* at 612.

157. *Id.* (discussing a 1966 opinion of the Attorney General concluding that each state must afford just compensation to avoid the ten percent penalty).

Transportation,¹⁵⁸ both supporting the court's interpretation of the statutory scheme. Finally, relying on policy considerations, the court determined that Congress, being generous in the federal share of the compensation, would not act without establishing a mechanism to enforce the federal policy of just compensation.¹⁵⁹ This thorough discussion ended in the conclusion that Congress intended that states would forfeit ten percent of the apportioned federal highway funds if they removed signs that were legally erected without paying just compensation to the landowner or sign owner.¹⁶⁰

Even conceding the validity of *Brinegar*, the North Carolina General Assembly can empower the Department of Transportation to remove nonconforming billboards without compensating either the landowner or the sign owner and without suffering the Highway Beautification Act's ten percent penalty. The federal act mandates that "[j]ust compensation . . . be paid upon the removal of any outdoor advertising sign, display, or device *lawfully erected under State law . . .*"¹⁶¹ As was the case in determining whether the Constitution required payment of just compensation,¹⁶² state law should determine the applicability of the just compensation requirement in the federal act. North Carolina, therefore, can remove any signs that were illegal at the time of their erection.

Because the interest in a billboard that is at stake is in the nature of an appurtenant easement, any sign that is noncompliant under the proposed legislation¹⁶³ would also be an illegal sign. The court in *Brinegar*, however, came to a contrary conclusion with regard to Vermont law,¹⁶⁴ which, like North Carolina, is based on easement appurtenant law.¹⁶⁵ Vermont argued that it licensed the billboards and "that termination of licenses is not compensable and all interests the signowner has in the signs are possessed by virtue of the licenses

158. *Id.* at 612–13 ("[W]e believe this case presents an appropriate instance for granting due respect to the administrative interpretation of this statute by those charged with administering it.").

159. *Id.* at 613. Of course this argument could cut the other way, for one could also argue that the exceedingly generous federal component was the vehicle Congress chose to enforce the stated federal policy.

160. *Id.* at 615.

161. 23 U.S.C. § 131(g) (2000) (emphasis added).

162. *See supra* notes 111–28 and accompanying text.

163. Again, the term "nonconforming sign" would include all signs except for official and directional signs, and signs advertising activities on the land upon which they stand. Any other sign would necessarily exceed the rights inherent in the appurtenant easement.

164. *Vermont v. Brinegar*, 379 F. Supp. 606, 613–15 (D. Vt. 1974).

165. *See supra* notes 44–70 and accompanying text.

and not by any substantive right.”¹⁶⁶ The court relied on two findings to refute the state’s proposition.¹⁶⁷ First, it concluded that the property law approach to billboard use in Vermont was replaced by the enactment of Vermont Statutes Annotated Title 10, section 496(a), which was modeled after the Highway Beautification Act and designed to avoid the forfeiture of federal highway funds.¹⁶⁸ Second, it found that § 131(g) required that just compensation “be paid for the taking of all right, title, leasehold and interest in” the sign removed, and, therefore, “[i]n the case of an owner of the real property upon which the sign is located, just compensation must be paid for the taking of the *right to erect and maintain* such signs.”¹⁶⁹ The court concluded that Vermont was required to compensate for the removal of signs lest it lose the federal highway funds.¹⁷⁰

The principles relied on for the holding in *Brinegar* are inapplicable to North Carolina law. First, in North Carolina, the property interest of the abutting landowner is an easement appurtenant right to be seen, and this legal right was not altered by the enactment of the Outdoor Advertising Control Act. The Declaration of Policy specifically states that “[i]t is the intention of the General Assembly to provide and declare herein a public policy and statutory basis for the regulation and control of outdoor advertising.”¹⁷¹ This law does not preempt the common law property rights relating to the right to be seen, nor create new substantive rights, but serves as a statement of policy, a statement of how resources will be allocated in enforcing the easement law relating to public highways. Certainly the arbitrary choice to regulate signs within 660 feet is not a decision to alter easement appurtenant rights within 660 feet, but rather a public policy choice to spend resources to enforce the state’s rights within this perimeter.¹⁷² The fact that the Act mirrors the Highway Beautification Act supports the inference that this provision was not intended to change the substantive law, but rather to enforce, or “effective[ly] control,” easement rights to avoid a federal penalty. The implementation of the Outdoor Advertising Control Act did not preempt the common law easement appurtenant rights afforded to the abutting landowner.

166. *Brinegar*, 379 F. Supp. at 613.

167. *Id.* at 614–15.

168. *Id.* at 614.

169. *Id.* at 614 (emphasis added).

170. *Id.* at 615.

171. N.C. GEN. STAT. § 136-127 (2001).

172. Both the federal act, 23 U.S.C. § 132(c) (2000), and the North Carolina act, section 136-129, regulate signs within 660 feet of the public way.

Nonconforming signs are thus illegal signs and not subject to the compensation requirement of § 131(g).

Second, the *Brinegar* decision incorrectly held that the landowner's right to erect and maintain billboards was a legitimate right, which would require compensation for a taking. Under Vermont law, the landowner did not have a legal right to advertise activities not conducted on the premises because such advertising would involve a use in excess of the rights afforded the abutting landowner.¹⁷³ Consequently, if a legal right does not exist in the first place, removing such a sign cannot be a taking of a legal right. As Vermont argued, this removal constituted a revocation of a license.¹⁷⁴ The same would be true in North Carolina. The enforcement of the Outdoor Advertising Control Act does not take from the landowner a legal right because the "right to be seen" only extends to advertisements pertaining to on-site activities. Similarly, no legal right exists and a restriction of this supposed "right to be seen" would not fall within the strictures of the compensation requirement of § 131(g). This restriction is simply a "withdraw[al] of a favor."¹⁷⁵ Because there is no legal right in question, should North Carolina choose to implement the suggested regulation, there would be no taking of a legal right and therefore the federal government would have no basis for withholding the highway funds.¹⁷⁶ The North Carolina General Assembly can therefore redraft outdoor advertising regulation to more effectively control billboards along public highways without violating the federal or state constitutions, or the federal Highway Beautification Act. Billboard regulation has been found to be a legitimate state interest. Such regulation would not violate the Takings Clause because there is no taking of a private interest for public use, and therefore the regulation does not make a legitimate interest economically useless. Similarly, there is no violation of the Highway Beautification Act. Any current signs which exceed their easement appurtenant rights were not lawfully erected in the first place. The Outdoor Advertising Control Act did not alter the common law regarding easements. A change in regulation from

173. See *supra* notes 86–96 and accompanying text.

174. See *Brinegar*, 379 F. Supp. at 613.

175. See *Wilson*, *supra* note 9, at 748.

176. This argument does not dispute the legitimacy of the Highway Beautification Act for such a task would be well beyond the scope of this Comment. It is interesting to note that much has been written about the constitutionality of the Act. For an excellent article on the history of the Act and how requiring states to comply with the legislation at the risk of losing valuable highway funds extends Congressional power beyond that permitted by the Spending Clause or the Tenth Amendment, see *Albert*, *supra* note 10, at 463.

the OACA would not be a taking of a legal right, only the withdrawal of a favor. Because North Carolina would not be removing lawfully erected signs, effective control under the HBA would not require compensation for their removal.

Although drafted to comply with the federal mandate and combat the expanse of billboards on North Carolina's highways, the effects of the Outdoor Advertising Control Act have been sparse—especially since federal funding was cut in 1981.¹⁷⁷ Clearly, the current regulations are not fulfilling the stated purpose of the Act. The General Assembly should revise the Act and abandon the current regulatory structure, as it is based on an ineffective federal mandate. The state legislature should extend the ban on new billboard construction permanently, and redraft the current law regarding existing structures so that removal efforts are more effective, with the ultimate goal of eliminating all nonconforming billboards along North Carolina highways. The state would be justified in doing so under its rights as a landowner under the common law of easements.

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177. See TEATER, *supra* note 8, at 26 (“With no more federal money on its way here, the state discontinued its billboard removal program soon after the federal funding was cut back.”).