Denver Law Review

Volume 46 | Issue 3 Article 3

April 2021

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THE HIGHWAY BEAUTIFICATION ACT OF 1965: A CASE STUDY IN LEGISLATIVE FRUSTRATION

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A growing national concern with billboards and other forms of visual pollution resulted in the Federal Highway Beautification Act of 1965. This article suggests that the legislation has had little positive effect and may actually work against highway beautification, with two factors combining to tie the hands of those state legislatures that seek to eliminate or reduce the number of billboards on their highways. First, Congress has not appropriated any funds during the last two fiscal years to enable the Federal Government to pay its 75 percent commitment; and second, the "just compensation" provisions of the act directly conflict with the laws of many states, which provide for taking under the police power. Two possible solutions to the problems are suggested: (1) Resort to the courts for clarification of ambiguities in the act; and (2) Amendment of the act by Congress to permit the states to elect their own techniques by which to enforce federal standards.

THE Congress of the United States in the Highway Beautification Act of 1965 declared loftily: "[T]hat the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty."[1]

The subsequent history of the Highway Beautification Act indicates these goals have not been realized and that the act which proposed to control billboards serves as the single greatest impediment in many states to passing effective billboard control legislation.[2]

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[1] Highway Beautification Act, 23 U.S.C. § 131(a) (1965). Both Houses of Congress expressed an awareness of a national billboard problem. In the Senate, roadside advertising was referred to as "a creeping cancer" which creates "blighted corridors" and makes the nation's highways "a huge and garish want ad." 111 CONG. REC. 23891 (1965) (remarks by Senator Dodd). The House also expressed a strong interest in eradicating "the garish clutter symbolic of a crass commercialism," 111 CONG. REC. 26140 (1965) (remarks by Representative Wright) in order to create scenic corridors, 111 CONG. REC. 26276 (1965) (remarks by Representative Howard).

[2] The Colorado Legislative Council made an inquiry of the fifty states. Replies were were received from 37. Some sample replies: "The terrific administrative expense in administering a program meeting the Federal requirements is a doubtful investment on the public's part for the benefits derived therefrom." (Alabama); "The hindrance encountered to date is a lack of participating Federal funds to implement the Federal Act and State Legislation." (Maryland); "[It] has hindered our ability to enforce

The fate of the act serves as an excellent illustration of how the legislative process can be subverted, in that a single section in legislation inserted by a clever lobby or overlooked in the political process can render the legislation inoperative and in effect make it counterproductive.

The Highway Beautification Act of 1965 provides that any state that the Secretary of Transportation determines has not provided for "effective control" of the erection and maintenance of outdoor advertising along the interstate and primary highway system would lose 10 percent of its Federal-Aid Highway allotment.[3] The Secretary is charged with the duty of setting certain national standards concerning the lighting, size, number, and spacing of signs[4] and with setting standards of "customery use" which will allow outdoor advertising in areas adjacent to the interstate and primary system which are "industrial or commercial" either as zoned or when meeting certain standards agreed upon between the Secretary and the individual state.[5]

The act provides that "just compensation" shall be paid for the removal of all outdoor advertising and provides that the states must pay 25 percent of the just compensation, which includes compensation to the owner of the billboard for the taking of his "right, title, leasehold, and interest" in it. In addition, the property owner on whose land the sign is located must be "justly compensated" for the taking of his "right to erect and maintain" the billboard thereon.[6]

The act further stipulates that any billboard which is lawfully in existence on September 1, 1965, and which is illegal under the act (Illegal billboards are defined as signs other than official signs, those which advertise the sale or lease of property, or which advertise activities conducted on the premises.[7]) does not have to be removed until July 1, 1970. All other lawfully erected nonconforming signs are not required to be removed until 5 years after they become nonconforming under the act.[8] The compliance date for states to conform to the Federal Act was set at January 1, 1968.[9] A 1968 amendment

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our 1961 Act, due to the compensation factor and resulting delays occasioned by several court injunctions filed in various Federal courts." (Washington). Legislative Council Survey, Colorado General Assembly, Denver, Colorado, 1969, on file with that agency [hereinafter cited as Survey].

[3] Highway Beautification Act, 23 U.S.C. § 131(b) (1965).

[4] *Id.* § 131(c).

[5] *Id.* § 131(d). A 1968 amendment to this section provides: "Whenever a bonafide State, county or local authority has made a determination of customary [commercial or industrial] use, such determination will be accepted . . . ." Federal-Aid Highway Act, 23 U.S.C. § 131(d) (1968).

[6] Highway Beautification Act, 23 U.S.C. § 131(g) (1965).

[7] *Id.* § 131(c).

[8] *Id.* § 131(e).

[9] *Id.* § 131(c).

declared that no outdoor advertising shall be required to be removed under the act until the federal share of the compensation to be paid is available.[10]

Two factors, both apparently unforeseen by even the sponsors of the Highway Beautification Act, serve to severely tie the hands of any state legislature which seeks to eliminate or reduce the number of billboards on its highways. The first is the fact that no funds were appropriated for 1968 or 1969 fiscal years by Congress to enable the Federal Government to pay its 75 percent commitment.[11]

The second factor is an opinion issued by the United States Attorney General which discusses the "just compensation" provision and declares "that Section 131 is to be read as *requiring* each state to afford their 25 percent share just compensation as a condition of avoiding the 10 percent reduction of subsection (b)."[12]

The effect of the inability or refusal on the part of Congress to fund its 75 percent share combined with the Attorney General's opinion that requires states to pay to take down billboards or risk losing 10 percent of their Federal-Aid Highway funds, has produced state legislative inaction and has had a negative effect on a state's ability to independently seek to control outdoor advertising.[13]

The effects of this impasse are becoming increasingly clear. The outdoor advertising situation reported throughout the United States ranges from "worse than ever" to reports of little change.[14] Only 21 of the 50 states have enacted legislation or taken steps to comply with the federal program and most of these already had effective billboard legislation prior to the act.[15] More serious, states that had legitimated billboard regulation through their police powers were confronted with the possibility of losing their Federal-Aid Highway funds unless they made provision for "just compensation" by amend-

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[10] Federal-Aid Highway Act, 23 U.S.C. § 131(n) (1968).

[11] The N.Y. Times, Aug. 31, 1969, at 42, col. 1. Since questions still exist concerning which areas are commercial and industrial, no valid determination on the costs of "just compensation" nationwide is yet available. However, estimates of the cost of compensating sign proprietors are $558 million. *Id.* at col. 3. In 1968, while considering the Federal-Aid Highway Act of 1968, Senator John Sherman Cooper recognized the fact that "a difficult fiscal situation" had imposed upon Congress "a responsibility to reduce, wherever possible, authorizations as well as appropriations." 3 *United States Code Congressional and Administrative News* 3526 (1968). In light of Senator Cooper's remarks, the authorization of $418.5 million for highway beautification by the Federal Government appears highly unlikely.

[12] Letter from Ramsey Clark, Attorney General, to John T. Connor, Secretary of Commerce, Nov. 16, 1966, on file with Highway department, State of Colorado, Denver, Colorado (emphasis added) [hereinafter cited as Letter].

[13] Survey, *supra* note 2.

[14] The N.Y. Times, Aug. 31, 1969, at 1, col. 2.

[15] Of the 21 presently complying states, 15 had previously enacted strong billboard control legislation. These states are: California, Connecticut, Delaware, Hawaii, Kentucky, Maine, Maryland, Nebraska, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia. The N.Y. Times, Aug. 31, 1969, at 42, col. 4.

ing their laws.[16] That the remaining states are not in compliance, may reflect frustration or a lack of understanding on the part of many state legislatures as to how to proceed on controlling outdoor advertising.

The jurisdictions which have passed legislation in compliance with the Highway Beautification Act show a great variance on exactly what is "just compensation."[17] Many state laws provide that "just compensation" means the full value of both the right, title, and interest in the sign and in addition compensation to the owner of the property for his right to erect and maintain signs thereon.[18] Others provide for a combination of amortization and compensation.[19] The dissatisfaction with the "just compensation" provision is clear, judging from a number of state laws which provide that compensation shall be paid "only when made mandatory by federal law," and absent such a mandate, removal of billboards must be effected by amortization without compensation.[20] The stilted language of Vermont's law evidences that legislature's frustration at the just compensation provision. The law provides:

> Compensation shall be paid upon the taking or removal of outdoor advertising under this chapter only if, and to the extent federal law, when in effect, requires payment of compensation for the taking or removal of outdoor advertising on state highways as a condition for payment to the state of federal highway funds, and the federal funds are available.[21]

There are many reasons why a state may object to the "just compensation" provision. There would appear to be no federal and, in most states, no state constitutional requirement to pay "just compensation" either to the owner of the sign or to the owner of the

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[16] Records of the Colorado Highway Department reveal that 23 states would have to amend their laws. Records on file with the Highway Department, State of Colorado, Denver, Colorado [hereinafter cited as Records].

[17] Jurisdictions which have instituted regulations conforming with federal standards are: Alaska, California, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Kentucky, Maine, Maryland, Minnesota, Nebraska, New York, Ohio, Pennsylvania, Puerto Rico, Rhode Island, Utah, Vermont, Virginia, and West Virginia. The N.Y. Times, Aug. 31, 1969, at 42, col. 4.

[18] *See, e.g.,* ARK. STAT. ANN. § 25-2501 (Supp. 1967); MO. REV. STAT. § 226.500 (Supp. 1968); W. VA. CODE § 17-22-5 (1967). *See also* Survey, *supra* note 2.

[19] *See, e.g.,* KY. REV. STAT. § 177.840(3) (1968); N.H. REV. STAT. ANN. ch. 249-A § 11(vi) (1969). The New Hampshire act provides:

> In calculating just compensation to be paid to the owner of an advertising device required to be removed by reason of nonconformity with Section 5 of this chapter . . . it is intended that the five-year period of nonconforming use shall be considered as whole or partial compensation to said owner for his loss. It is further intended that in calculating just compensation to the owner of land for which rental compensation has been paid for the five preceeding years, such rental income during the period of nonconforming use be taken into consideration as whole or partial compensation.

Id. Ch. 249-A § 11. *See also* Survey, *supra* note 2.

[20] *See. e.g.,* ME. REV. STAT. ANN. tit. 32, ch. 38 § 2719(7) (Supp. 1969); VT. STAT. ANN. tit. 10, ch. 14 § 336 (Supp. 1969). *See also* Survey, *supra* note 2.

[21] VT. STAT. ANN. tit. 10, ch. 14 § 336 (Supp. 1969).

land on which the sign is located.[22] Under the Federal Aid Highway Act of 1958, which granted a bonus to states which passed outdoor advertising control, 25 states had passed legislation and signed agreements with the Secretary of Commerce, and of these, 23 chose to use police power rather than eminent domain.[23] Congress, therefore, went against a large and growing body of law when it required payment of "just compensation."[24]

The reasons for the legislative decisions of these 23 states seems clear and are reflected in the various State Supreme Court opinions which upheld "police power" legislation. In *New York Thruway Authority v. Ashley Motor Court* the New York court said:

> [I]t is to be borne in mind that it was the very construction of the Thruway which created the element of value in the land abutting the road. Billboards and other advertising signs are obviously of no use unless there is highway to bring the traveller within view of them. What was taken by the regulation, therefore, was the value which the Thruway itself had added to the land and of this the defendant cannot be heard to complain.[25]

In *Ghaster Properties, Inc. v. Preston,* the Ohio Supreme Court said:

> In the instant case, the statutes only deprive an owner of a claimed right to use his land to communicate with those using the highway . . . . [A]ny such right to so communicate can be taken from the landowner without compensation by the state for the purpose of improving the highway as a means of passage for the public.[26]

The Supreme Court of Vermont, upholding general billboard regulation, in *Kelbro, Inc. v. Myrick,* quoted with approval from an earlier case, saying:

> It is obvious that something more is claimed than the mere right to erect and maintain bill-board structures upon lands adjacent to the highway. In its essence the right that is claimed is to use the public highway for the purpose of displaying advertising matter. This fact has been well stated by the Philippine Supreme Court which said that "the success of bill-board advertising depends not so much upon the use of private property as it does upon the use of the channels of travel by the general public. Suppose that the owner of private property — should require the advertiser to paste his posters upon the billboards so that they would face the interior of the property instead of the exterior. Bill-board advertising would die a natural death if this were done, and its real dependency not

[22] Euclid v. Amber Realty Co., 272 U.S. 365 (1926); St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269 (1919); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); St. Louis Gunning Advertising Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed,* 231 U.S. 761 (1913); New York Thruway Authority v. Ashley Motor Court, Inc., 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964).

[23] Records, *supra* note 16.

[24] Highway Beautification Act, 23 U.S.C. § 131(g) (1965).

[25] 10 N.Y.2d 151, 176 N.E.2d 566, 569, 218 N.Y.S.2d 640, 644 (1961).

[26] 176 Ohio St. 425, 200 N.E.2d 328, 333 (1964).

> upon the unrestricted use of private property but upon the unrestricted use of the public highways is at once apparent. Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares. Hence, we conceive that the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares."[27]

The Massachusetts Supreme Court, in *General Outdoor Advertising Co. v. Dept. of Public Works,* had this to say about the right of private property:

> The right asserted is not to own and use land or property to live, to work, or to trade. While it may comprehend some of these fundamental liberties, its main feature is the superadded claim to use private land as a vantage ground from which to obtrude upon all the public traveling upon highways, whether indifferent, reluctant, hostile or interested, an unescapable propaganda concerning private business with the ultimate design of promoting patronage of those advertising. Without this superadded claim, the other rights would have no utility in this connection.[28]

Congress in requiring "just compensation," then, apparently made its own legislative determination, and rejected the police power approach taken by the vast majority of state outdoor advertising legislation.[29] In doing so it not only undercut the well established practice of regulating outdoor advertising through the police power, but also raised two questions: first, what is "just compensation"; and second, can the Federal Government constitutionally dictate not only the substantive end results, but also the procedural means by which roadside beautification is to be achieved?

A study of the legislative history of the act shows that the declared effect of the *just* compensation provision might be far different than that which Congress intended. The Administration bill on highway beautification which was introduced into Congress in May of 1965, authorized the use of state police power, not eminent domain, for effecting the control of outdoor advertising.[30] But the Committee on Public Works in the Senate amended the bill to require "just compensation."[31] It was explained that it was because the act was to apply to the primary road system as well as to the interstate,

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[27] 113 Vt. 64, 30 A.2d 527, 529 (1943), *quoting from* Churchill *et al.* v. Rafferty, 32 P.I. 580, 609, *appeal dismissed,* 248 U.S. 591 (1918).

[28] 289 Mass. 149, 193 N.E. 799, 808, *appeal dismissed,* 296 U.S. 543 (1935), *appeal dismissed,* 297 U.S. 725 (1936).

[29] Representative Thomas Pelly remarked during the 1965 beautification bill debates, that 36 states were already able to regulate outdoor advertising by use of their police powers. 111 CONG. REC. 26306 (1965) (remarks by Representative Pelly). This statement is consistent with the fact that 23 police power states *had signed agreements* with the Secretary of Commerce under the 1958 Highway Act. Records, *supra* note 16.

[30] 111 CONG. REC. 23797 (1965) (remarks by Senator Cooper).

[31] *Id.*

and to the billboard industry and small businesses which had advertised and developed with the primary roads for more than 40 years, that compensation should be paid,[32] even though it was acknowledged that the zoning powers of the state had previously been used to regulate that industry. However, it is clear that many Congressmen thought the proposed legislation would allow the state to use the police power if its own constitution permitted. Congressman Edmondson stated in response to a question: "There is no question but what title I and title II specifically authorized stricter standards by a state if a state wishes to have them, both as billboard control and on the junkyard problem."[33] Many people interpreted the Federal Act to merely make compensation available if states either desired to pay compensation, or were forced by their own constitutions to do so.[34] They assumed that the use of the state police power to impose billboard control restrictions, which were the same or greater than those imposed by the federal statute, would continue to be available and would not impose an obligation to "justly compensate" upon either Federal or state Government.[35] For these people the opinion of the Attorney General declaring that a state risked losing its Federal-Aid Highway funds if it did not provide "just compensation" came as no small shock.[36]

When the beautification bill reached the floor of the Senate, initial opposition focused upon the 25 percent "just compensation" contribution of the states.[37] It was urged that the highway beautification program, being a national one, should be fully financed by the Federal Government.[38] Those in favor of total compensation by the Federal Government argued that the states were not in the position to accept such a heavy administrative and financial burden as the bill proposed to put upon them.[39] (There are 41,000 miles of interstate roads and 225,000 miles in the primary system,[40] and a federal report estimates the number of illegal signs outside commercial areas at 839,000.)[41] The fear was expressed by others that payment made solely by the Federal Government would relieve the

[32] *Id.* at 23798.

[33] *Id.* (remarks by Representative Edmunson).

[34] *See generally Hearings on S. 1467 Before the Subcomm. on Pub. Roads of the Senate Comm. on Pub. Works, Beautification and Highway Safety Programs,* 90th Cong., 1st Sess. 59-101 (1967).

[35] *Id.*

[36] Letters, *supra* note 12.

[37] 111 CONG. REC. 23796 (1965) (remarks by Senator Cooper).

[38] *Id.*

[39] *Id.* at 23871 (remarks by Senator Robertson).

[40] *Id.* at 23874 (remarks by Senators Holland and Randolph).

[41] The N.Y. Times, Aug. 31, 1969, at 42, col. 3.

states of all responsibility and would "lead toward inflated compensation payments."[42]

The proponents of state contribution were eventually successful in retaining the 25 percent compensation burden provision.[43] In explaining the interrelated functioning of sections 131(e,f) of the act, some members of the Senate strove to alleviate potential confusion on the part of the states legislatures when confronted by what appeared to be an intolerable financial drain upon state resources:

> Whatever interest remains at the particular time the States act to compensate them, they would be paid, but as the amortization period advanced, of course, then their property interests would be of less value.[44]

And more precisely:

> [A]ll that can be compensated for is whatever remains of the leaseholds or the unamortized values, so that if, in fact, the billboard has been completely amortized or the leasehold has expired, no compensation will be paid under the bill.[45]

These comments go a long way in explaining the 5-year period of nonconformance stipulated in section 131(e) and what role that period was intended to play in "just compensation." It was apparently thought that partial or even full amortization of both sign owner and property owner interests could be accomplished during that time, thus making "compensation" as described in the act partially or totally unnecessary.[46] Viewed in a slightly different perspective, a period of amortization could be seen as compensation; for that in essence is what the stipulated period of nonconformance accomplishes.

When one considers that amortization is a technique traditionally employed in phasing out a nonconforming use within the police power function of zoning,[47] and that compensation as referred to is classically spoken of in light of eminent domain,[48] the coupling of a nonconforming time period with "just compensation" appears incongruous and confusing — *but only when examined out of leg-*

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[42] 111 CONG. REC. 23874 (1965) (remarks by Senator Randolph).

[43] Highway Beautification Act, 23 U.S.C. § 131(g) (1965).

[44] 111 CONG. REC. 23872 (1965) (remarks by Senator Cooper).

[45] *Id.* (remarks by Senator Muskie). After looking through subcommittee testimony, Senator Neuberger had noted "that the signboard industry [felt] that it [could] amortize its investments in signboards in 5 years." *Id.* (remarks by Senator Neuberger).

[46] Highway Beautification Act, 23 U.S.C. § 131(g) (1965).

[47] *See generally* Katarincic, *Elimination of Nonconforming Uses, Buildings, and Structures by Amortization — Concept Versus Law*, 2 DUQUESNE L. REV. 1 (1963).

[48] DILLON, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 555 (5th ed. 1911).

islative context. Taking into account the existence of an extremely vocal billboard industry lobbying for compensation,[49] and the fact that in 1965, 36 states were able to regulate billboards by terminating without compensation, after allowing for amortization of costs,[50] it becomes clear that just compensation after a reasonable period of amortization was the logical Congressional solution to a perplexing legislative problem.

The correct and apparently Congressionally intended interpretation of section 131(g) is extremely important to the success of the Highway Beautification Act. If "just compensation" means "compensation" mitigated by "amortization" it could clearly result in a somewhat more manageable federal and state expenditure, while an interpretation requiring *full* compensation could not only preclude Congress from ever funding the project, but could also serve as an insurmountable impediment to other federal, state and local beautification-through-zoning projects.

The Administration bill which was considered by the Senate Committee on Public Works in May 1965, required that the Secretary of Commerce deny *all* highway funds to a state that did not comply with its provisions.[51] Strong opposition in the committee itself, to the imposition of this severe 100 percent penalty, succeeded in reducing it to a 10 percent forfeiture.[52]

The issue of whether the selection of a method of billboard control, previously left to the discretion of the states, can be taken from them by the 1965 act is worth examination. In his letter to the Secretary of Transportation, then Attorney General Ramsey Clark, responding to criticism that the act left the states no alternative to compliance, declared that an option did exist, — the states could ignore the act and incur the 10 percent penalty of its provisions.[53] Attorney General Clark cited *Massachusetts v. Mellon,*[54] wherein a suit was brought which attacked the constitutionality of legislation that provided matching funds to states for federally approved programs designed to improve maternal and child health care. By way of dicta, the Court said:

> Probably, it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation,

[49] *See generally Hearings on S. 2084 Before the Subcomm. on Pub. Roads of the Senate Comm. on Pub. Works, Highway Beautification and Scenic Road Program,* 89th Cong., 1st Sess. 200-28, 278-353, 390-408 (1965).

[50] 111 CONG. REC. 26306 (1965) (remarks by Representative Pelly). This responsibility is currently the jurisdiction of the since established post of Secretary of Transportation.

[51] *Id.* at 23796 (remarks by Senator Cooper).

[52] Highway Beautification Act, 23 U.S.C. § 131(b) (1965).

[53] Letter, *supra* note 12.

[54] 262 U.S. 447 (1923), *overruled,* Flast v. Cohen, 392 U.S. 83 (1965).

> but simply extends an option which the state is free to accept or reject.[55]
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> Nor does the statute require the states to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.[56]

The Attorney General believed that *Oklahoma v. United States Civil Service Commission*[57] was the case most nearly in point to the present situation. In *Oklahoma,* the state objected to the discharge by the Federal Government of a state employee, a member of its highway commission, for a violation of the Hatch Act,[58] a federal law. The state had received a grant of federal highway aid, and that grant was conditional on compliance with the Hatch Act. The Court upheld the position of the Civil Service Commission, declaring: "While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have the power to fix the terms upon which its money allotments to states should be disbursed."[59]

The distinguishing element between the two cases cited by former Attorney General Clark and a case which could arise under the Highway Beautification Act of 1965 is obvious. In *Massachusetts,* matching funds for maternal and child health care were to be denied where federally-approved programs designed for that purpose were not utilized.[60] In *Oklahoma,* a state *highway* official could be dismissed by the Federal Government for violation of federal law, where the Federal Government participated in *highway* development in that state.[61] But under the 1965 Act, a state which refuses to participate in a national program of beautification not only forfeits Federal Government participation in the state's beautification effort, *i.e.* a 75 percent share of compensation payments, but must also sustain a 10 percent loss of federal funds for a defense-commerce project, the construction of highways. Analagous to the situation at hand would be a forfeiture of federal funds used in the construction of a state's medical facilities as a result of the state's unwillingness to comply with a federal program of recreation-area development. The two contentions appear equally preposterous.

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[55] 262 U.S. 447, 480 (1923).

[56] *Id.* at 482.

[57] 330 U.S. 127 (1947).

[58] Hatch Political Activities Act, 5 U.S.C. § 118 (*l,* k-n) (1964), 18 U.S.C. §§ 594-95, 600-01, 604-05, 608 (1964).

[59] Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127, 143 (1947).

[60] Massachusetts v. Mellon, 262 U.S. 447 (1923), *overruled,* Flast v. Cohen, 392 U.S. 83 (1968).

[61] Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127 (1947).

This inconsistency in the rationale of the penalty provision of the Highway Beautification Act of 1965 was noted in the Senate:

> [A]nd no state should be deprived of this assistance so necessary to provide a complete nationwide system for commerce and defense needs, by reason of not being able to qualify as a member in good standing of an extraneous program.[62]

Still another Senator commented:

> I do not know of any Federal-aid program, in existence or proposed, with the exception of this bill, which requires States to take legislative action and make appropriations under penalty of losing Federal-aid available under another program.[63]

The issue thus arises as to what provision "violations" will bring the 10 percent penalty into effect. The Attorney General's opinion[64] declared that the "just compensation" provision was a condition of avoiding the 10 percent reduction of section 131(b).

The major case to date interpreting the "just compensation" section,[65] *Markham Advertising Co. v. State,* held that its language was not mandatory and that Congress did not pre-empt the field but left the states free to act.[66] The court declared that Washington's billboard control statute which used police power was therefore valid. It stated:

> Our examination of § 131, supra, leads us to conclude that its essential operation is to condition payment of 10 percent of a State's share of federal-aid highway funds upon the state's exercise of its powers to regulate outdoor advertising in a manner consistent with federal standards. We think that the purpose of the federal statute is obviously to induce the States to act, not to require them to do so. The statute allows the state to choose between foregoing 10 percent of its allotment of federal-aid highway funds and compliance. If Congress had intended . . . [it] to be mandatory on the states, there would have been no need to attach a monetary penalty to noncompliance.[67]

The *Markham* case seems well reasoned and reflects the rule of long standing that conflicts between Federal and state Governments must be so "direct and positive" that the federal and state acts cannot "be reconciled or consistently stand together."[68] State legislatures, however, in other states still have to resolve the "compensation"

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[62] 111 CONG. REC. 26252 (1965) (remarks by Senator Berry).

[63] *Id.* at 23798 (remarks by Senator Cooper). Further substantiation of the fact that two different programs were therein involved may be found in the fact that § 131(g) of the act, suggesting "just compensation," was funded for fiscal years 1966 and 1967 not from the highway trust fund but from the general fund. *Id.* at 23869 (remarks by Senator Randolph).

[64] Letter, *supra* note 12.

[65] Highway Beautification Act, 23 U.S.C. § 131(g) (1965).

[66] 439 P.2d 248 (Wash. 1968), *appeal dismissed,* 393 U.S. 316 (1969). *See also* Southeastern Displays, Inc. v. Ward, 414 S.W.2d 573 (Ky. 1967).

[67] *Id.* at 257.

[68] *Id., quoting from* Kelly v. Washington, 302 U.S. 1, 9-10 (1937).

problem, knowing that their states may have the penalty imposed against them and that the courts may uphold the penalty in following the reasoning of the Attorney General's opinion.[69] For these legislatures the question is not so much the odds but the stakes. The traditional use of police power in this area will possibly deprive them of a significant portion of much needed highway funds.

Thus, although the 1965 Highway Beautification Act, when correctly interpreted to mean compensation after a period of amortization, permits compliance legislation which places a more reasonable financial burden upon the state, the act has attempted to give authority to the Federal Government to resolve problems previously within state jurisdiction which were well on the way to solution by state authorities. The zoning approach taken by the majority of concerned states which drafted billboard control legislation prior to the enactment of the 1965 act, contained no element of "just compensation."[70] An amortization period was considered to be compensation enough.[71] State and federal court decisions consistently upholding the constitutionality of zoning to control the spread of billboard blight along the highways,[72] furnish yet another reason why the states have not assumed a position of ready compliance to the 1965 act's "just compensation" provisions.

Congressional action, suggesting the use of eminent domain in the billboard control area, seems ironic upon consideration of the rapid emergence and acceptance of zoning as the police power tool by which aesthetics as an element of general welfare, or in its own right, can be protected by the states.[73]

A common device by which zoning regulations actually based upon aesthetics have been brought under the more traditional general welfare umbrella, has been to declare that the promotion of aesthetics

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[69] Letter, *supra* note 12.

[70] Records, *supra* note 16.

[71] *Id.*

[72] Euclid v. Amber Realty Co., 272 U.S. 365 (1926); St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269 (1919); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); St. Louis Gunning Advertising Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed,* 231 U.S. 761 (1913); New York Thruway Authority v. Ashley Motor Court, Inc., 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964).

[73] Eskind v. City of Nero Beach, 150 So. 2d 254 (Fla. 1962), *rev'd,* 159 So. 2d 209 (Fla. 1963); Sunad, Inc. v. City of Saratoga, 122 So. 2d 611 (Fla. 1960); Dade County v. Gould, 99 So. 2d 236 (Fla. 1957); Merritt v. Peters, 65 So. 2d 861 (Fla. 1953); City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941); State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967); City of New Orleans v. Pergament, 223 La. 14, 64 So. 2d 798 (1953); City of New Orleans v. Levy, 198 La. 852, 5 So. 2d 129 (1941); Town of Lexington v. Govenar, 295 Mass. 31, 3 N.E.2d 19 (1936); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963); Ohio v. Buckley, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968); Oregon City v. Hartke, 240 Ore. 351, 400 P.2d 255 (1967).

will improve the economy and will thus benefit the general welfare.[74] In the Florida tourism cases,[75] zoning restrictions on billboards were upheld where the economic health of the city's major industry (tourism) was at stake, and therefore, the general welfare of the community's inhabitants was endangered. Somewhat similarly, in *City of New Orleans v. Pergament*[76] and *City of New Orleans v. Levy*,[77] the preservation of areas of historic interest was deemed to be sufficiently important to the city's economy, hence zoning towards that end was upheld as legislating for the general welfare.

In 1963, in *People v. Stover*,[78] the New York Court of Appeals wrote a landmark decision in the history of zoning. That case involved an ordinance prohibiting the maintenance of clotheslines in front or side yards abutted by a street. In the court's words:

> [I]t is our opinion that the ordinance may be sustained as an attempt to preserve the residential appearance of the city . . . .
>
> . . . .
>
> Once it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power.[79]

Making that concession, recognizing that the statute in question was based on aesthetic considerations, the court concluded that the ordinance was properly grounded on a proper exercise of the police power.[80]

As momentous as the *Stover* decision was to the field of zoning for aesthetics generally, equally momentous was the impact of *Cromwell v. Ferrier*,[81] another New York case decided in 1967 on the specific issue of billboard zoning for beautification. The ordinance in *Cromwell* set forth a comprehensive plan for regulating accessory signs, those related to a business located on the same lot, and implicitly prohibiting all others.[82] In discussing the validity of

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[74] Eskind v. City of Nero Beach, 150 So. 2d 254 (Fla. 1962), *rev'd*, 159 So. 2d 209 (Fla. 1963); Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960); Dade County v. Gould, 99 So. 2d 236 (Fla. 1957); Merritt v. Peters, 65 So. 2d 861 (Fla. 1953); City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941); City of New Orleans v. Pergament, 223 La. 14, 64 So. 2d 798 (1953); City of New Orleans v. Levy, 198 La. 852, 5 So. 2d 129 (1941).

[75] The Florida Cases include: Eskind v. City of Nero Beach, 150 So. 2d 254 (Fla. 1962), *rev'd*, 159 So. 2d 209 (Fla. 1963); Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960); Dade County v. Gould, 99 So. 2d 236 (Fla. 1957); Merritt v. Peters, 65 So. 2d 861 (Fla. 1953); City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941).

[76] 198 La. 852, 5 So. 2d 129 (1941).

[77] 223 La. 14, 64 So. 2d 798 (1953).

[78] 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963).

[79] *Id.*, 191 N.E.2d at 274, 240 N.Y.S.2d at 738.

[80] *Id.*, 191 N.E.2d at 276, 240 N.Y.S.2d at 738-39.

[81] 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

[82] *Id.*, 225 N.E.2d at 751, 279 N.Y.S.2d at 24.

that ordinance, the court recognized that the primary objective of any anti-billboard ordinance is an aesthetic one, and rejected the notion that aesthetic objectives alone would not support a valid ordinance.[83] The court upheld the constitutionality of the ordinance in question and approved the enactment of legislation prescribing outdoor advertising, based primarily on aesthetic considerations. Billboard zoning for aesthetics was thus confirmed as a proper function of the police power.

Since the two New York decisions, other states have taken similar strides in the same direction. In *State v. Diamond Motors Inc.*,[84] the court declared:

> We accept beauty as a proper community objective, attainable through the use of police power. We are mindful of the reasoning of most courts that have upheld the validity of ordinances regulating outdoor advertising and of the need felt by them to find some basis in economics, health, safety, or even morality . . . . We do not feel so constrained.[85]

In *Ohio v. Buckley*,[86] statutes which required junkyards outside of a municipality to be obscured from the view of persons traveling on the city's roads, were held a valid exercise of the police power although they were based upon aesthetic considerations.[87] Earlier, the majority in *Oregon City v. Hartke*,[88] joined *Stover* in its holding that "aesthetic considerations alone [could] warrant an exercise of the police power."[89] With such precedents established, it is not surprising that today neither Ohio nor Oregon has fully implemented the 1965 Federal Beautification Act, and that both are regulating billboards by police power.[90]

As shown by the recent decisions in Hawaii,[91] New York,[92] Ohio,[93] and Oregon,[94] the *Stover* decision in 1963 rather than starting a trend in police power exercise — marked its culmination. State legislatures, municipal zoning groups, and the judiciary, had been promoting aesthetics through zoning for many years, cloaking

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[83] *Id.*, 225 N.E.2d at 753, 279 N.Y.S.2d at 27.

[84] 50 Hawaii 33, 429 P.2d 825 (1967).

[85] *Id.* at 827. The state supreme court was butressed in its decision by the HAWAIIAN CONST. art. 7, § 5: "The State shall have power to conserve and develop its natural beauty, objects and places of historic or cultural interest, sightliness and physical good order, and for that purpose private property shall be subject to reasonable regulation."

[86] 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968), *appeal dismissed*, 395 U.S. 163 (1969).

[87] *Id.*

[88] 240 Ore. 35, 400 P.2d 255 (1967).

[89] *Id.*, 400 P.2d at 262.

[90] Survey, *supra* note 2.

[91] State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967).

[92] Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963).

[93] State v. Buckley, 243 N.E.2d 66 (Ohio 1968).

[94] Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1967).

their intent in an argument based primarily on health,[95] safety,[96] public welfare,[97] or morals.[98] While aesthetics had remained well hidden in the dicta of pre-*Stover* decisions, times had slowly changed and the attitudes of people toward aesthetics had changed with them.[99]

Whatever the reason for the ascendance of aesthetics, it appears certain that beauty has finally acquired the mantle of legislative and judicial respectability within the states. Were it not for the highway beautification program of 1965, state legislatures could clearly have a wide array of police power justification in preserving beauty along our Nation's highways.

For the foregoing reasons, the majority of state legislatures have not complied with the mandate of the Federal Highway Beautification Act of 1965. The fact that the Federal Government itself is not able to perform its obligations under the act — pay its share of compensation — has been a crucial factor in state noncompliance. Confusion has arisen over antithetical provisions which join "just compensation" and amortization concepts. Also, the act, in seeking to create a national program of beautification, has established a potentially dangerous precedent in threatening to withdraw a portion of federal funds from one federal-state program for a state's noncompliance with another.

In addition, in the interpretation of the act, there exists great confusion as to the effect of the term "compensation"; whether, despite the Attorney General's opinion,[100] the nonexistence of a direct and positive conflict between the Federal Act and an existing state act,[101] may still permit the state to operate under "stricter"[102] standards which utilize the police power?

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[95] *See generally* St. Louis Gunning Advertisement Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911).

[96] *Id. See also* Los Angeles v. Barrett, 115 Cal. App. 2d 776, 315 P.2d 503 (1957); *In re* Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961); New York Thruway Authority v. Ashley Motor Court, Inc., 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964).

[97] Eskind v. City of Vero Beach, 150 So. 2d 254 (Fla. 1962), *rev'd*, 159 So. 2d 209 (Fla. 1963), Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960); Dade County v. Gould, 99 So. 2d 236 (Fla. 1957); Merritt v. Peters, 65 So. 2d 861 (Fla. 1953); City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941); City of New Orleans v. Pergament, 223 La. 14, 64 So. 2d 798 (1953); City of New Orleans v. Levy, 198 La. 852, 5 So. 2d 129 (1941); Town of Lexington v. Govenar, 295 Mass. 31, 3 N.E.2d 19 (1936).

[98] *See generally* St. Louis Gunning Advertisement Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911).

[99] The Oregon supreme court described that change in attitude as "a reflection of the refinement of our tastes and the growing appreciation of cultural values in a maturing society." Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1967).

[100] Letter, *supra* note 12.

[101] Markham Advertising Co. v. State, 439 P.2d 248 (Wash. 1968).

[102] Highway Beautification Act, 23 U.S.C. § 131(e) (1965).

Finally, courts have for many years recognized the constitutionality of controlling the billboard problem through zoning.[103] Suddenly, the application of eminent domain principles may be demanded of the states by an ambiguous federal act. The reaction of state government is understandably one of confusion.

Although the Highway Beautification Act of 1965 has generated much confusion, the act should not "join Prohibition in the Federal annals of noble experiment."[104] For the motivation of the Administration and the legislators who drafted and enacted it was one of an urgent interest in controlling our environment and preserving our Nation's heritage of natural beauty. A solution to this frustrating situation would be to amend the act to permit the states to elect their own techniques by which to enforce federal standards, thereby transforming the highway beautification program into an effective, truly federal effort. A return to the incentive system as presented in the 1958 Federal-Aid Highway Act,[105] but with an incentive offered to the states in the form of any needed highway beautification funds, could be an innovative aspect of that amended act.

Should amendment to the 1965 Act not be made by the current Congress, resort to the courts for clarification of ambiguities of the act will be necessary. A declaratory judgment action by a state official asking the court, under the Federal Administrative Procedure Act,[106] to determine whether there is a conflict between the Tenth Amendment[107] and the Attorney General's interpretation of section 131(g) of the 1965 Act would be brought. Such a course of action would probably involve extensive litigation, during which time noncomplying states, enforcing billboard controls by locally determined procedures, would be doing so under threat of penalty. It appears clear, then, that this confusing situation may be most expediently resolved by the Congress through its amendment procedures, and that it should be the Congress, therefore, that solves the problem which it has created.

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[103] Euclid v. Amber Realty Co., 272 U.S. 365 (1926); St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269 (1919); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); St. Louis Gunning Advertising Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed*, 231 U.S. 761 (1913); New York Thruway Authority v. Ashley Motor Court, Inc., 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964).

[104] The N.Y. Times, Aug. 31, 1969, at 42, col. 7.

[105] Federal-Aid Highway Act, 23 U.S.C. § 122(c) (1958).

[106] 5 U.S.C. §§ 1001-11 (1964).

[107] U.S. CONST. amend. X.

DENVER LAW JOURNAL

VOLUME 46 SUMMER 1969 NUMBER 3

Member, National Conference of Law Reviews

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