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Roads and Recreation

BY ROGER TIPPY*

Editor's Note: Since 1916, federal aid for the construction of highways has been granted solely on the utilitarian premise that roads are primarily a means of moving the population from one place to another. Mr. Tippy views our expanding population and suggests that roads are now becoming a source of recreation in themselves. The Highway Beautification Act of 1965, which affords scenic beauty to our highways by controlling billboards and junkyards, is seen as evidence of the new philosophy. Mr. Tippy suggests that highways should be constructed to provide easy access to and through our recreational parks without destroying their natural beauty. The author concludes by stating that recreational development and highway planning should be closely coordinated to fulfill this dual purpose of our highways.

As the American population doubles in size during the period from 1960 to 2000, its demand for outdoor recreation will triple. This exponential relationship, noted by the Outdoor Recreation Resources Review Commission in 1962,1 is due primarily to two factors: increased leisure time, and increased mobility.

Since people will ordinarily be driving to their recreational sites, the highways on which they will drive must necessarily play an essential role in the enjoyment of natural resources. This article will describe three aspects of highways which affect recreation planning: the highway as access, as a use land, and as a recreation resource. By way of introduction, it is necessary to describe briefly the various roadbuilding programs in the United States.

I. THE HIGHWAY PROGRAMS

A. The Federal-aid Highway Systems

Federal aid to the states for highway construction began in 1916.2 In 1956, this program was vastly expanded by the creation

1 Outdoor Recreation For America (Washington, 1962).
of the federal Highway Trust Fund and the authorization of the National System of Interstate and Defense Highways (the Interstate System). The Trust Fund receives federal taxes on gasoline, motor oil, tires, and trucks, and receipts are allocated to the states by the Bureau of Public Roads (hereinafter cited as BPR) for the three federal-aid highway systems.

The Interstate System receives the largest slice of the Trust Fund allocations—three billion dollars in fiscal year 1967. The Interstate System will be, when completed, a 41,000 mile network of divided, controlled-access highways. According to the authorizing legislation, the system is to be completed by 1972, with the federal government assuming ninety per cent of construction costs.

The federal-aid primary system consists of 225,280 miles of the larger conventional routes—the "U.S. highways"—plus some major state-numbered highways. New construction on the primary system is financed equally by BPR and the states.

The federal-aid secondary system is well described by its alternate name, the farm-to-market roads. The basic federal share, as with the primary system, is fifty per cent of the cost of new or rebuilt secondary roads. This system was composed of 616,928 miles in 1963, with federal aid to the primary and secondary systems amounting to one billion dollars annually in recent years.

The state highway departments decide, on all three systems, where and when roads will be built. The role of BPR is technically passive; it calculates the Trust Fund allocations available to each state and obligates the allocated moneys on a project-by-

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3 70 Stat. 397 (1956).
4 70 Stat. 378 (1956). An Interstate system was authorized in 1944, 58 Stat. 888, but never moved far off the drawing board until the 1956 statute raised the federal share of construction costs from sixty to ninety per cent.
10 Ibid.
11 U.S. Dept. of Commerce, op. cit. supra note 8 at 119.
project basis. The form of the obligation is a project agreement signed by the proper state official and the Secretary of Transportation. Congress and the BPR are able to affect the state highway programs by varying the allocations with bonuses or penalties or by attaching conditions to the project agreement. But, in the final analysis, the state highway department always has the right to choose whether to accept federal aid with its conditions, or to build roads as it chooses, without the aid.

The Trust Fund, as presently constituted, will not provide enough revenue to complete the Interstate System by the target date of June 30, 1972. This leaves Congress the alternatives of extending the completion date, increasing the highway-user taxes, or shifting money from the primary and secondary systems to the Interstate program. Since Congress has not yet reached a decision on these questions, the BPR is required to try to keep the cost of Interstate projects as low as possible. Added costs, often to the benefit of recreation values, are thus harder to justify.

B. Federal Highway Systems

Most of the highways on federally-owned lands are constructed and maintained entirely with federal funds. The BPR builds forest and public lands highways (which are the major routes

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14 23 U.S.C. § 110 (1958). This authority was transferred from the Secretary of Commerce to the Secretary of Transportation by the Department of Transportation Act, § 6(a) (1), 80 Stat. 937 (1966).
15 BURCH, HIGHWAY REVENUE AND EXPENDITURES POLICY IN THE UNITED STATES 215-16 (1962).
17 On a user tax increase, the administration's position since 1961 has been that trucks should bear the burden of new taxes, either the excise tax on trucking operations or the tax on diesel fuel, as this is more commensurate with the benefits trucking would receive from a completed Interstate system. Federal Pay-As-You-Go Highway Program—Message from the President. H. R. Doc. No. 96, 87th Cong., 1st Sess. 5-6 (1961), The Budget of the United States Government, Fiscal Year 1967, 58 (Washington, 1966). The opposition of the trucking industry has kept this approach from being approved by Congress. N. Y. Times, May 30, 1965, § 3, p. 1, Col. 6. Allocations for the primary and secondary systems will probably not be reduced, as this money is spent in every Congressional district—an attribute lacking in the Interstate system. A further "stretch-out," extending the completion date for the Interstate system, is viewed with dismay by the public works committees in Congress which would have to take the first steps to authorize such an extension. Federal-Aid Highway Act of 1966, S. REP. No. 1410, 89th Cong., 2d Sess. 18 (1966).
across the national forests and the public domain) and roads on the Indian reservations.\footnote{20} The Forest Service, Department of Agriculture, has built and maintains over 158,000 miles of supplementary access roads in the national forests, many of which carry substantial recreation traffic.\footnote{21} The National Park Service, Department of the Interior, has built and operates several national parkways, which are simply highways encased on a ribbon of parkland.\footnote{22} The Park Service also constructs the road systems in the conventional national parks. All these federal highways are financed from general funds rather than from the Highway Trust Fund.

\section*{C. State and Local Highway Systems}

Three-fourths of the mileage of the streets and highways of the nation is built and maintained by state and local governments with no federal participation.\footnote{23} While the streets in cities and towns have little recreation significance, the smaller rural roads are usually the link between the main roads of the federal-aid system and the destination of the recreation seeker.\footnote{24}

\section*{II. THE HIGHWAY AS ACCESS}

The main purpose of a highway is to allow motor vehicles to move from one point to another. This is also the highway's major role in recreation programs. Roads are a major factor in recreation planning, as their quantity and quality largely determine the den-

\footnote{22} Their popularity is illustrated by the fact that the Blue Ridge National Parkway (Virginia-North Carolina) was the most visited single unit of the National Parks System in 1965. U.S. Department of the Interior, news release, February 27, 1966 (Washington, D.C.).
\footnote{23} 2,645,993 miles were built entirely by state or local governments, out of a national total of 3,620,457 miles of roads and streets, as of 1963. U.S. Dept. of Commerce, \emph{op. cit. supra} note 8 at 119.
\footnote{24} The ski area presents a novel problem in some state highway programs. Ski resorts are customarily developed by private capital and are usually located in remote mountain areas where access roads would serve nothing but the ski area. Several New England states encourage the ski business by building ski access roads at public expense, which is essentially a subsidy to the ski area owner. N. H. Rev. Stats. Ann. ch. 236-C, (Supp. 1965); Me. Rev. Stats. Ann. T. 23, ch. 703 (1964); Vermont, by special acts of the legislature. It is estimated that Vermont has spent about 2 million dollars on these ski access roads. Letter from Russell A. Holden, Commissioner of Highways, State of Vermont, October 27, 1966.
sity of use of recreation lands and waters. Density of use is the main key to the recreation area classification system of the Bureau of Outdoor Recreation, a system composed of six categories:

- Class I—High-Density Recreation Areas;
- Class II—General Outdoor Recreation Areas;
- Class III—Natural Environment Areas;
- Class IV—Unique Natural Areas;
- Class V—Primitive Areas;
- Class VI—Historic and Cultural Sites.

Class I areas such as beaches and municipal parks and Class II areas such as ski slopes and boating marinas need wide all-weather roads in order to function at their intended capacities. The access requirements of Class III and IV areas are not as great and can often be served by single-lane unimproved roads or jeep trails. The essence of a Class V wilderness area is the complete absence of roads and other signs of civilization, and roadbuilding is thus incompatible with wilderness management.

Sound planning for recreation programs and highway building requires close co-ordination between the two. Highway design is dictated primarily by the volume of traffic the road is expected to carry. Ordinarily, this figure should be based on periods of peak traffic, but too often is not. Weekend recreation traffic reaches peaks far above normal levels putting a heavy unplanned burden on our roads. For example, the State of Maryland maintains a two-lane bridge across Chesapeake Bay between the Baltimore-Washington area and the seashores of Delaware and Maryland. Adequate for normal traffic, the bridge becomes a bottleneck on Sunday evenings during the summer, as thousands of cars move from the beaches to the cities. Traffic may be stalled for three or four hours at such times. It was not until 1966 that the state legis-

\[25\] *Outdoor Recreation for America*, op. cit. supra note 1 at 97.

\[26\] A conflict squarely posed in the Great Smokies National Park recently. Under the Wilderness Act of 1964, 78 Stat. 890 at 892, the Secretary of the Interior must review all roadless areas of 5,000 acres or more in the National Parks by 1974 and recommend, after hearings, that suitable areas be added to the National Wilderness System. In the Great Smokies, the National Park Service proposed to build a road through the center of the roadless land and classify the lands on each side of the road as wilderness areas. 31 F.R. 5667 (April 12, 1966). Local hiking clubs and other wilderness supporters urged that the road not be built and that one large wilderness be established in the area. Public hearings on Proposed Great Smokies Wilderness, June 13, 1966 (Gatlinburg, Tenn.); June 15, 1966 (Bryson City, N.C.).
lature voted to build a second bridge to handle the recreation traffic.\textsuperscript{27}

State governments are currently developing staffs of professional recreation planners, much as they had to develop professional highway planning staffs a few years ago. The reason for each development is the same, \textit{i.e.}, that a professional staff is needed to acquire and spend federal grants-in-aid.\textsuperscript{28} When recreation planning matures into a thriving professional discipline, its interaction with highway planning should be good for both programs.

III. THE HIGHWAY AS LAND USE

An expanding highway system needs land, and its requirements occasionally impinge on recreation resources. In addition to controversial route location choices, the two programs have come into conflict over highway land acquisition policies and highway construction and design techniques.

A. Land Acquisition Policies

Many states, especially since the advent of the Interstate program, authorize their highway departments to acquire "property of any kind," or "property, public or private" with the eminent domain power.\textsuperscript{29} With a power granted in such terms, highway departments may take parks, schools, and other types of public land without the consent of the governmental unit administering such land.\textsuperscript{30}

\textsuperscript{27} Md. Laws ch. 517 (1966). The decision to build the bridge was disapproved by the electorate when the foregoing act was petitioned to a popular referendum in the 1966 elections. The controversy was over the location of the bridge; however, the necessity was undisputed.

\textsuperscript{28} The Bureau of Outdoor Recreation (hereinafter cited as BOR) in the Interior Department administers a recreation program very much like BPR's highway program, with a "trust fund" based on user fees, annually allocated to the states in the form of matching grants for recreation land acquisition and development. The Land and Water Conservation Fund Act of 1965, 78 Stat. 597 (1964), receives admission fees to federal parks and recreation areas, gasoline taxes for motorboat fuel, and proceeds from sales of surplus federal land. These collections are allocated to the states and the federal recreation agencies. The states, to be eligible for allocations, submit comprehensive statewide outdoor recreation plans to BOR. 78 Stat. 901 (1964).


\textsuperscript{30} State Highway Comm'n v. Greensboro City Bd. of Educ., 265 N.C. 35, 148 S.E.2d 87 (1965); City of San Antonio v. Congregation of Sisters of Charity, 360 S.W.2d 580 (Tex. 1962), \textit{cert. denied}, 372 U.S. 967 (1963); People v. City of Los Angeles, 170 Cal. App. 2d 558, 4 Cal. Rptr. 531 (1960). But when the power of condemnation is granted with respect to "property," without more (Continued on next page)
When a state legislature has left some types of public land exempt from the condemnation powers of the highway department, the department can invoke the aid of the BPR, which can take property in the name of the federal government and turn it over to the state. BPR has occasionally condemned parkland and cemeteries which state highway departments were unable to acquire.

The situation might not have become a problem if highway planners had exercised restraint in avoiding recreational and historic properties. In cities, however, taking parkland meant lower land costs and fewer relocations for the urban highways; consequently, freeways supporters and park defenders came into frequent conflict.

The federal government could not dictate eminent domain policies to the states but it could condition its grants-in-aid to alleviate the pressure on parkland. This was done in a section of the Federal-Aid Highway Act of 1966 (the Yarborough amendment) which states:

It is hereby declared to be the national policy that in carrying out the provisions of this title, the Secretary shall use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites. The Secretary shall cooperate with the States in developing highway plans and programs which carry out such policy. After July 1, 1968, the Secretary shall not approve under section 105 of this title any program for a project which requires the use for such project of any land from a

(Footnote continued from preceding page)

elaboration, the grant has been construed as not authorizing the taking of public land for highways. Departments of Public Works and Bldgs. v. Ellis, 23 Ill. App. 2d 619, 179 N.E.2d 679 (1962); Society of the New York Hospital v. Johnson, 5 N.Y. 2d 102, 154 N.E.2d 550, 180 N.Y. 2d 287 (1959); City of Louisville v. Milton, 247 S.W.2d 975, 977 (Ky. 1952) (dictum).


33 A typical controversy is that over the location of Interstate 90 in the Cleveland area. The county engineer selected a route through a greenbelt area "after engineering surveys of several routes had been made. He said the route was chosen because it would remove the least number of homes. In addition, he said, it would be cheaper to buy park land." N.Y. Times, Oct. 2, 1966, § 1, p. 111, col. 1. Other controversies are mentioned throughout Forer, Preservation of America's Parklands: The Inadequacy of Existing Law, 41 N.Y.U.L. Rev. 1093 (1966).

34 Senator Ralph Yarborough of Texas was the sponsor of the amendment.
Federal, State, or local government park or historic site unless such program includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use.\footnote{35}{23 U.S.C. § 138 (1966 supp.)}

The Secretary to which the section refers was the Secretary of Commerce. A few weeks later another act of Congress created a Department of Transportation and transferred all highway building responsibilities of the Secretary of Commerce to the Secretary of Transportation.\footnote{36}{Pub. L. No. 89-670, 89th Cong. 2d sess. § 6(a) (1) (1966).} Concerning the preservation of recreation lands, the Department of Transportation Act states a policy which applies to all modes of transportation under the new Secretary, including highways. This section, known as the Jackson amendment,\footnote{37}{The principal author was Senator Henry Jackson of Washington. Senator Karl Mundt of South Dakota also contributed to the final language.} reads:

The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreation area, wildlife and waterfowl refuge, or historic site resulting from such use.\footnote{38}{§ 4(f), 80 Stat. 934 (1966).}

The Jackson amendment is stronger in several respects than the Yarborough amendment. First, it takes effect at the same time other parts of the statute do,\footnote{39}{The Act takes effect ninety days after the Secretary first takes office. § 15(a), 80 Stat. 950.} accelerating the July 1, 1968 date of the Yarborough language. It also extends the protection to wildlife and waterfowl refuges. Further, it involves the Departments of the Interior, Housing and Urban Development, and Agriculture in a general consulting capacity. It also requires the Secretary to find that no feasible and prudent alternative route is available.
before he may approve a project under this section. Of course, the
Jackson amendment applies to all transportation programs in the
new Department, but it is obvious that the highway program is
the main object.\textsuperscript{40}

In most situations there is an alternative route somewhere.
This route, however, is usually more costly than one through a
park or other public land, which the highway department can
acquire for an unrealistically low price. Hopefully, the Secretary
of Transportation will not overweight comparative costs in
deciding whether an alternative route is feasible and prudent. In
cities, a route through built-up areas will displace more residents
and businesses than a route through a park. This results from the
very nature of open space. To say that an alternative would not be
prudent because of the displacement factor would constitute dis-
regard for the new park-preservation policy. Highway-caused dis-
placement in cities is a serious problem, but the solution lies in
improving compensation policies and relocation assistance, not in
building freeways through the little urban open space remaining.

“All possible planning to minimize harm” usually would mean
incorporating some ameliorative design features in the highway
which is to be built through a park. An example is the proposed
Cumberland Gap tunnel on the Kentucky-Virginia state line. A
750-foot tunnel for U.S. 25 E would be built under the floor of the
gap, in order to preserve the scenic and historic quality of the
area.\textsuperscript{41}

\textbf{B. Construction and Design Techniques}

In the past, construction practices have seriously damaged
water resources such as fish habitat and water quality. For example,
when the contractor takes gravel from the stream bed the dis-
ruption may destroy the stream’s fish propagation potential, create
sediment pollution, and affect the ground water aquifer system.\textsuperscript{42}
Meandering streams are sometimes rechanneled into straight lines
paralleling highways, further reducing the fish population.\textsuperscript{43}
Road cuts, borrow pits, and other surfaces of bare earth send

\textsuperscript{40} 112 Cong. Rec. 25591-92 (daily ed. October 13, 1966).
\textsuperscript{41} Kentucky Department of Highways news release, October 14, 1966.
\textsuperscript{42} Highway Beautification and Scenic Roads Program, \textit{Hearings Before the
Subcommittee on Public Roads of the Senate Committee on Public Works}, 89th
\textsuperscript{43} Id. 448-54, 490-93.
quantities of silt washing down to the streams during rainstorms, thereby causing even more pollution and loss of recreation resources.\(^4\)

These problems have been attacked by requiring highway departments to consult more extensively with resource agencies. To this end, the BPR has issued two policy and procedure memoranda to the state highway departments. The first, in 1963, requires every state highway department to negotiate a joint planning agreement with its state fish and game department.\(^4\) These agreements must provide that the fish and game agency be permitted to comment on every federal-aid road project affecting fish and wildlife resources, and project applications must be accompanied by the comments and suggestions of that agency.\(^4\) A 1964 memorandum extended this consulting relationship to recreational and historical agencies.\(^4\) The BPR is in turn under mandate to confer with the Soil Conservation Service for help in prescribing construction methods which will keep soil erosion at a minimum.\(^4\)

Recommendations from these sources may be implemented in two ways. General recommendations concerning construction practices can be incorporated into the agreement between the state highway department and the contractor building the road. Recommendations pertaining to specific route locations or design policies, however, must be taken up by the highway department itself.

The design of the rural highway—as a subject apart from route selection—is rarely a problem today. Engineers have learned to fit the highway to the contours of the land. The fish and game coordination procedure seems to have reduced highway damage to fishing streams and has, in a number of instances, actually enhanced fish and wildlife habitat.\(^4\)

The design of the urban highway, particularly the freeway, remains a major problem. Even when urban parks and historic sites

\(4\) Id., reprinted in Hearings, supra note 42 at 459.
are avoided, the freeway's design may adversely affect scenic views, pedestrian accessibility, the character of neighborhoods, and other aesthetic values. The key design element is the elevation of the roadway. Besides conventional surface designs, the highway may be constructed at elevated, depressed, or tunneled elevations. Tunneled designs have the least impact on cities and have been used when other elevation alternatives were unacceptable. But tunneling is the most expensive technique. The House Public Works Committee had this testy comment on underground answers to urban highway problems:

Proper consideration must be given to Aesthetic values, but prudent judgment does require recognition of the fact that highway transportation is a basic and essential element in the American economy, that the automobile will continue to be a dominant mode of transportation, and that highways in rural and urban areas alike must be provided at a cost reasonably consistent with the service they provide.

Expressways in urban areas serve an essential human need, a need which can be provided for within the authorizations of this. Short segments of covered highways are a necessary element of urban highway design to be used when needed in conjunction with other design elements. These authorizations are not adequate, and not intended, to finance a proliferation of tunnel design as the sole answer to highway transportation problems in urban areas. Cities planned for people need highways planned for people and this bill authorizes highways within that concept.

Although design alternatives to surface elevation are often available to soften the highway's impact on the city, they are usually more expensive. It is not impossible to find satisfactory designs for city freeways, but it is difficult to decide who should pay the added costs. To be sure, the needs of the highway user make the freeways necessary in the first place. But the statements of the House Public Works Committee reflect the concern of politically powerful groups about the strains on the Trust Fund. Architect and planner Lawrence Halprin argues that the dif-
difficulty lies in thinking of urban freeways as single-purpose structures, designed to move traffic. He urges that freeways be designed as an integral part of the cities, illustrating his points with examples of “rooftop freeways,” apartment buildings built over freeways, and pedestrian parks developed alongside freeways. He implies that the highest cost of socially responsive freeway design may be recouped by using land in the right-of-way, over or under the road, for housing, commerce, and public facilities. Under this approach, the Trust Fund and state matching highway funds would pay for that part of a freeway’s cost which could be attributed to the traffic-moving purpose. This theory combines political acceptability with desirable improvements in design.

IV. THE HIGHWAY AS RECREATION

The American scene on a Sunday afternoon is ample evidence that driving an automobile is a recreation experience for millions. Outdoor Recreation for America has described “driving for pleasure” as a form of outdoor recreation and has found that it is the single most popular recreation activity. Highway planners have responded to the recreational instinct by designing roads that avoid monotony in driving, and by seeking to preserve the scenic view from the road. The design techniques were relatively easy to establish, but scenic protection has been one of the most vexing problems encountered in the highway program.

A. Background

Aside from following parkway construction programs, anti-litter campaigns, and roadside landscaping projects on state, local, and private levels, the first major federal involvement in highway scenery protection came in 1958. This was the billboard control section of the Federal-Aid Highway Act of 1958. As an incentive to the states to regulate outdoor advertising along the Interstate system, the Act offered to increase the federal share of Interstate projects by one-half of one per cent when the roadsides of such projects were controlled in conformity with national standards.

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53 Id. at 124-27, 133-41.
54 U.S. Dept. of Commerce, op. cit. supra note 1, at 34.
56 72 Stat. 95 (1958).
The standards defined "control" as prohibiting signs which are visible from the road and within 660 feet of the edge of the right-of-way, exceptions were made for certain types of signs.\(^{57}\)

In the following seven years, twenty-five states passed legislation authorizing their highway departments to control billboards along Interstate roadsides.\(^{58}\) However, very few billboards were removed and very little money was paid out pursuant to bonus agreements.\(^{59}\) In some states protracted constitutionality tests held the administration of the new statutes in abeyance, although the statutes were nearly always upheld, eventually, by state supreme courts.\(^{60}\) The control program was further hampered by timid or insufficient enforcement by some state highway departments.

These shortcomings of the 1958 Act led the BPR and the administration to propose a much stronger law in 1965. After sharp debate and substantial revision, the bill emerged as the Highway Beautification Act of 1965.\(^{61}\) It set up three separate programs aimed at billboard control, junkyards elimination, and scenic protection.

**B. The Highway Beautification Act of 1965**

1. **Billboard Control.**—The 1965 Act repeals its 1958 predecessor, but retains the principle of a control zone 660 feet from the edge of the right-of-way, free of off-premise advertising signs. Such control is to be applied both to the Interstate system and to the much more extensive primary system. The control is exercisable by the state, under state law, and at the state's option—but the 1958 carrot has become the 1965 stick. If by 1970 a state has not exercised effective control, as defined in the act, its Trust Fund allocation for highway construction will be reduced by ten per cent.\(^{62}\)

\(^{57}\) The exceptions permitted signs advertising the sale or rent of the property on which they stood, signs advertising business activities within twelve miles of the sign site, official directional signs, and signs authorized by state law to give information to the travelling public. See Comment, 46 Calif. L. Rev. 796 (1958), for a detailed analysis of the 1958 Act.

\(^{58}\) Listed in Hearings, op. cit. supra note 42, at 22.

\(^{59}\) Id. at 22, 42.

\(^{60}\) Moore v. Ward, 277 S.W. 2d 881 (Ky. 1964); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964); In re Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961); Markham Advertising Co. v. State Memorandum Opinion No. 95570, (Superior Ct., Thurston Co., Washington 1966).


The Title was amended rather heavily as it proceeded through Congress, and in several instances confusing language resulted. One of the more ambiguous passages of the Highway Beautification Act is the statement that “just compensation shall be paid upon the removal of . . . signs . . . lawfully in existence on the date of enactment of this subsection.” The federal government assumes seventy-five per cent of these compensation payments.

The compensation provision has been criticized as an effort to unravel a principle which the courts fashioned only after much time and travail: that aesthetic considerations, such as roadside scenery protection, are a public purpose for which the police power may be employed without providing compensation. When land use regulation—through zoning—was first initiated, the courts held that such regulation could be exercised to promote the public health, safety, welfare, or morals, but that it could not rest upon aesthetic grounds. Aesthetics were only gradually accepted as a public purpose, and the series of state court decisions upholding billboard regulation pursuant to the 1958 bonus law appeared to put police power regulation for aesthetics on a firm ground. Hence the 1965 Act's compensation principle has been criticized for abandoning and discrediting police power control.

This is a partial overstatement. To be sure, no state may disregard the compensation requirement without incurring the ten per cent penalty. But the state's police power is not completely interdicted thereby. The police power may be used in two different ways to control billboards. That is, the legislature can declare the signs a public nuisance and subject to immediate re-

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66 The Kentucky Court of Appeals was especially clear on this point. "Aesthetic considerations are of sufficient potency for the legislature to find a public necessity for this type of legislation. We have recently considered this question and have accepted aesthetic considerations as justifying the use of the police power." Moore v. Ward, 377 S.W.2d 881, 886-87 (Ky. 1964).
67 The Justice Department, in response to BPR's request for an advisory interpretation, has stated that the compensation provision is mandatory upon the states and that any state which used its police power to remove billboards would be subject to the ten per cent cut. Letter from Ramsey Clark, Acting Attorney General, to John T. Connor, Secretary of Commerce, November 16, 1966. The Justice Department interpretation further held that this procedure is a constitutional exercise of federal power, relying on Oklahoma v. U.S. Civil Service Commission, 330 U.S. 127 (1947) for the proposition that Congress may always set terms and conditions for the receipt of federal grants-in-aid.
moval without payment, or it can zone the land adjacent to the highways for non-billboard uses and treat existing signs as non-conforming uses which must be removed after a reasonable amortization period. Under the non-conforming use approach, compensation may be paid for unamortized value remaining if a sign is removed before the end of the amortization period. The federal law's mandatory compensation provision bars a state from using the nuisance-abatement procedure but does not discourage the nonconforming-use device, so long as compensation is paid for any unamortized balance.

When the 1958 billboard control legislation was enacted, Congress left the states free to choose between police power control and acquisition- eminent domain control. While most of the states participating in the bonus program chose the police power approach, at least one highway department—Nebraska's—adopted the course of acquiring "advertising easements" along the Interstate system. However, that option was not written into the 1965 Act, in part due to the application of control to the primary as well as the interstate system. A uniform compensation policy, in Senator Cooper's words,

... Advertising on the primary system has been accepted throughout the years as a legitimate business, and as useful to the travelling public, and has not heretofore been prohibited except

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68 E.g., Ohio Rev. Stat. § 5516.04 (1964) (signs may be removed by state thirty days after notice of illegal location is given to the owner).
69 E.g., Calif. Business & Prof. Code § 5288.2 (1965 Supp.) (five years' amortization).
70 Calif. Business & Prof. Code § 5288.3 (1965 Supp.).
71 BPR has so advised the state of Colorado. "The Federal Act does not prohibit amortizing signs, insofar as possible under State law. Since this procedure amounts to an appraisal technique, such legislation would comply with the federal requirements for compensation." Letter from Dowell H. Anders, General Counsel, Bureau of Public Roads, to Richard W. Phillips, Assistant Attorney General, Colorado Department of Highways, January 19, 1967.
73 These easements are often acquired at little or no cost, even through condemnation proceedings. In Fulmer v. State, 178 Neb. 664, 134 N.W.2d 798 (1965), the Nebraska Supreme Court held that the price a billboard company was willing to pay for a sign-site lease did not constitute evidence of the value of the advertising easement; the proper measure was defined as the difference in the market value of the underlying property with and without the right to place billboards on it. In the absence of such evidence, a trial court's award of "zero dollars compensation" was affirmed, as was a similar award in Mathis v. State, 178 Neb. 701, 135 N.W.2d 17 (1965).
through the zoning power of the states. It is proper and just that the taking of the sign from landowners should be accompanied by compensation.\textsuperscript{74}

Another troublesome section provides that billboards:
whose size, lighting, and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems, which are zoned industrial or commercial under authority of State law, or in unzoned industrial or commercial areas as may be determined by agreement between the several States and the Secretary.\textsuperscript{75}

In January, 1966, the BPR published a "discussion draft" for standards and criteria under this section\textsuperscript{76} and held public hearings in every state on the basis of this draft. This document was not a draft of Bureau regulations, but rather a trial version of the terms on which the BPR would seek agreements with the states. It was nonetheless widely misunderstood and interpreted as a proposed unilateral regulation. An act of the 1966 Kentucky Legislature, for example, provides for billboard control along the primary system roads where:

the Commissioner of Highways shall adopt regulations to carry out the provisions of this Act which are not more restrictive than the regulations adopted by the United States Secretary of Commerce pursuant to Section 181, Title 23, United States Code or any amendment thereto.\textsuperscript{77}

The federal act, as originally introduced, gave the Secretary the power to issue regulations governing advertising in industrial and commercial areas; Congress, however, deliberately amended this section, and directed that this authority be shared with the states.\textsuperscript{78} The change may reflect the fact that different types of scenery are characteristic of the several states \textit{i.e.}, a billboard in Vermont would not have the same effect as one in Nevada. For this reason, the BPR is not expected to reach identical agreements

\begin{itemize}
\item[\textsuperscript{74}] S. Rep. No. 709, 89th Cong., 1st Sess. 15 (1965).
\item[\textsuperscript{75}] 23 U.S.C. § 131(d) (1966 supp.).
\item[\textsuperscript{76}] 31 Fed. Reg. 1162 (1966).
\item[\textsuperscript{77}] Ky. Rev. Stat. § 177.865 (1966 supp.).
\end{itemize}
with all fifty states. On the other hand, the 1958 Act authorized
the Secretary of Commerce to promulgate nationally uniform
standards with which all states would have to comply in order to
earn the bonus. Thus, in comparing the Acts, the standards for
permitted signs have shifted from uniformity to state-by-state
treatment, while the theory of allowing state choice in means of
control under their police power has shifted to requiring uniform
compensation.

After the hearings had been digested, the BPR staff circulated
a second trial version of standards in the summer of 1966 and
considered the subsequent comments. Early in 1967, the Bureau's
official position on the standards and criteria, together with a
cost estimate, were released in a report to Congress.79 These
standards represent a compromise between the protection of
scenery and billboard industry interests.

The standards, if they are to be accepted by every state, will
require the removal of 178,000 signs from industrial or com-
mercial areas.80 Another 839,000 signs, located outside the regu-
lated areas, will also have to be removed by virtue of the statutory
requirements.81 Although administration and enforcement ex-
penses of the 1967 standards weren't estimated, it appears the
cost of sign removal and compensation alone will amount to 558
million dollars. Thus, billboard control will remain in the political
arena for some time since both Congress and the states must
decide whether to accept the costs and administrative burdens
involved in participating in the program established by the 1965
Act.

2. Junkyards.—The second Title of the Highway Beautifica-
tion Act has had a much less controversial history than the first.
This section urges the states (again, the sanction is a ten per cent
cut in Trust Fund money) to screen or remove auto junkyards
which are within 1000 feet of, and visible from, the rights-of-way
of Interstate and primary highways.82 This control is not re-

79 1967 HIGHWAY BEAUTIFICATION PROGRAM, Report of the Department of
(1967).
80 Id. at 6.
81 Ibid. However, should a state insist on a definition of unsound industrial
or commercial areas differing from that proposed by BPR, the number of signs in
prohibited areas would shift vis-a-vis the number of signs in regulated areas.
82 Ibid.
quired for junkyards in zoned or unzoned industrial areas. Screening approximately 14,000 junkyards affected by the act and payment for the removal of another 3,500 junkyards which cannot be screened effectively will cost an estimated 122 million dollars. Again, the federal share of these payments is seventy-five per cent. As with billboard control provisions, the states are free to regulate junkyards more restrictively. Kentucky does this, controlling junkyards within 2000 feet of the center-lines of these highways.

In considering appropriate legislative treatment, it should be remembered that auto junkyards present an economic problem very different from billboards. Billboards are placed alongside highways because of a profit motive. Yet, automobiles are left along the highways because there is often no profitable way to dispose of them, and abandonment is the cheapest alternative. In some situations, scrap metal can be sold to steel mills on competitive terms, but, usually, iron ore is a better buy for the mills. The junkyard problem will diminish considerably if and when technological advances reduce the processing cost of junked automobiles and scrap steel finds a wider market.

3. Scenic Protection.—The third Title of the Highway Beautification Act created a simple federal grant program for the purpose of acquiring easements in, or title to, land and of developing roadside recreation facilities to protect the scenic view. Under this Title, the BPR pays the entire cost of a project. The reason the states do not have a matching obligation is that many of them cannot spend their highway funds for non-highway purposes, e.g., for buying land outside the right-of-way. A number of states have passed legislation enabling their highway departments to acquire land outside the right-of-way for scenic protection purposes, even though the money to be spent on such acquisitions was from federal funds.

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84 1967 HIGHWAY BEAUTIFICATION PROGRAM, supra note 79, at 28.
85 23 U.S.C. § 136(g) (Supp. 1968.).
87 Hearings, supra note 42, at 125-28, 353-57.
89 The anti-diversion laws are discussed in BURCH, HIGHWAY REVENUE AND EXPENDITURE POLICY IN THE UNITED STATES 68-68 (1962). But see Newman v. State, 133 N.W.2d 549 (N. Dak. 1965), holding that the expenditure of earmarked state highway funds for advertising rights outside the right-of-way did not violate an anti-diversion amendment in the state constitution.
The BPR has issued vague priorities for the use of these funds. The main result is to put a low priority on applications for landscaping projects within the right-of-way. This use was authorized by a floor amendment in the House after the BPR had opposed it on grounds that landscaping with the right-of-way is properly a construction cost. No preference is indicated for land acquisitions in fee as opposed to scenic easement acquisitions or other less-than-fee preservation devices. However, roadside rest stops are of lower priority than scenic protection projects. Outright fee acquisitions are probably more popular than scenic easements due to the latter’s novelty and legal uncertainty.

The 1965 Act authorized appropriations of 120 million dollars a year for fiscal years 1966 and 1967. The BPR has since proposed that the scenic protection program be authorized for a ten-year period, at either a “minimum level” of 991 million or a more thorough level of just over 2 billion dollars. It is unlikely that either goal would be realized through the regular appropriations process. Since the Congressional guardians of the Highway Trust Fund would never sanction a diversion of such magnitude, from the Fund, the administration has proposed the creation of a “beauty-safety trust fund.” This fund would receive two percentage points of the federal excise tax on new automobiles and

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93 Policy and Procedure Memorandum 21-4-66, op. cit supra note 91, states that projects should be selected “that first will preserve existing scenic beauty, second will permit the improvement, restoration, or enhancement of the strip, and third will make available supplemental areas whereon to provide facilities such as rest and recreation areas and scenic overlooks that are lacking on the right-of-way.” Kentucky Highway Department projects to date have been of the first category; i.e., the protection of existing scenery. These projects have been fee acquisitions to preserve the scenic approaches outside but leading to areas such as Mammoth Cave National Park, Cumberland Falls State Park, and Natural Bridge State Park. Letter from J.R. Harbison, Program Management Engineer, Kentucky Department of Highways, October 18, 1966.
94 For a description of the National Park Service’s problems in enforcing scenic easement obligations along the Blue Ridge Parkway, see Land Acquisition for Outdoor Recreation—An Analysis of Selected Legal Problems, OUTDOOR RECREATION RESOURCES REVIEW COMMISSION STUDY REPORT No. 16, 44-45 (Washington 1962). Although such easements are almost always acquired by negotiation, the Supreme Court of Wisconsin has held that they can be condemned. Kamrowski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1966).
96 1967 HIGHWAY BEAUTIFICATION PROGRAM, supra note 79, at 10.
would be dedicated to the three programs authorized in the Highway Beautification Act and to the federally-aided highway safety programs. However, opposition from the automobile manufacturers may prevent the enactment of this new trust fund proposal.

C. Scenic Roads and Parkways

The highway beautification legislation originally proposed by the administration in 1965 contained a fourth Title which was dropped. This would have required the states to divert one-third of the Trust Fund allocations for secondary (farm-to-market) roads to the construction or development of scenic roads and roads leading to recreational or scenic areas. This proposal was attacked by state and local government officials and others interested in maintaining construction efforts on the secondary system. Advised by the BPR that a detailed study of scenic roads and parkways was then in progress, Congress deleted the Title to await the presentation of the study.

This study, released in March, 1967, was based on state highway department reports which were submitted in response to a BPR questionnaire directing the states to propose potential systems of scenic roads and parkways within their domains. The Forest Service and the Department of the Interior submitted similar reports. The routes nominated by these reports totaled 136,500 miles, at a development cost of 18.7 billion dollars. Based on these nominations, the BPR report proposes a “minimum program” of 54,411 miles of scenic roads and parkways, costing four billion dollars or an “extended program” of 96,967 miles, costing eight billion dollars, allocated according to the figures below.

<table>
<thead>
<tr>
<th>Mileage</th>
<th>Survey Nominations</th>
<th>Minimum Program</th>
<th>Extended Program</th>
</tr>
</thead>
<tbody>
<tr>
<td>New routes</td>
<td>50,500</td>
<td>11,535</td>
<td>26,146</td>
</tr>
<tr>
<td>Existing routes</td>
<td>86,000</td>
<td>42,876</td>
<td>70,821</td>
</tr>
<tr>
<td>Cost (in billions)</td>
<td>$18.71</td>
<td>$3.97</td>
<td>$7.99</td>
</tr>
<tr>
<td>New routes</td>
<td>13.17</td>
<td>2.67</td>
<td>5.61</td>
</tr>
<tr>
<td>Existing routes</td>
<td>5.54</td>
<td>1.30</td>
<td>2.33</td>
</tr>
</tbody>
</table>

100 Scenic Roads 130.
101 Scenic Roads 130, 148, 155.
The construction of new roads is the largest cost item in each proposal. However, most of the mileage would be derived from the scenic development of existing highways. Such development would involve protecting the scenery along the road and creating recreational facilities beside the road (picnic tables, boat launching ramps, campgrounds, and the like).

The scenic road study has raised several differences of opinion among the federal recreation-oriented agencies. An initial policy question is whether a special program is needed at all. If the purposes of the Highway Beautification Act are achieved, would not “driving for pleasure” be feasible on all the Interstate and primary roads? To some degree this is true, although the compromises written into the Beautification Act make its purposes hard to realize. The statute could certainly be rewritten to promote more effective roadside protection on the most scenic portions of the Federal-aid highway systems. However, the truly scenic road is something more than a road completely in compliance with the Beautification Act. It is designed for leisurely driving and its engineering specifications for gradients, curves, etc., are not as rigid as the specifications for general traffic on the Interstate or the primary system.

A related question is whether the magnitude of the proposed investment—even in the BPR’s minimum program—would be a fair allocation in light of present public investment in recreation. Precise estimates on total annual federal expenditures on recreation are not available, but it is noteworthy that in fiscal 1967 the Bureau of Outdoor Recreation and the National Park Service together spent on their programs the equivalent of what the BPR proposes to spend annually in the name of a minimum recreational road program.

Another question is whether a scenic road program should be administered under the traditional BPR-state highway department

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102 A bill introduced in Congress early in 1967 by Representative Thomas M. Pelly (R.-Wash.) would amend the 1965 Highway Beautification Act by requiring stricter billboard and junkyard controls along the Interstate System and only ten per cent of the primary and secondary systems. The ten per cent, about 82,000 miles nationally, would be called a National Scenic Road System. H. R. REP. No. 4137, 90th Cong., 1st Sess. (1967).

103 The fiscal 1967 appropriation for BOR and the Park Service totaled 225 million dollars, 80 Stat. 170 (1966); BPR would disburse 210 million dollars annually for scenic roads and parkways (excluding national parkways), SCENIC ROADS 10.
relationship or whether state outdoor recreation planners should be given an equal voice in the selection and development of routes. One consideration is that, since the inception of the Interstate System, the route selection and construction practices of highway engineers have made those engineers the object of deep distrust by conservationists and sportsmen alike. A scenic roads bill packaged as just another road building program would undoubtedly be opposed by many conservation organizations.

The source of financing may be troublesome. Thus, if, as the BPR claims, one-third of all automobile travel consists of "driving-for-pleasure," then such driving generates a substantial contribution to the Highway Trust Fund—and a recreational road program could lay claim to a share of the money. But the Trust Fund is already overburdened, and barely able to meet existing obligations. The report proposes a one-half cent increase in the federal gasoline tax, with the augmented Trust Fund then financing the federal share of scenic road construction.104

If the minimum program is enacted, either Congress or the BPR will have to forge a balance between new construction projects and scenic projects on existing highways. The state highway departments, if the choice is left to them, may choose to spend the funds on new routes. For example, the two highest priority nominations of the Kentucky Department of Highways, the Cumberland Parkway and the Appalachian Parkway, would cost together over 110 million dollars.105 The 345 miles in these two programs alone, of which 280 miles would be new routes, would consume almost all federal and state money budgeted under a minimum scenic road program.106 Other state highway departments may also be more enthusiastic about new construction projects, since new roads, (a) mean more jobs, and are thus popular in economically depressed regions, and (b) do not pose as many problems in corridor protection as would existing roads.

Corridor protection includes restricting the use of surround-

104 Scenic Roads 164-65. The cost of corridor protection would come out of general funds.
105 Kentucky Department of Highways, Kentucky Scenic Roads and Parkways Study (1965). The thirty proposals in this study aggregate 2,086 miles of roadway costing 278 million dollars. New construction proposals came to 447 miles.
106 Under the BPR minimum proposal, 61.7 million dollars would be allocated to Kentucky as a fifty per cent matching grant. Scenic Roads 214.
ing land for billboard advertising, junkyards, overhead power lines, subdivision or commercial development, large excavations, and tree cutting.\textsuperscript{107} Control is ordinarily secured by using the police power (as in zoning), by acquiring a partial interest in the land (scenic easements), or by acquiring a fee interest. Regardless of the form, corridor protection will not be popular with the inhabitants or landowners of the corridor, for it restricts private financial opportunities to make money.

But the BPR has proposed a goal of 54,000 miles of scenic roads and parkways. If this goal is to be realized within the proposed financial limitations, then four out of every five miles of the scenic system must be designated on existing roads. If new-route project applications are submitted in excessive quantities, the BPR will have to reject them to reach its goal.

The scenic roads proposal may have some specific shortcomings. But it is a proposal of great significance to recreational resources, for the scenic road can be a major link between the popular concepts of natural beauty and recreation. Scenic road development will also contribute to the diversification of state highway department planning staffs, adding environmental disciplines to the engineering expertise now predominant in such planning. This trend could provide the long range solution to the location and design problems that too often pit roads against recreation.

\textsuperscript{107} Scenic Roads 49-53; California Department of Public Works, the Scenic Route, A Guide For The Designation of An Official Scenic Highway 29-39 (1966). California began developing a scenic roads system in 1963, with corridor protection to be administered by counties or municipalities.