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## Regulating Aesthetics Of Coastal Maine: Kroeger v. Department Of Environmental Protection

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REGULATING AESTHETICS OF COASTAL MAINE:  
*KROEGER v. DEPARTMENT OF ENVIRONMENTAL  
PROTECTION*

*Nancy Walworth\**

I. INTRODUCTION

In *Kroeger v. Department of Environmental Protection*,<sup>1</sup> the Maine Supreme Judicial Court, sitting as the Law Court, held that the Department of Environmental Protection (DEP) had appropriately denied a private landowner a permit to build a dock.<sup>2</sup> Out of nine permitting criteria<sup>3</sup> enforced by the DEP, the court held that the structure would violate one criterion: the unreasonable interference with the scenic uses of Somes Sound.<sup>4</sup> The majority cited the enjoyment of the Sound by boaters and recreationalists, as well as the nearby tourist attraction of Acadia National Park as factors supporting the area's scenic use.<sup>5</sup> The majority found that the DEP had not arbitrarily denied the permit and that the plaintiff had practicable alternatives<sup>6</sup> to building the proposed dock, including utilizing

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1. 2005 ME 50, 870 A.2d 566.

2. *Id.* ¶ 1, 870 A.2d at 568.

3. Under 38 M.R.S.A. § 480-D (2004), proposed activities must not unreasonably interfere with or harm nine criteria: existing scenic uses, soil, habitat, water flow, water quality, flooding, sand or gravel, river segments and dredging. For a comprehensive analysis of wetland permitting in Maine, see William E. Taylor & David P. Littell, *Wetland Permitting in Maine*, 12 ME. BAR J. 274, 274-287 (1997).

4. *Kroeger v. Dep't. of Env'tl. Prot.*, 2005 ME 50, ¶ 1, 870 A.2d at 568. *See supra* note 3.

5. *Id.* at ¶ 14, 870 A.2d at 570.

6. To be eligible for a permit, applicants intending to alter a wetland or water body must demonstrate that there are no "practicable alternative[s] to the project that would be less damaging to the environment." Me. Dep't of Env'tl. Prot. 06 096 CMR 310-4.

"Practicable" is defined as "[a]vailable and feasible considering cost, existing technology and logistics based on the overall purpose of the project alternatives." Me. Dep't of Env'tl. Prot. 06 096 CMR 310-3.

a local marina and making boat launches from the shore.<sup>7</sup> The dissenting opinion, however, argued the plaintiff's application satisfied the DEP's wetland permitting criteria and that no perceptible visual impairment would occur by constructing the plaintiff's proposed dock.<sup>8</sup> The dissent maintained that the plaintiff had no practicable alternatives by which to reasonably access and utilize the waterfront.<sup>9</sup> In addition, the dissent criticized the majority for overlooking the plaintiff's property rights as a landowner and instead deferring too readily to the DEP's decision regarding scenic uses.<sup>10</sup>

The *Kroeger* decision highlights the ongoing debate over the use of aesthetics<sup>11</sup> as a legitimate basis for regulations protecting visual resources.<sup>12</sup> The subject of aesthetics is by its nature controversial: at its heart are questions and subjective assessments pertaining to beauty - its value, importance, and whether it should or should not be afforded protection in particular situations.<sup>13</sup> Nonetheless, aesthetic regulations have existed throughout this country's history, gaining traction in the early 20th century.<sup>14</sup> The United States Supreme Court has addressed the issue of aesthetic regulations, first via zoning cases, and then by way of dicta forceful enough to inspire the growth of aesthetic regulations by state governments.<sup>15</sup> Aesthetic regulations have been and continue to be utilized in Maine, as demonstrated by *Kroeger*.<sup>16</sup> Indeed, much of the case law surrounding aesthetics in Maine involves the DEP's scenic uses provision, and often focuses on coastal locales.<sup>17</sup> However, *Kroeger* offers a new

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7. *Kroeger v. Dep't of Env'tl. Prot.*, 2005 ME 50, ¶¶ 19-20, 870 A.2d at 570.

8. *Id.* at ¶¶ 23, 26, 870 A.2d at 573 (Dana, J., dissenting).

9. *Id.* at ¶¶ 38-40, 870 A.2d at 575-76.

10. *Id.*

11. Aesthetics are defined as "a branch of philosophy dealing with the nature of beauty, art, and taste and with the creation and appreciation of beauty." THE AMERICAN HERITAGE COLLEGE DICTIONARY 21 (3d ed. 1993).

12. See, e.g., Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697, 700-01 (1995) ("The highest court in nearly every state has wrestled with the concept of land-use regulation for aesthetic objectives."). See also, Beverly A. Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 VAND. L. REV. 603, 623 (1981) (the author suggests that aesthetics is considered an "old pariah" when crafting judicial decisions).

13. Kimberly K. Smith, *Mere Taste: Democracy and the Politics of Beauty*, 7 WIS. ENVTL. L.J. 151, 154 (2000).

14. *Id.* at 155-56.

15. *Berman v. Parker*, 348 U.S. 26, 31-33 (1954).

16. *Kroeger v. Dep't of Env'tl. Prot.*, 2005 ME ¶ 1, 870 A.2d at 568.

17. See also, *Uliano v. Bd. of Env'tl. Prot.*, 2005 ME ¶ 88, 876 A.2d 16; Conservation

dimension because it involves the issue of tourism along Maine's coast. The question now arises: given the important role tourism plays in this state's economy, how should the Law Court weigh the competing interests of preserving both aesthetic value and land owners' rights when the protected area is near a coastal tourist destination?

This Note considers where Maine generally stands in the national debate regarding aesthetic regulation after *Kroeger*, and where it may be headed in terms of coastal aesthetic regulation. First, this Note chronicles how aesthetic regulations slowly developed from the general laws of nuisance into the legitimate exercise of the police powers.<sup>18</sup> It then describes the two different approaches taken by various jurisdictions in this country for validating aesthetic regulations.<sup>19</sup> The first approach is premised on the belief that aesthetic regulations on their face fit securely within the general welfare prong of the police powers.<sup>20</sup> The other approach relegates aesthetics to a secondary role, not allowing them to stand alone, but rather to play an ancillary role in the government interests of health, safety, moral, or general welfare.<sup>21</sup> This Note then chronicles how Maine specifically has interpreted aesthetic regulations, analyzing the approaches in *Kroeger* that the Law Court's majority and dissent utilized, and criticizing both sides for not more fully explaining their rationales. In conclusion, this Note contends that in its next relevant case the Law Court should more fully detail the preferred basis for aesthetic regulations in Maine, potentially creating a litmus test for cases involving popular coastal scenic areas. In addition, this Note suggests that the Maine Legislature could include the promotion of the economy, which would encompass tourism, as a legitimate category within the state's police powers. Such a specific governmental directive would decidedly aid the Law Court in future coastal aesthetic regulations cases.

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Law Found. Inc. v. Dep't of Envtl. Prot., 2003 ME ¶ 62, 823 A.2d 551; Hannum v. Bd. of Envtl. Prot., 2003 ME ¶ 123, 832 A.2d 765.

18. Police powers are defined as "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice." BLACK'S LAW DICTIONARY 1196 (8th ed. 2004). See also Ernst Freund, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 3 (1904) ("[I]t is possible to evolve at least two main attributes or characteristics which differentiate the police power: it aims directly to secure and promote the public welfare, and it does so by restraint or compulsion."); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851) (an early exploration of the concept of police powers by the Massachusetts municipal court).

19. See Bobrowski, *supra* note 12 at 701-02.

20. *Id.* at 702.

21. *Id.*

## II. DEVELOPMENT OF AESTHETIC REGULATION IN THE UNITED STATES

A. *Defining Aesthetics and Its Place in the Law*

The rise of the American environmental movement depended not only on scientific and biological breakthroughs, but also on the social sciences.<sup>22</sup> Artists, authors, and even politicians have waxed eloquent about the merits of natural beauty throughout this country's history.<sup>23</sup> The popularity of environmental appreciation and protection grew with the words of Emerson and Thoreau, the vistas painted by the Hudson River Valley School, the development of New York's Central Park by Frederick Law Olmstead, the championing of national parks by President Theodore Roosevelt,<sup>24</sup> and the popularity of the City Beautiful movement.<sup>25</sup> Popularity increased further as the concept of leisure began to overlap with outdoor recreation.<sup>26</sup> The increase in disposable income and transportation resources provided vacationing Americans the means to enjoy the "aesthetic and environmental qualities of nature."<sup>27</sup> Despite the groundswell of support by the public in the late 19th and early 20th centuries, legal recognition of aesthetic interests came at a slower pace.<sup>28</sup> City ordinances that attempted to curb the construction of unsightly signage were regularly thrown out of court.<sup>29</sup> In the case of *City of Passaic v. Patterson Bill Posting Co.*, the Court of Errors and Appeals of New Jersey wrote, "[W]e [are not] aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. A[e]sthetic considerations are a matter of luxury and indulgence rather than of necessity . . . ."<sup>30</sup>

The dichotomy between social acceptance and legal hesitance, as one commentator wrote, "beg[s] the question of what 'aesthetic' means."<sup>31</sup>

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22. See Smith, *supra* note 13, at 154.

23. *Id.* at 155.

24. *Id.*

25. See generally Erik Larson, *DEVIL IN THE WHITE CITY*, 374 (2003). The City Beautiful movement began with the Chicago World's Fair, which, in its creation of a model utopian city, sought to elevate American cities to the level of the great European cities and in turn spurred a new direction in "modern urban planning." *Id.*

26. Jan G. Laitos, *National Parks and the Recreation Resource*, 74 *DENV. U. L. REV.* 847, 848 (1997).

27. *Id.* at 848-49.

28. See Smith, *supra* note 13, at 157.

29. See generally *City of Passaic v. Patterson Bill Posting Co.*, 62 A. 267 (N.J. 1905); *Crawford v. Topeka*, 33 P. 476 (Kan. 1893); *Commonwealth v. Boston Advertising Co.*, 74 N.E. 601 (Mass. 1905).

30. 62 A. 267, 268 (N.J. 1905).

31. See Smith, *supra* note 13, at 158.

There is little scholarly agreement on an explicit definition, but at its heart is the philosophical study of beauty and taste.<sup>32</sup> Given the lack of consensus, contemplation of this “definition” naturally raises a host of questions, such as “*what* is beauty?” and “*who* is the arbiter of beauty?”<sup>33</sup> These two questions are especially problematic and highlight how aesthetic value judgments can change “like a weather vane, turned around by any philosophical, cultural, or scientific gust of wind.”<sup>34</sup> Despite this unsettled framework, American public opinion, public policy, and law forges ahead, treating aesthetics as a worthy interest.<sup>35</sup> This is particularly true of aesthetics and coastal areas.<sup>36</sup> When one considers coastal aesthetics, one might feel contemplative, or imagine traditional scenes such as soaring gulls, rocky shores, and idyllic seaside villages.<sup>37</sup> Hidden from such tranquil imagery is the fact that well-maintained coastal areas also “act as storm barriers[,] . . . attract tourism[,]” and protect fragile ecosystems.<sup>38</sup> Environmental policies protecting coastal areas are often underscored by aesthetic principles.<sup>39</sup> Thus, “whatever goals Americans are pursuing in

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32. *Id.* at 158-59.

33. In fact, “[e]ntire books and entire undergraduate- and graduate-level philosophy courses are devoted to the study of ‘aesthetics.’ Some philosophers have dedicated their whole careers to discussing and writing about ‘aesthetics.’” Avi Brisman, *The Aesthetics of Wind Energy Systems*, 13 N.Y.U. ENVTL. L.J. 1, 81 (2005).

34. The full quote of philosopher Moritz Geiger reads:

[A]esthetics is, like a weather vane, turned around by any philosophical, cultural, or scientific gust of wind; one moment it is pursued meta-physically and the next moment empirically, now normatively and now descriptively, one moment from the point of view of the artist, the next moment from the art-lover’s point of view, today the centre of aesthetics is seen in art, for which natural beauty is regarded only as a preliminary stage, but tomorrow the beauty of art is seen only as some second-hand surrogate of the beauty of nature.

Otto Neumaier, *What is the Subject of Aesthetics?*, [http://sowi.iwp.uni-linz.ac.at/dialog/MITARBEITER/Sub\\_Aesth.html](http://sowi.iwp.uni-linz.ac.at/dialog/MITARBEITER/Sub_Aesth.html) (last visited Apr., 4, 2006).

35. See Smith, *supra* note 13, at 159.

36. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1653 (2003).

37. See generally, Eugene C. Brickleyer, Jr., et al., *Preservation of Coastal Spaces: A Dialogue on Oregon’s Experience with Integrated Land Use Management*, 9 OCEAN & COASTAL L.J. 239, 240-41 (2004).

38. See Claeys, *supra* note 36, at 1653.

39. See generally, 16 U.S.C.A. §§ 1451-1465 (2000 & Supp. 2003) (the Congressional findings in the Coastal Zone Management Act read, “[t]he coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, and esthetic resources of immediate and potential value to the present and future well-being of the Nation.”). The Coastal Zone Management Act “has resulted in the creation of management programs in thirty-four of the eligible thirty-five coastal states, which are where management action agendas are developed and implemented.” See Brickleyer, *supra* note 37, at 240.

their environmental policies, aesthetic interests are consistently among them.”<sup>40</sup>

### *B. Aesthetics and the United States Supreme Court*

The history of aesthetic regulations began with zoning, which is the regulated use of land within communities by local governments.<sup>41</sup> Zoning regulations themselves are rooted in the common law of nuisance,<sup>42</sup> which was premised upon the idea that general community interests should be protected from interference; any such interference would constitute a criminal offense.<sup>43</sup> Restrictions on land use were common even in colonial America,<sup>44</sup> and after World War I, the urbanization of America saw nuisance laws develop into municipality-adopted zoning regulations.<sup>45</sup> While zoning ordinances often consider practicalities like building size (such as mass or height) and purpose (such as residential or business), zoning also inherently encompasses value judgments about community aesthetic standards.<sup>46</sup> When the Massachusetts Supreme Judicial Court reviewed early zoning cases, aesthetics were acknowledged but never accepted as a singular, sound criteria for land use regulation.<sup>47</sup> In *Welch v. Swasey*, the United States Supreme Court upheld the city of Boston’s

40. Brickleyer, *supra* note 37, at 240.

41. Andrew J. Cappel, *A Walk Along Willow, Patterns of Land Use Coordination in Pre-Zoning New Haven (1870-1926)*, 101 YALE L.J. 617, 617 (1991).

42. George P. Smith, *Re-Validating the Doctrine of Anticipatory Nuisance*, 29 VT. L. REV. 687, 687 (2005) (“A nuisance is defined generally as merely some interference with the use and enjoyment of the land,” quoting Restatement (Second) of Torts § 821D cmt. d (1979)).

43. Restatement (Second) of Torts § 821B cmt. b (1979).

44. See generally John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1275-76 (1996). (The colonies imposed restrictions on beauty in some communities, such as New Amsterdam and New York City. The New York Assembly, for instance, allowed New York City “to make ‘rules and orders for the better . . . gracefulness of such new buildings as shall be Erected for habitations.’” *Id.* at 1276 (citation omitted)).

45. John B. Grandoff, *Preparing Zoning Opinions*, PROB. & PROP., Oct. 1999, at 29.

46. See Cappel, *supra* note 41, at 617-19.

47. *Commonwealth v. Boston Advertising Co.*, 74 N.E. 601, 602 (Mass. 1905). The court focused more on the Takings Clause than aesthetics, stating:

The question here is not of the power of the state to expend money or to lay taxes to promote aesthetic ends, or to regulate the use of property with a view to promote such ends. It is of the right of the state by such regulations to deprive the owner of property of a natural use of that property without giving compensation for the resulting loss to the owner.

*Id.* at 602.

restrictions on building height as a proper exercise by legislature to protect public safety, however, the Court also recognized that even if “considerations of an aesthetic nature . . . entered into the reasons for [the regulation’s] passage” such considerations “would not invalidate them.”<sup>48</sup> As long as aesthetics were tied to more predominant zoning criteria, they were acceptable background factors.

In a 1926 landmark zoning case, the concept of aesthetics was present, although not directly mentioned.<sup>49</sup> In *Euclid*, zoning provisions controlling industrial and residential building specifications impacting the visual environment were upheld as a legitimate exercise of the legislature’s police powers.<sup>50</sup> Justice Sutherland outlined the powers when he wrote “before the ordinance can be declared unconstitutional, [it must be demonstrated] that such provisions are clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals, or general welfare.”<sup>51</sup> The delineation and acceptance of the police powers by the Court had an immediate impact: state jurisdictions quickly adopted the police powers as a standard tool when analyzing the applicability and justification for zoning regulations.<sup>52</sup>

Aesthetics finally were explicitly addressed in the dicta of *Berman v. Parker*.<sup>53</sup> Justice Douglas argued that the concept of the public welfare must include aesthetics and that legislatures ought to control and protect beauty in their communities: “[t]he concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical,

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48. 214 U.S. 91, 108 (1909).

49. *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926). Interestingly, in the District Court case of *Ambler*, the presiding Judge had strong concerns about the aesthetic themes of the town’s zoning scheme. Judge Westenhaver wrote that restrictions involving community beautification standards could “not be done without compensation under the guise of exercising the police power.” *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (1924).

50. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 388.

51. *Id.* at 395.

52. Kenneth Regan, Note, *You Can’t Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 *FORDHAM L. REV.* 1013, 1017 (1990). See also *Wilbur v. City of Newton*, 18 N.E.2d 365 (Mass. 1938); *Blitch v. City of Ocala*, 195 So. 406 (Fla. 1940); *Oliva v. City of Garfield*, 62 A.2d 673 (N.J. 1948); *Corthouts v. Town of Newington*, 99 A.2d 112 (Conn. 1953); *Hoffmann v. City of Waukegan*, 201 N.E.2d 177 (Ill. App. 1964); *Chicago Title & Trust Co. v. Village of Wilmette*, 188 N.E.2d 33, (Ill. 1963); *Thompson v. City of Palestine*, 510 S.W.2d 579 (Tex. 1974); *Town of Bay Harbor Islands v. Driggs*, 522 So. 2d 912 (Fla. Dist. Ct. App. 1988); *Cent. Motors Corp. v. Pepper Pike*, 653 N.E.2d 639 (Ohio 1995); *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 690 N.E.2d 510 (Ohio 1998); *King v. City of Bainbridge*, 577 S.E.2d 772 (Ga. 2003).

53. 348 U.S. 26, 33 (1954).



aesthetic as well as monetary.”<sup>54</sup> *Berman* led commentators to debate the lasting effects of the dicta: had it sanctioned aesthetics legislation under the general welfare power or did it lack constitutional support?<sup>55</sup> The question inspired by *Berman* was addressed in the notable and more recent case of *Metromedia Inc. v. City of San Diego*, where a billboard ordinance regulating specific types of signs was overturned for violating the First Amendment.<sup>56</sup> Despite the free speech focus of the case, the majority also recognized aesthetic regulations as a “substantial government goal,” effectively affirming aesthetic regulations as a permissible government function.<sup>57</sup> It is important to note that the Court in *Metromedia* acknowledged the risk of aesthetic regulations: with the acceptance of aesthetic notions as permissible goals comes the danger that regulations can be based on subjective rationales that defy “objective evaluation.”<sup>58</sup> The Court pointed out that this risk mandates aesthetics be scrutinized carefully “to determine if they are only a public rationalization of an impermissible purpose” that would not fall within the police powers.<sup>59</sup> These “impermissible purposes” have been the subject of much litigation, as demonstrated by state court cases below.

### C. Approach by State Jurisdictions: The Ancillary and Primary Views

*Berman* heralded a growing awareness of the importance of aesthetics regulation in American society. Federal action soon followed: Congress passed the National Environmental Policy Act,<sup>60</sup> the Wild and Scenic

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54. *Id.* In *Berman v. Parker*, Justice Douglas also wrote, “[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.” *Id.*

55. *See, e.g.,* Smith, *supra* note 13, at 158 (“[Justice] Douglas’ expansive dicta went beyond sanctioning the legislative action; he practically demanded it.”). *But see* Regan, *supra* note 52, at 1026 (contending that a “proper reading” of *Berman v. Parker* fails to sustain legislation based on aesthetics).

56. 453 U.S. 490, 521 (1981).

57. *Id.* at 507-08. Justice Rehnquist’s support for aesthetic regulations went even further in his dissent: “aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community.” *Id.* at 570-71 (Rehnquist, J., dissenting).

58. *Id.* at 510.

59. *Id.*

60. 42 U.S.C. §§ 4321-4347 (2000) (The stated policy of 42 U.S.C. § 4331(a) is “to create and maintain conditions under which man and nature can exist in productive harmony . . .”).

Rivers Act,<sup>61</sup> the National Trails System Act,<sup>62</sup> and the Coastal Zone Management Act,<sup>63</sup> all to protect the environment against public and private mistreatment.<sup>64</sup> States soon became involved as well, and as of the 1960s, legislatures were passing statutes protecting wetlands.<sup>65</sup> State regulation even went so far as to focus regulations on locations ranging from golf courses to battlefields.<sup>66</sup> The new legislation had to pass judicial scrutiny for impermissible purposes, however, and two judicial approaches towards aesthetic regulation began to emerge under the police powers: the ancillary approach and the primary approach.<sup>67</sup> In some jurisdictions, aesthetic regulations were deemed ancillary to health and safety components of the police powers.<sup>68</sup> Conversely, other jurisdictions devised an “aesthetics alone” approach, making aesthetics the primary purpose for regulations under the general welfare police power.<sup>69</sup> During the mid-1990s, the trend in jurisdictions was to utilize the primary over the ancillary approach in aesthetic regulation cases.<sup>70</sup>

The ancillary approach focuses on the health and safety functions of the police power first, with aesthetics second. For instance, the Court of Appeals of New York linked billboard regulation to issues relating to traffic safety, such as clear visibility and distraction prevention, although it

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61. 16 U.S.C. § 1271 (2000) (selecting certain rivers that possessed “outstandingly remarkable scenic . . . or other similar values . . . [to] be preserved in free-flowing condition . . .”).

62. 16 U.S.C. §§ 1241-1251 (2000) (establishing a trail system to “promote the preservation of . . . and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation . . .”). *Id.* at § 1241(a).

63. 16 U.S.C. §§ 1451(b), 1451(e), 1452(1) (2000) (declaring it national policy “to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations . . .”). *Id.* at § 1452(1).

64. *See* Smith, *supra* note 13, at 156-57.

65. *See* Bobrowski, *supra* note 12, at 698-99. The author lists Massachusetts as first passing its wetland regulation statute in 1967. *Id.* at 699, n.9.

66. *See* J.R. Golf Services, Inc. v. Linn County, 661 P.2d 91 (Or. Ct. App. 1983) (prohibiting the construction of a golf course on farmland); Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc., 311 A.2d 588 (Pa. 1973) (allowing a 307-foot observation tower to be built despite the state’s aesthetic objections).

67. *See* Bobrowski, *supra* note 12, at 701-02.

68. *See id.* at 703.

69. *See id.* at 701.

70. *Id.* at 701-02 n.32. Thirty states permit “aesthetics alone” regulation while five do not. Fifteen remain undecided or have not yet addressed the issue. *Id.* *See also* Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisance in the New Millennium*, 10 S.C. ENVTL. L.J. 1, 9-10 (2002) (indicating that by 1982, eighteen states held that zoning regulations based on aesthetics alone were Constitutional, while only seven held the opposite).

acknowledged the blight billboards created on motorways was akin to “a plague of locusts.”<sup>71</sup> Where developments near or on natural resources are challenged, some jurisdictions addressed the public health and safety issues first, and included scenic uses last.<sup>72</sup> Scenic areas often overlap with natural resource areas, creating an “easy alliance” between aesthetics and environmental protection.<sup>73</sup> In *Oswego Properties, Inc. v. City of Lake Oswego*,<sup>74</sup> the City denied a housing development plan to build a forty-four foot wall in the proximity of existing trees because it failed to satisfy the city’s open space requirement.<sup>75</sup> The court held that the city’s standard of maintaining aesthetic appearances justified the protection of the nearby trees.<sup>76</sup> Other jurisdictions such as Arkansas have also accepted the promotion of tourism as a basis for regulations protecting the visual landscape, rather than aesthetics alone.<sup>77</sup> In *Donnrey Communications Co. v. City of Fayetteville*, ordinances regulating outdoor advertising advanced the legitimate government interest in tourism and aesthetics.<sup>78</sup> In its opinion, the court took note that the city’s board of directors had deemed billboards as not only ill equipped mechanisms to provide useful information to tourists, but also objects detrimental to the scenic resources

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71. *New York State Thruway Auth. v. Ashley Motor Court, Inc.*, 176 N.E.2d 566, 569 (N.Y. 1961). The court had some classic quotes regarding aesthetic interests, and while it was not amenable to considering aesthetics as a primary, legitimate purpose for billboard regulations, the court certainly thought it was ancillary: “Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency.” *Id.* at 644 (quoting *Perlmutter v. Greene*, 182 N.E. 5, 6 (N.Y. 1932)). See also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (“It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an ‘aesthetic harm.’”); *Pate v. City Council of Tuscaloosa*, 622 So. 2d 405, 408 (Ala. Civ. App. 1993) (The court reviewed testimony of experts who opined that traffic safety was at risk when billboards were placed in busy intersections that could distract motorists. The court refused to remark on whether the “propriety or impropriety of aesthetics” was an acceptable basis for municipal zoning regulations); *City of Hot Springs v. Carter*, 836 S.W.2d. 863, 864 (Ark. 1992).

72. *Bobrowski*, *supra* note 12, at 712-13 (collecting cases); See *1000 Friends of Oregon v. Land Conservation & Dev. Comm’n*, 737 P.2d 607 (Or. 1987); *McNulty v. Town of Indialantic*, 727 F. Supp. 604 (M.D. Fla. 1989); *Thurston v. Cache County*, 626 P.2d 440 (Utah 1981).

73. See *Bobrowski*, *supra* note 12, at 712.

74. 814 P.2d 539 (Or. 1991).

75. *Id.* at 540.

76. *Id.* at 542.

77. See *Donnrey Comm’ns Co. v. City of Fayetteville*, 660 S.W.2d 900 (Ark. 1983).

78. *Id.* at 903. “Hand in hand with aesthetics is tourism, one of Fayetteville’s important industries and a substantial economic resource.” *Id.*

that attracted tourists to the city in the first place.<sup>79</sup> Although the case of *Lucas v. South Carolina Coastal Council*<sup>80</sup> admittedly focused on a takings and compensation challenge to South Carolina's total ban on coastal development rather than a specific aesthetic regulation, both aesthetics and tourism were among the numerous factors behind the state's Beachfront Management Act that prohibited new development below an established erosion line.<sup>81</sup> Despite reversal on appeal to the U.S. Supreme Court,<sup>82</sup> the Supreme Court of South Carolina deemed preservation of "this existing public resource . . . a 'laudable goal.'"<sup>83</sup>

The primary approach advances protection of visual resources as its chief objective and suggests that the general welfare prong of the police powers includes aesthetics.<sup>84</sup> Regulations of eyesores such as junkyards and wind turbines pass judicial scrutiny for solely aesthetic purposes. In Oregon, for instance, the Supreme Court upheld an ordinance regulating a wrecking yard for purely aesthetic purposes.<sup>85</sup> In the case *In re Halnon*, the Supreme Court of Vermont upheld the Vermont Public Service Board's denial of a certificate to build a wind turbine based on the adverse aesthetic impact it would have on the environment.<sup>86</sup> The New Hampshire Supreme Court has been explicit in its acceptance of the primary approach. In *Asselin v. Town of Conway*,<sup>87</sup> where a sign owner protested the municipality's directives regarding lighted signage, the court stated, "We now conclude that municipalities may validly exercise zoning power solely to advance aesthetic values, because the preservation or enhancement of the visual environment may promote the general welfare."<sup>88</sup> *Asselin* was cited by the Court in the more recent case of *Taylor v. Town of Plaistow*, where a zoning ordinance required a distance of 1,000 feet between car dealerships for purely aesthetic reasons.<sup>89</sup>

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79. *Id.*

80. 404 S.E.2d 895 (S.C. 1991).

81. *Id.* at 897-98.

82. 505 U.S. 1003 (1992).

83. 404 S.E.2d at 896.

84. *See* Bobrowski, *supra* note 12, at 718.

85. *Oregon City v. Hartke*, 400 P.2d 255, 262-63 (Or. 1965). The court held that a city may wholly exclude a particular use of a property if it has a rational basis for doing so, and "aesthetic considerations alone may warrant an exercise of the police power."

86. 811 A.2d 161 (Vt. 2002).

87. 628 A.2d 247 (N.H. 1993).

88. *Id.* at 250. *See also* *Town of Chesterfield v. Brooks*, 489 A.2d 600, 604 (N.H. 1985) (allowing towns' zoning regulations to consider "aesthetic values, such as preserving rural charm").

89. 872 A.2d 769, 772 (N.H. 2005).

*D. Maine's Aesthetic Regulation History*

Maine courts are familiar with aesthetic regulation disputes and have utilized both the ancillary and primary rationales, sometimes concurrently.<sup>90</sup> This dual approach is evidenced by *John Donnelly & Sons v. Roger L. Mallar*,<sup>91</sup> wherein the United States District Court for the District of Maine (Southern Division) upheld a law eliminating billboards because the “preservation and promotion of aesthetic standards serves as an adequate basis for comprehensive anti-billboard legislation.”<sup>92</sup> In addition, the court also linked the preservation of scenic beauty to economic health through tourism, contending that billboards had negative economic consequences on a state so dependent upon tourist dollars.<sup>93</sup>

Looking at singular uses, the Law Court employed the ancillary method in the mobile-home zoning case of *Wright v. Michaud*.<sup>94</sup> Upholding the restrictions against placing mobile-homes in the town as non-discriminatory and non-arbitrary, the court wrote:

[w]e do not feel that aesthetic considerations alone will warrant zoning restrictions against individual mobile homes. However, . . . a municipality in determining whether there should be a prohibition of individual mobile homes . . . may properly consider, among other factors, the impact of the use of that type of structure upon the development of the community.<sup>95</sup>

The court also reflected the ancillary method in the critical waterfront resource case of *Town of Freeport v. Brickyard Cove Associates*.<sup>96</sup> The town's zoning regulation protected waterfront resource areas from timber harvesting in an effort to control soil erosion.<sup>97</sup> The defendant's clearing

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90. See, e.g., *Finks v. Me. State Highway Comm'n*, 328 A.2d 791 (Me. 1974); *Mack v. Mun. Officers*, 463 A.2d 717 (Me. 1983); *Stewart v. Town of Sedgwick*, 2002 ME 79, 797 A.2d 27; *Widewaters Stillwater Co. v. Bangor Area Citizens Organized for Responsible Dev.*, 2002 ME 27, 790 A.2d 597; *Town of Pownal v. Emerson*, 639 A.2d 619 (Me. 1994); *Murphy v. Bd. of Env'tl. Prot.*, 615 A.2d 255 (Me. 1992); *Town of Freeport v. Brickyard Cove Associates*, 594 A.2d 556 (Me. 1991); *Lincoln Homes Corp. v. Town of Newcastle*, LINS-AP-02-002 (Me. Super. Ct., Lin. Cty., Feb. 25, 2004) (Marden, J.).

91. 453 F. Supp. 1272 (D. Me. 1978), *rev'd sub nom.* *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980).

92. *Id.* at 1278.

93. *Id.* at 1279.

94. 200 A.2d 543 (Me. 1964).

95. *Id.* at 548.

96. 594 A.2d 556 (Me. 1991).

97. *Id.* at 557-58.

of timber not only threatened the soil, but also created a 7,500 square foot gap in the forest canopy.<sup>98</sup> The town's regulations, although primarily concerned with protection of the water and soil, also indicated the desire to protect natural, scenic views.<sup>99</sup> The court employed the primary purpose approach in the case of *Brophy v. Town of Castine*.<sup>100</sup> The court held that the town's requirement that satellite dishes be set back from a river by seventy-five feet was justified by its interest in preserving the public's aesthetic welfare.<sup>101</sup>

The Maine Legislature has also formalized the government interest in protecting natural resource aesthetics. The Natural Resources Protection Act (NRPA),<sup>102</sup> passed in 1988, declared that Maine's rivers, streams, ponds, mountains, and wetlands are significant state resources of "great scenic beauty."<sup>103</sup> The NRPA underscores the significance the state places on such natural resources "in terms of their recreational, historical, and environmental value to present and future generations."<sup>104</sup> The intent of the NRPA "is to prevent any unreasonable impact to, degradation of or destruction of the resources and to encourage their protection or enhancement."<sup>105</sup> In particular, the NRPA focuses on wetlands regulation, and carves out specific restrictions on how wetlands can be utilized.<sup>106</sup> The DEP has noted the myriad uses for Maine's wetlands, ranging from storing water and controlling shoreline erosion, to providing critical habitats for fish and wildlife.<sup>107</sup>

The NRPA is enforced by the DEP, which is charged by the legislature with the duties of "preserv[ing], improv[ing] and prevent[ing] diminution

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98. *Id.* at 559.

99. *Id.* at 558 (quoting FREEPORT, ME., ZONING ORDINANCE § 420(A) (May 1988)).

100. 534 A.2d 663 (Me. 1987).

101. *Id.* at 664. The court wrote that the set-back requirement from the river's edge "reasonably promotes the town's interest in preserving, for the public's aesthetic welfare . . ." *Id.*

102. 38 M.R.S.A. § 480-A (2004).

103. *Id.*

104. MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, ISSUE PROFILE: NATURAL RESOURCES PROTECTION ACT (NRPA) (2002), <http://www.maine.gov/dep/blwq/docstand/ip-nrpa.htm> (last visited Apr. 4, 2006).

105. *Id.*

106. *Id.*

107. MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, OVERVIEW OF MAINE'S WETLANDS: THEIR FUNCTION AND VALUES, <http://www.maine.gov/dep/blwq/docstand/ipwetfv2.htm> (last visited Apr. 4, 2006). The DEP estimates that there are five million acres of freshwater tidal areas in Maine, and 157,500 acres of saltwater tidal wetlands, including "tidal flats, salt marsh, brackish marsh, aquatic beds, beach bars and reefs." *Id.*

of the natural environment of the State.”<sup>108</sup> When reviewing a permit application that implicates an environmental area under the umbrella of the NRPA, the DEP can deny the application using various criteria, including whether the proposed permit structure unreasonably interferes with the existing natural resources’ scenic or aesthetic uses, and if practicable alternatives to the proposed construction exist.<sup>109</sup>

Denials of permits by the DEP are appealed first to the Superior Court and then to the Law Court, which critically reviews such rejections.<sup>110</sup> The court looks for any indication that the administrative board has abused its discretion or made an error in applying the law.<sup>111</sup> The court has found that the DEP has both succeeded and erred in its analysis of the practical alternatives standard.<sup>112</sup> In *Uliano v. Board of Environmental Protection*,<sup>113</sup> the court held that the DEP, in denying a permit for a dock, had improperly applied the practicable alternative test by using it in isolation from the standards outlined by the NRPA.<sup>114</sup> In contrast, the court found that the DEP appropriately applied the practicable alternatives test in *C.H. Rich Co. v. Board of Environmental Protection*, when it denied a permit to

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108. MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, OVERVIEW OF THE MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, <http://www.maine.gov/dep/overview.htm> (last visited Apr. 4, 2006). The DEP has evolved from the 1941 Sanitary Water Board which was responsible for protecting the water supply. Since then, throughout various permutations, it has become the administrative agency responsible for enforcing the “state’s environmental laws.” *Id.*

109. 38 M.R.S.A. § 480-D (2004).

110. *Hannum v. Bd. of Env’tl. Prot.*, 2003 ME 123, ¶ 11, 832 A.2d 765 at 768. *See also* 5 M.R.S.A., § 11007(4)(C) (2002) (Judicial review of final agency actions can be reversed or modified if: the actions violate the Constitution or other statutes; the actions are “in excess” of the agency’s authority; the procedure upon which the actions is based are unlawful, based on error or bias, or unsupported by evidence in the record; or the actions are an abuse of discretion).

111. *Id.* at 769. *See also* *Connolly v. Bd. of Soc. Work Licensure*, 2002 ME 37, ¶ 6, 791 A.2d 125, 127; *Downeast Energy Corp. v. Fund Ins. Review Bd.*, 2000 ME 151, ¶ 13, 756 A.2d 948, 951.

112. *See, e.g.*, *Uliano v. Bd. of Env’tl. Prot.*, 2005 ME 88, 876 A.2d 16.

113. Note that the Board of Environmental Protection (“the Board”) is an organizational department within the DEP that consists of ten individuals appointed by the governor. The Board is the entity that makes the permitting decisions. Department of Environmental Protection, State of Maine, *available at* <http://www.maine.gov/dep/bep/index.htm> (last visited Apr. 4, 2006).

114. 2005 ME 88, ¶ 11, 876 A.2d 16, 19. Specifically, the Board had not “relate[d] its finding that a practicable alternative exist[ed] to its overall determination of whether the relevant section [of the NRPA] criteria were satisfied.” *Id.*

an applicant because the applicant's purposes could be satisfied using "other methods."<sup>115</sup>

The court has also held that the DEP has denied permits based on conclusions that were supported and not supported by evidence.<sup>116</sup> In *Conservation Law Foundation, Inc. v. Department of Environmental Protection*, the court found that the DEP had properly granted a permit for a dock extending into twenty-five percent of a waterway because there was sufficient evidence in the record that the proposed dock would not interfere with the channel's existing uses.<sup>117</sup> Conversely, in *Hannum v. Board of Environmental Protection*, the court reversed a permit denial due to insubstantial evidence relied upon by the DEP in making its administrative decision. The court found that the DEP incorrectly speculated that allowing one dock to be built would encourage more dock building in the future.<sup>118</sup>

### III. THE *KROEGER* DECISION

In *Kroeger v. Department of Environmental Protection*,<sup>119</sup> Harold Kroeger requested the court review a final decision made by the DEP. The plaintiff had submitted an application to the DEP for permission to build a 180-foot dock<sup>120</sup> extending from his property on Mount Desert Island into Somes Sound, covering a wetland area of 138 square feet.<sup>121</sup> He appealed the DEP's denial of his application to the Superior Court (Kennebec).<sup>122</sup>

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115. 567 A.2d 69, 70 (Me. 1989).

116. *See, e.g.*, *Conservation Law Found., Inc. v. Dep't of Env'tl. Prot.*, 2003 ME 62, 823 A.2d 551; *Hannum v. Bd. of Env'tl. Prot.*, 2003 ME 123, 832 A.2d 765.

117. *Conservation Law Found., Inc. v. Dep't of Env'tl. Prot.*, 2003 ME 62, ¶ 41, 823 A.2d at 564.

118. *Hannum v. Bd. of Env'tl. Prot.*, 2003 ME 123, ¶ 14, 832 A.2d at 769.

119. 2005 ME 50, 870 A.2d 566.

120. The dock was to consist of a 110-foot long permanent pier, followed by a fifty-foot long seasonal ramp, and then a float measuring twenty feet. *Id.* at ¶ 2, 870 A.2d at 568. Originally, the petitioner had applied for a permit for an even larger dock. That proposal was for a dock 160 feet in length and six feet wide, with an aluminum ramp of forty-eight feet in length and four feet wide that led to a wooden float of an additional forty-eight feet in length and fourteen feet across. The entire pier was to rest upon three "granite cribs" that were based within the tidal waters. This original proposal was opposed not only by the petitioner's neighbors but also by the Town of Mount Desert. The proposal was rejected by the DEP. The petitioner then resubmitted with the dock proposal upon which the ensuing law suit was based. *See generally* *Kroeger v. Dep't of Env'tl. Prot.*, KENSC-AP-03-19 (Me. Super. Ct., Ken. Cty., Jan. 6, 2004) (Studstrup, J.), *available at* 2004 WL 187830.

121. *Kroeger v. Dep't of Env'tl. Prot.*, 2005 ME 50 ¶¶ 1-2, 870 A.2d at 568.

122. *Id.*



The Superior Court granted intervenor status to a neighboring landowner who opposed the plans for the dock and ultimately denied the plaintiff's appeal.<sup>123</sup> The plaintiff then appealed to the Maine Law Court, which affirmed the lower court.<sup>124</sup>

The plaintiff argued on appeal that the DEP's findings were arbitrary and contrary to the evidence in the record.<sup>125</sup> He maintained that his petition met the DEP's standards<sup>126</sup> regarding construction of a permanent structure in or near wetlands<sup>127</sup> and that it would not interfere with Somes Sound's scenic uses.<sup>128</sup> The plaintiff relied on expert testimony and photograph simulations to show that the dock would not visually interfere with the existing shoreline and instead be compatible with the surroundings due to its dark green color.<sup>129</sup> The plaintiff also argued that there were no practicable alternatives to his proposed dock due to the location of his property and the impracticability of manually maneuvering a hitch bearing watercraft down to the shoreline.<sup>130</sup>

On appeal, the DEP argued that the denial was appropriate because the dock presented a visual disturbance to the aesthetics of the shoreline and would result in the loss of coastal wetlands.<sup>131</sup> The majority did not address the loss of coastal wetlands in their opinion, as the failure of the petitioner

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123. *Id.*

124. *Id.*

125. *Id.* Arbitrary or capricious actions by administrative agencies must be "willful and unreasoning" and "without consideration of the facts or circumstances." *Id.* at ¶ 8, 870 A.2d at 569 (quoting *Cent. Me. Power Co. v. Waterville Urban Renewal Auth.*, 281 A.2d 233, 242 (Me. 1971)).

126. *See supra* note 3.

127. The NRPA defines "coastal wetlands" as:

[a]ll tidal and subtidal lands, including all areas below any identifiable debris line left by tidal action; all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous lowland which is subject to tidal action during the maximum spring tide level as identified in tide tables published by the National Ocean Service.

ME. REV. STAT. ANN. tit. 38, § 480-B(2) (2004).

128. *Kroeger v. State Dep't of Envtl. Prot.*, 2005 ME 50 ¶ 1, 870 A.2d at 568.

129. *Id.* at ¶ 21, 870 A.2d at 572. The expert claimed the dock became less visible from afar and that its dark green coloring would make the dock blend into the background. *Id.* at ¶ 11, 870 A.2d at 570. To review the simulated photographs of the dock in question, *see* National Oceanic and Atmospheric Administration, *Visual Impacts*, Apr. 4, 2006, available at <http://coastalmanagement.noaa.gov/czm/dockpier/visualimpactsdoc.pdf>.

130. *Id.* at ¶¶ 18-19, 870 A.2d at 572. The plaintiff argued: 1) he had notified the Department; 2) utilizing a three-point hitch to maneuver his watercraft was impractical; and 3) the closest marina was two miles away. *Id.*

131. *Id.* at ¶ 1, 870 A.2d at 568.

to meet the other standards of practicable alternative and non-interference with scenic uses made such a discussion unnecessary.<sup>132</sup> The intervenor submitted an expert's report that highlighted the significance tourists who visit the area place on viewing "high quality" landscapes.<sup>133</sup> The DEP also noted that Somes Sound is close to Acadia National Park and is home to "boaters, hikers and sightseers."<sup>134</sup> Lastly, the DEP argued that the plaintiff had failed to show that he had no practicable alternatives to the dock.<sup>135</sup>

The *Kroeger* majority held that the DEP's decision to deny the plaintiff's permit was not arbitrary and that the plaintiff had failed in his burden to show that the proposed dock would not interfere with existing scenic uses.<sup>136</sup> The majority concluded that the record demonstrated that the proposed dock would unreasonably interfere with the scenic use of Somes Sound, the sole fjord on the east coast of the country.<sup>137</sup> Noting that visitors "flock" to Acadia National Park and Somes Sound in anticipation of its aesthetic qualities,<sup>138</sup> the court held that the dock's placement on a narrow reach of the sound would significantly contrast with the scenic landscape.<sup>139</sup>

The majority dismissed the dissent's contention that subtidal lands held no scenic value.<sup>140</sup> Refusing to limit the reading of the NRPA to only "tidal and subtidal lands," the majority concluded that the water covering the lands and the "uses of the location in which the [dock] is to be constructed" were common sense components of the regulation.<sup>141</sup> Citing *Murphy v. Board of Environmental Protection*,<sup>142</sup> the court recognized the deference given to the DEP when interpreting NRPA and therefore accepted its stance that the general location of the dock would degrade Somes Sound's existing visual uses.<sup>143</sup> The majority also showed deference to the DEP when it

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132. *Id.* at ¶ 22, 870 A.2d at 573.

133. *Kroeger v. State Dep't of Envtl. Prot.*, 2005 ME 50, ¶ 12, 870 A.2d at 570.

134. *Id.* at ¶ 14, 870 A.2d at 570. The DEP demonstrated that the photographs provided by the plaintiff captured both the scenic beauty of the Sound and highlighted the lack of any neighboring docks within 2,000 feet of his property. *Id.*

135. *Id.* at ¶¶ 18-19, 870 A.2d at 572. The DEP maintained that launching small craft from the shore was possible and that the plaintiff could also utilize nearby local marinas. *Id.*

136. *Id.* at ¶ 9, 870 A.2d at 569.

137. *Id.* at ¶ 10, 870 A.2d at 569-70.

138. *Id.* at ¶ 15, 870 A.2d at 570.

139. *Id.* at ¶¶ 13-16, 870 A.2d at 570-71.

140. *Kroeger v. Dep't of Envtl. Prot.*, 2005 ME ¶ 15, 870 A.2d at 570.

141. *Id.*

142. 615 A.2d 255 (Me. 1992).

143. *Kroeger v. Dep't of Envtl. Prot.*, 2005 ME ¶ 16, 870 A.2d at 571. *See also* *Kosalka v. Town of Georgetown*, 2000 ME 106, ¶ 16, 752 A.2d 183, 187. Even before the court

affirmed the DEP's decision that the plaintiff actually had practicable alternatives to the dock: the plaintiff could launch small watercraft from the shore, as well as have water access via two local marinas.<sup>144</sup>

In his dissent, Justice Dana, joined by Justice Alexander, sharply criticized the court for what he considered an expansive interpretation of the NRPA statute.<sup>145</sup> He argued that the analysis of the aesthetic impact of the dock should be limited to subtidal wetlands, as "the only area relevant . . . is the tidal land itself, not the landscape" of Somes Sound.<sup>146</sup> He also maintained that the subtidal wetlands "are not regarded as particularly scenic or aesthetic, except perhaps by scuba divers [who are] underwater all the time."<sup>147</sup> In addition, he argued that there was no evidence in the record showing Somes Sound's tidal lands possess a greater aesthetic value than other tidal lands elsewhere in the state.<sup>148</sup> Justice Dana also asserted that the DEP's stance on the plaintiff's practicable alternatives was arbitrary because the DEP ignored indications, both through the plaintiff's own application and through DEP visits to the site, that shore launching was impractical.<sup>149</sup>

#### IV. THE IMPACT OF *KROEGER* ON AESTHETIC REGULATIONS IN MAINE

*Kroeger* brings to the surface the debate surrounding aesthetic regulations: are they a permissible government purpose that can stand alone within the general welfare prong of the police power, or must they rely upon other areas of the police power for their justification? Moreover,

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considers deferring to an administrative body's discretionary decision, that agency in question must have been provided adequate guidance for the exercise of said discretion by the legislature. *Id.*

144. *Kroeger v. Dep't of Envtl. Prot.*, 2005 ME ¶ 20, 870 A.2d at 572. The court faulted the plaintiff for failing to provide alternatives in his first application and then for neglecting to explain why shore launching of small watercraft was impracticable. *Id.* at ¶¶ 18-19, 870 A.2d at 572 (emphasis added).

145. *Id.* at ¶ 30, 870 A.2d at 574 (Dana, J., dissenting).

146. *Id.* at ¶ 32, 870 A.2d at 575.

147. *Id.* at ¶ 30, 870 A.2d at 574.

148. *Id.* at ¶ 31, 870 A.2d at 574. Justice Dana asserted that, natural fjord or not, the impact of the dock on the scenic uses of the wetland "would be virtually non-existent." *Id.* at ¶ 32, 870 A.2d at 575.

149. *Kroeger v. Dep't of Envtl. Prot.*, 2005 ME ¶¶ 38-41, 870 A.2d at 575-77. Justice Dana found ample evidence showing shore launching was impractical, including a steep shoreline lined with boulders. He also noted that the Legislature defined an alternative as practicable if it is "based on the overall purpose of the project." In Justice Dana's view the sole purpose of plaintiff's proposed dock was to access and enjoy the water from his property and "not around the local marina." *Id.*

*Kroeger* raises the question that haunts aesthetic regulations: what are the standards behind them and are they permissible? Neither the majority nor the dissenting opinions clarified the preferred approach to aesthetic regulation in Maine: ancillary or primary. Instead, they both created further ambiguity, with the majority utilizing both approaches and the dissent hardly addressing either. The primary shortcoming of both sides is that neither acknowledged the frank discussion that the topic of aesthetic regulations necessitates: that is, how should the court define aesthetics, which are inherently subjective?<sup>150</sup>

The opportunity was ripe and the following factors were in place for the court to address this issue: 1) DEP's decision that the dock interrupts existing scenic uses of Somes Sound; 2) Kroeger's neighbors objecting so strenuously to the dock that one became an intervenor in the case; 3) the repeated mention of bikers, hikers, and boaters in the vicinity by the majority; and 4) the highlighting of tourists' expectations for, and dollars spent visiting, Acadia National Park. The court had a unique opportunity for a frank discussion on aesthetic priorities in Maine but the majority skirted the issues, and did not directly acknowledge its aesthetic preferences. Thus, it remains unclear if the court intentionally sent the message that aesthetic regulations will prevail over property rights when scenic resources are located near major tourist attractions.

The majority employed the ancillary method when it deemed Somes Sound a tourist destination. Its reliance on tourists' expectations of unadulterated scenic landscapes immediately linked aesthetics to the economic health of Maine. However, the majority also employed the primary approach when it interpreted the definition of subtidal to include the land, water, and general location of the dock.<sup>151</sup> By their reasoning, to focus solely on land rather than on general surroundings would have so restricted the definition of scenic in this case as to render it devoid of any intrinsic value whatsoever. The dock—its size, color, and length—had to be considered fully against the shoreline, any other neighboring docks, and the entire fjord. In that sense, aesthetic considerations were primary. While the majority did not state as such, by deferring to the DEP's interpretation of "scenic uses," it communicated that the dock aesthetically did not belong within that environment.

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150. See, e.g., Richard Brooks & Peter Lavigne, *Aesthetic Theory and Landscape Protection: The Many Meanings of Beauty and Their Implications for the Design, Control, and Protection of Vermont's Landscape*, 4 UCLA J. ENVTL. L. & POL'Y 129, 141 (1985) ("[A]esthetic judgments are necessarily subjective, defying objective evaluation . . . ." (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981))).

151. *Kroeger v. Dep't of Envtl. Prot.*, 2005 ME ¶ 16, 870 A.2d at 571.

Although the dissent addressed the aesthetic regulations at issue, the opinion severely limited the scope of the debate. The dissent minimized the majority's broad notion of general scenic value including the dock and instead narrowly focused on the NRPA's statutory language.<sup>152</sup> Viewed by the dissent, subtidal lands were of no value to anyone other than scuba divers, a small constituency whose interests do not merit the protection of aesthetic regulations.<sup>153</sup> Interestingly, this precise view drew the dissent closest to initiating an open debate about aesthetics and subjectivity. By saying that subtidal lands were not considered beautiful enough to prevent the building of a dock, Justice Dana made a value judgment about beauty that was not directly challenged by the majority. Further, he pointed out that if one were to follow the majority's logic and accept the general scenic value of the area, what may be considered aesthetic beyond the subtidal water would be imperceptible to the public. Not only did he accept that the dock would be unobtrusive from afar due to its coloring, but the "rock, seaweed, sand, shells, and various critters that occupy the tidal lands [of Somes Sound], and may, on close inspection, offer some aesthetic value, are largely invisible to boaters in the Sound and hikers in Acadia."<sup>154</sup> In his dissent, Justice Dana echoes the minority jurisdictions that deny stand-alone aesthetic regulations due to their risk of being arbitrary and capricious.

By failing to address the inherent issue of subjectivity, the majority glossed over crucial weaknesses in its own opinion. First, the broad deference it gave the DEP was apparently enough to dismiss what the dissent deemed "plain" evidence that shore launching was not practicable for the plaintiff due to the steep nature of the boulder-lined shore.<sup>155</sup> The majority de facto assumed that no barrier of age, physical ability, or economic hardship would prevent one from maneuvering a boat down to the shore.<sup>156</sup> Second, the majority did not address the dissent's concern regarding the plaintiff's "right to wharf-out to navigable waters" or the fact that his riparian rights<sup>157</sup> were potentially at odds with the wetlands

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152. *Id.* at ¶ 30, n.6, 870 A.2d at 574 (Dana, J., dissenting) Justice Dana stated, "[b]ecause coastal wetlands, as defined by the Act, are the only protected natural resource at issue here, we must limit the scope of our analysis to the Act's definition of that resource." *Id.*

153. *Id.* at ¶ 30, 870 A.2d at 574.

154. *Id.* at ¶ 31, 870 A.2d at 574.

155. *Id.* at ¶ 38, 870 A.2d at 576.

156. *Id.* at ¶ 40, 870 A.2d at 576.

157. The court provided helpful definitions regarding coastal private property ownership in the case of *Conservation Law Foundation, Inc. v. Dep't of Env'tl. Prot.*, 2003 ME 62, 823 A.2d 551. "The public trust doctrine means, for the owner of coastal property, that the

statute.<sup>158</sup> A property owner's right to access water (e.g., by building a dock) is to be weighed against the public's use/navigation of such water, as well as any "reasonable regulation" by the state. Considering the overlap between 1) Kroeger's right as a land owner to access Somes Sound; 2) the majority's belief that Somes Sound is used by boaters and; 3) the "reasonable regulation" of the NRPA as promulgated by the DEP, these factors create a compelling stage for further discussion in order to help determine the majority's prioritization of aesthetics. The court's silence in these areas as compared to its vocal endorsement of tourism raises the question if and to what degree it prefers aesthetic regulations for scenic landscapes when located in prime coastal tourist destinations.

There is little wonder that the court stresses the importance of tourism. Maine generated \$9.5 billion in goods and services, 122,000 jobs, and \$384 million in state and local taxes from its tourism industry in 2004.<sup>159</sup> Commentators estimate that in Maine's coastal counties, tourism nets the state \$166 million in taxes.<sup>160</sup> Acadia National Park clearly plays a pivotal financial role in Maine tourism, as 2.2 million people visited the park in 2004 alone.<sup>161</sup> Given the crucial role tourism plays in the state's economy, the court's interest in preventing the degradation of the state's visual resources in tourist areas makes sense. Based on these notable facts and figures, and the laudatory language employed by the majority, it is no great stretch of the imagination to envision the court specifically endorsing promotion of tourism as a separate public purpose under the general welfare prong of the police power and thereby placing Maine within the ancillary jurisdictions. But a troubling question remains to be asked: what if the plaintiff's dock had been in an isolated section of coastal Maine, away from Acadia and the tourist buses? What would the *Kroeger* majority

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owner's property rights in the intertidal zone are subject to the public's rights to fishing, fowling and navigation." *Id.* at ¶ 36, 823 A.2d at 563. Such public rights, however, are "subject to the owner's right to wharf out to the navigable portion of the body of water." *Id.* Finally, the land owner's right to "construct a wharf to the navigable water is subject to reasonable regulation." *Id.* For an interesting look at Maine case law regarding riparian rights, see *Great Cove Boat Club v. Bureau of Public Lands*, 672 A.2d 91 (Me. 1996); see also *Whitmore v. Brown*, 102 Me. 47, 65 A. 516 (1906); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851).

158. *Kroeger v. Dep't of Env'tl. Prot.*, 2005 ME 50, ¶ 15, 870 A.2d at 576.

159. Tom Groening, *Tourist Dollars Up as Visits Drop Off*, BANGOR DAILY NEWS, Apr. 30, 2005, at A1.

160. Brian Roach, Jonathan Rubin & Charles Morris, *Measuring Maine's Marine Economy*, ME. POL'Y REV., Fall 1999, at 56, 58.

161. National Park Service, Public Use Statistics Office, Visitation Database Reports, Park by Year 1904-2004, available at <http://www2.nature.nps.gov/stats> (last visited Apr. 4, 2006).

have decided then? Would the majority's preference for tourism fall away, allowing property rights to thrive where aesthetic regulations might otherwise be enforced? The court's judicial preferences regarding existing aesthetic laws remain ambiguous.

Lastly, the Law Court did not consider the possibility of the Legislature readdressing aesthetic regulations in Maine. After all, it is from the legislative arena that such regulations are born. If signaled by the Judiciary, the Legislature might consider crafting a regulatory "scale," that is, having aesthetic regulations in coastal tourist locations bear greater weight, and less in areas that are not as heavily visited or economically viable. Alternatively, the Legislature can explicitly deem promotion of tourism as falling within the police powers, thus establishing ancillary aesthetic regulation as permissible and proper. By having the Legislature debate the subjective value judgments at the heart of aesthetic regulations, the Law Court may then be able to more concretely address cases similar to *Kroeger* in the future.

#### V. CONCLUSION

The ambiguity surrounding aesthetic regulations in Maine will continue after *Kroeger*. The primary and ancillary approaches may well overlap again, but their use may not reveal the unstated value judgments behind the Law Court's judicial opinions. Where aesthetic regulations pertain to scenic resources within coastal tourist destinations, the court will need to assess what is worth preserving: the coast's visual resources (and status as a tourist attraction), or property rights? If the court has specific aesthetic or economic criteria, then let it speak more clearly. This Note encourages the Law Court, when approached with similar questions in the future, to more concretely delineate its criteria when evaluating aesthetic regulations in the state.