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THE REGULATION OF OUTDOOR ADVERTISING: PAST, PRESENT AND FUTURE

John T. Lucking*

I. INTRODUCTION

Misplaced outdoor advertising billboards have long been a familiar eyesore. When placed in predominantly residential or scenic zones, they mar horizons and fill green spaces with intrusive commercial messages which invade our privacy and insult our sensibilities. Although their purpose is to further the economic well-being of local businesses, they may paradoxically contribute to its demise by making an area unattractive to those consumers capable of living or going elsewhere. Outdoor advertising must therefore be strictly regulated in order to enhance the overall aesthetic and economic welfare of the community.

Outdoor advertising cannot be condemned entirely. It has been part of the commercial scene since the days of ancient Greece when panel-covered columns listed the order of contests at public games. Outdoor displays serve as a low cost means of providing the desired

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1 The following testimony, given by a local town meeting member before a state board empowered to regulate outdoor advertising, typifies the increased awareness in local communities that they have the right and often the responsibility to demand an aesthetically pleasing environment: "Communities can no longer neglect the total living spaces. We cannot run away from our homes, nor do we want to. We cannot escape our obligation to strike down ugliness as we would strike down noise in order to protect the viability of our communities. . . ." Brief for Appellant app., at 80-81, John Donnelly & Sons v. Outdoor Advertising Bd., Mass. Adv. Sh. 3450, 339 N.E.2d 709 (1975).


3 Outdoor advertising is less costly than any other medium. Interview with William McBain, Legal Counsel for John Donnelly & Sons, Inc., in Boston, Mass. (Nov. 26, 1976). Outdoor advertising (billboards) costs $20.00 per adult rating point as compared with $47.00 for radio; $42.00 for television; $76.00 for newspaper; and $100.00 for magazines. INSTITUTE FOR OUTDOOR ADVERTISING, THE FIRST MEDIUM 20 (1975), quoting MEDIA MARKET GUIDE (Summer 1975).
information needed to induce purchases in the marketplace. Thus, it is neither economically desirable nor aesthetically necessary to eliminate outdoor advertising from predominantly commercial, nonresidential areas.

Since the beginning of the century an increasing number of billboard and sign regulatory laws have been enacted at all levels of government. Most of these regulations have been based partially or totally upon aesthetics. At the local and state level, these regulations have been upheld under the states' police power to preserve the health, safety, and general welfare. State regulation has usually taken the form of enabling legislation which empowers communities to enact their own outdoor advertising ordinances. Sometimes the state sets limits on the municipalities or retains review power. However, in recent years some local ordinances have gone beyond regulation to complete prohibition of billboards. Two states have virtually prohibited commercial outdoor advertising. The courts have upheld these prohibitions under the states' police power.

Outdoor advertisers, when confronted with aesthetically based regulations, often claim that legislatures should not be vested with the power to declare what is aesthetically pleasing because they cannot define their choices by objective standards. Thus many early court decisions employed legal fictions to disguise a fear that aesthetic evaluations may be a matter of individual taste, and thus too subjective to be applied in any but an arbitrary and capricious manner.

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1 See, e.g., John Donnelly & Sons v. Outdoor Advertising Bd., Mass. Adv. Sh. 3450, 339 N.E.2d 709 (1975). Police powers are those broad powers reserved to the states which have not been specifically granted to the federal government by the Constitution. They are exercised to preserve and further the public health, safety, and welfare, even at the expense of private rights. See Berman v. Parker, 348 U.S. 26 (1954).


3 See, e.g., R.I. GEN. LAWS §§ 5-18-2, 5-18-3 (1956); MASS. GEN. LAWS ANN. ch. 93 §§ 29-31 (West 1972).

4 E.g., BROOKLINE, Mass., SIGN-BY-LAW, art. XXIII as amended (1972).

5 HAW. REV. STAT. §§445-112 (1968); VT. STAT. ANN. tit. 10, §§ 481-505 (1973). The prohibition in these two states refers to off-premise signs and not on-premise signs. See text at notes 82, 87-116, infra.


7 Authorities in general agree as to the essentials of a public health program while
However, many recent decisions have established that the legisla­tive function includes determining that the community should be aesthetically pleasing. Even some state constitutions explicitly empower their legislative assemblies to preserve the right of the people to an aesthetically pleasing environment. The judiciary may intervene only when such legislation is unreasonable or arbitrary, that is when it is insufficiently related to the general welfare.

The problem in trying to define the undefinable is not one new to the law. The problems in defining what is ugly or obtrusive are in some ways analogous to those in defining what is obscene or immoral. In the latter, the Supreme Court has allowed legislative determination of community standards so long as the statutory reg­ulation is constitutionally specific and thus not overbroad or vague. As Justice Douglas pointed out in Berman v. Parker, the legislature should also be empowered to determine that the com­munity should be beautiful as well as safe, despite the difficulty in defining beauty. Sometimes the undefinable must be defined in order to ensure, as Chief Justice Warren stated, the “right of the Nation and of the States to maintain a decent society. . . .” The community or society determines what is “decent” for itself and this must be reflected through representative legislatures.

In 1965, the federal government also began to regulate outdoor advertising through the Highway Beautification Act. The Act proposes to preserve natural beauty and promote safety on the nation’s federally funded highways by controlling outdoor advertising in areas adjacent to those highways. Implementation of the Act, however, is left to the states, most of which have enacted legislation

the public view as to what is necessary for aesthetic progress greatly varies. . . . Successive city councils might never agree as to what the public needs from an aesthetic stand­point, and this fact makes the aesthetic standard entirely impractical as a standard for use restriction upon property. The world would be at a continual seesaw if aesthetic considerations were permitted to govern the use of the police power. . . .


See text at note 33, infra.

See, e.g., HAW. CONST. art. IX, § 5; MASS. CONST. amend. art. XLIX (Mass. 1918, amended 1972).


In order to ensure state cooperation, the federal government will impose a ten percent
prohibiting outdoor advertising in areas near the interstate system.19

This article is primarily concerned with off-premise sign ordinances at the state and local level which go significantly beyond the federal act; that is, which affect vistas well beyond federally funded highways.20 Those arguments most frequently raised for and against these ordinances will be outlined and traced through their evolution. Finally, legislation will be suggested which could improve the present situation.

II. AESTHETICS AND THE GENERAL WELFARE

Justification for any regulatory ordinance or statute must be found in some aspect of the state police power.21 If the ordinance has no relation to the health, safety, or general welfare, it may be challenged as an arbitrary, unreasonable, and thus unconstitutional taking of private property in violation of the due process clause of the Fourteenth Amendment.22

The long debated issue in outdoor advertising regulation is whether the often undefinable concept of the general welfare anticipates legislation to promote an aesthetically pleasing environment. The courts, as will be shown, initially defined the concept in a limited way but eventually broadened their interpretation to include aesthetic regulation.

A. Use of Legal Fiction as a Justification for Aesthetic Regulation

The courts were initially reluctant to recognize aesthetics as a valid police power objective.23 They were willing to consider aesthetics as one permissible factor behind billboard and architectural controls, but hesitated to accept them as the sole rationale for such controls. Courts often went to almost comic lengths to find traditional police power objectives with which they could rationalize

reduction in federal aid highway funds to those states which have failed to control the signs. 


20 On-premise signs, those meant to identify the business on the premises, have traditionally been subject to different regulation than off-premise product or service advertisement signs. See text at notes 79-85, infra.

21 See note 9, supra.


such controls.\textsuperscript{24} The use of legal fictions enabled the courts to avoid the real issue: whether these ordinances could be justified on aesthetic grounds alone.

\textit{Welch v. Swasey}\textsuperscript{25} exemplifies this evasive approach, in the Supreme Court's treatment of a city ordinance limiting the height of buildings in certain residential historic districts. The Court strained to include the ordinance, enacted primarily for aesthetic reasons, within the notion of protecting public safety—a traditional police power objective.

This Court is not familiar with the actual facts, but it \textit{may be} that in this limited commercial area the high buildings are generally of fireproof construction. . . . And there \textit{may be} in the residential part (where the height restriction applies) more wooden buildings, the fire apparatus \textit{may be} more widely scattered. . . .\textsuperscript{26} However, in dictum the Court previewed things to come by admitting that an aesthetic rationale for the ordinance would not invalidate it.\textsuperscript{27}

The courts gradually became more willing to accept aesthetics as partial justification for a sign ordinance. For example, in 1935, the Supreme Judicial Court of Massachusetts upheld a regulation prohibiting billboards near highways where, in the opinion of the authorities, "having regard to the health and safety of the public, the danger of fire and the \textit{unusual scenic beauty} of the territory, signs would be particularly harmful to the public welfare. . . ."\textsuperscript{28} Many courts, in fact, still cling to an "aesthetics plus justification" approach.\textsuperscript{29} In many of the "aesthetics plus justification" rulings, the courts had latitude to apply other police power objectives. Nevertheless, in many instances the courts used ostensible police power objectives to avoid and obscure the ultimate issue of whether aesthetics alone are a valid police power goal.

\textsuperscript{21} One court expanded the public safety notion by cautioning that criminals can commit crimes behind billboards. St. Louis Gunning Advertisement Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911). Traditional police power objectives include, e.g., the preservation of historic areas, New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953), and promotion of public safety, General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935).

\textsuperscript{22} 214 U.S. 91 (1909).

\textsuperscript{23} Id. at 107 (emphasis added).

\textsuperscript{24} Id. at 108.


B. Aesthetics as a Sole Welfare Objective

In 1954, the Supreme Court in *Berman v. Parker*\(^{30}\) calmed judicial anxieties over unlimited aesthetic discretion by defining the general welfare in terms of changing public values: "The concept of the public welfare is broad and inclusive. . . .the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy. . . ."\(^{31}\)

Not until the last decade, however, did state courts begin to accept aesthetics as a permissible sole rationale for zoning ordinances.\(^{32}\) Now the validity of a restriction rests solely upon whether the method of achieving an attractive, prosperous community is rational and not arbitrary and not upon whether the objectives are primarily aesthetic.\(^{33}\)

In *Cromwell v. Ferrier*,\(^{34}\) for example, the New York Court of Appeals upheld the constitutionality of a local ordinance which totally prohibited off-premise signs in the community on the basis of aesthetic considerations alone. The court noted that "[a]dvertising signs and billboards, if misplaced, often are egregious examples of ugliness, distraction and deterioration. They are just as much subject to reasonable controls, including prohibition, as enterprises which emit offensive noises, odors and debris. . . ."\(^{35}\) The court emphasized that signs may be detrimental to the general welfare if they are not significantly related to the economic, social, and cultural patterns of the particular district.\(^{36}\) Although the holding in *Cromwell* was sound as applied to its facts, ugliness should not be restricted to those areas economically, socially, and culturally "deserving" of beauty. Citizens living in the less affluent, more urban communities are also entitled to protection from visual pollution.

In 1975, the Supreme Judicial Court of Massachusetts discussed the equal treatment issue in a decision perhaps the most significant to-date in confirming the trend towards acceptance of aesthetic reg-


\(^{31}\) *Id.* at 33 (citations omitted); see also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6 (1974).


\(^{33}\) *Id.* at 49, 400 P.2d at 262.


\(^{36}\) *Id.*
ulation of outdoor advertising. John Donnelly & Sons v. Outdoor Advertising Board37 shunned the use of legal fiction and directly confronted the issue of regulation for aesthetic purposes. The case merits special attention for its comprehensiveness and its probable precedential impact. In Donnelly, a municipality amended its sign by-law to prohibit any advertising sign or device, including off-premise signs and non-accessory signs in any residential, industrial, or business zone.38 The amendment, in effect, prohibited all billboards within the town. Donnelly, involving judicial review of an administrative decision, upheld the by-law and thus denied the plaintiff, a large billboard advertiser, the right to maintain its signs in the town.

The court, in validating the ordinance, announced that aesthetics alone may justify the exercise of the police power. To reach this result it used a two step reasoning process. First, the court noted that the ordinance would be unconstitutional only if, according to the federal due process test of Euclid v. Ambler Realty Co.39 it had no reasonable relation to the public health, safety, or general welfare. Second, the court held that the test for reasonableness is not very strict, that the ordinance enjoys a presumption of validity, and that the outcome is not to be determined by the court's own opinion on the issue.

The by-law is to be presumed valid and, if its reasonableness is fairly debatable, the judgment of the local legislative body must be sustained. Due regard is to be accorded to the expression of the residents of the town, whom we must presume are familiar with the locality and its needs.40

The Donnelly court counseled that the Massachusetts Constitution established the state policy that the people have a right to "the natural, scenic, historic and aesthetic qualities of their environment . . ."41 and that the Massachusetts Zoning Enabling Act42 provided that regulations shall be designed to "preserve and increase

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38 BROOKLINE, MASS., SIGN-BY-LAW, art. XXIII, § 4 as amended (1972).
41 MASS. CONST. amend. art. XLIX (Mass. 1918, amended 1972).
42 MASS. GEN. LAWS ANN. ch. 40A,§3 (1968)(repealed 1975) (amended by 1975 Mass. Acts ch. 808, §3). Section 2A of the amended Act provides that "said [zoning] regulations may include . . . the development of the . . . aesthetic qualities of the community."
. . . [the] amenities” within a city or town. The court then harmonized this legislative notion of the general welfare with judicial precedent. Donnelly properly concluded that the trend is to recognize aesthetics as a permissible sole police power objective. Further, the court noted that the statutory inclusion of aesthetic ideals offers “a strong indication that citizens...consider visual pollution, including billboards, to be a detriment to the general welfare,” demonstrating that the judiciary is not acting as a subjective evaluator of beauty. Thus Donnelly may have dulled the anxieties of courts which fear that “aesthetic evaluations are a matter of individual taste and are thus too subjective to be applied in any but an arbitrary and capricious manner.” Donnelly is particularly applicable in jurisdictions which have written aesthetic goals into their statute books.

Prior to Donnelly, most cases which upheld ordinances prohibiting all billboards involved towns which were primarily residential. Total prohibition was upheld, for example, in Raritan, New Jersey, an exclusively residential community of 6000 persons, and in Walkill, New York, a residential area with a population of 1000. On the other hand, the community involved in Donnelly was densely populated with a business district occupying nearly a quarter of the total area.

The trend toward recognizing aesthetics as an independently sufficient police power objective has not been unanimous, however. In Metromedia, Inc. v. City of Des Plaines, an Illinois intermediate court invalidated an ordinance based solely on aesthetics which prohibited off-premise signs but allowed on-premise signs. In Combined Communications Corp. v. City of Denver, a court struck down an outdoor advertising ordinance on the grounds that totally prohibiting an entire industry in the county was unreasonable. However, these cases should offer little precedential significance. Metromedia ignored the prior case law in other jurisdictions, while Combined Communications ignored the real issue: whether a city

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34 See cases cited in notes 32, 34, and 35, supra.
36 Id. at 3465, 339 N.E.2d at 716.
41 524 P.2d 79, 82 (Colo. 1974).
in the exercise of its police power can prohibit off-premise billboards for aesthetic reasons.\textsuperscript{51}

Most challenged sign ordinances have been those creating restrictions in commercial districts because the general aesthetic welfare rationale appears less applicable in commercial districts than in residential zones.\textsuperscript{52} Signs are a creation of the commercial sector and have always been a fundamental part of it. Perhaps the most controversial part of \textit{Donnelly} is the court's finding that not only rural but also urban communities should have the benefit of aesthetic police power protection.\textsuperscript{53} The opinion counsels that densely populated areas are often not distinctly residential or commercial, but both.\textsuperscript{54} People who live in mixed urban-residential areas should have the same right to live in an aesthetically pleasing environment as those who live in more distinctly residential areas.\textsuperscript{55} On this theory \textit{Donnelly} completely erased any distinction between residential and commercial districts, stating that "city-wide prohibition of billboards can also be justified on the grounds that a community has a legitimate interest in improving the aesthetic quality of its business districts, as well as its residential districts."\textsuperscript{56}

Residents living in residential-commercial areas certainly deserve

\textsuperscript{51} Combined Communications Corp. v. City of Denver, 542 P.2d 79, 84 (Colo. 1975)(Kelley, J., dissenting). The following view of a New Jersey court signifies a more logical approach for the Colorado Supreme Court to have taken:

Those who live in an urban megalopolis are no strangers to the jungle of signs which daily compete for their attention. Undoubtedly, some signs by virtue of their design are more aesthetically pleasing than others, regardless of size. But a municipality may perceive that a plethora of signs of a certain size, no matter how tasteful, can have an undesirable cumulative effect upon the well-being of the entire community. Is the citizenry then powerless to deal with this problem when it beholds the fruits of a philosophy of noninterference? We think not. In such a situation, assuming the municipality acts reasonably and fairly in the process of balancing the various interests, the right of the businessman to promote his goods may become subservient to the community's interest in its appearance. . . .


\textsuperscript{53} Id. at 3474, 339 N.E.2d at 719.

\textsuperscript{54} Id. at 3475, 339 N.E.2d at 720.

\textsuperscript{55} The Fourteenth Amendment to the United States Constitution provides that no state shall deny any person the equal protection of the laws. A refusal to uphold an aesthetically based ordinance in an urban, residential community might constitute a violation of this amendment if at the same time a similar ordinance was upheld in a more suburban, residential community.

the same protection afforded to those living in more distinctly residential zones. Yet, the notion that an extensively commercial or industrial area will be made more attractive by the absence of billboards is open to debate. Since the issue is debatable, however, the modern judicial presumption in favor of legislation\(^{57}\) required the Donnelly court to uphold the ordinance as a rational means of enforcing the legislative purpose of preserving aesthetics.

Although a community must necessarily have a right to improve the aesthetic quality of its business zone, a local legislative assembly may not be justified in assuming that the elimination of outdoor advertising will achieve this objective. The local legislature in Donnelly illustrated that reasonableness is not necessarily wisdom. It failed to balance sufficiently the needs of the residential community with those of business. This failure stems from a lack of investigation into community standards of aesthetics and the benefits of outdoor advertising.\(^{58}\)

Anti-sign ordinances originally appeared in residential communities, where people regarded billboards as most obnoxious when erected close to their homes. To these individuals the aesthetic detriment far outweighed the signs' communicative value and seemed an intrusion of privacy.\(^{59}\) On the other hand, in purely commercial areas, outdoor advertising plays a significant role. Its long-lived success illustrates its effectiveness as a low cost means of communication. In a predominantly commercial zone, the billboard thrusts its message at an audience willing and eager to participate in the marketplace. Yet a broadly drawn ordinance could conceivably prohibit outdoor advertising in Times Square. Such areas flourish with commercial hustle and bustle, caused in part by outdoor advertising displays.

Although a city might decide that it is more likely to attract commercial enterprises if it enhances its appearance,\(^{60}\) economic

\(^{57}\) Id. at 3476, 339 N.E.2d at 720; Breard v. Alexandra, 341 U.S. 622 (1951).

\(^{58}\) In a survey conducted in 1969 to assess human reaction to roadside environment, only 30% of a random group of individuals favored outlawing billboards entirely. Herrmann, Human Response to Visual Environments in Urban Areas, in Outdoor Advertising 57, 63 (J. Houck ed. 1969). In a series of tests which measured response to the change in the physical environment caused by removal of billboards, only 32.4% of that same group noticed any change in the commercial zone. Id. at 71.

\(^{59}\) See text at notes 75-77 infra.

welfare depends on a flow of information about goods and services. No community will be in favor of an ordinance which will hurt the economic well-being of local business. The local legislature in Donnelly neglected its duty to weigh these considerations before determining that a prohibition of billboards in a commercial zone would benefit the general welfare. A more cautious legislative approach might be to narrow the distinction between commercial and residential districts rather than to eliminate it completely. Following this approach, a total off-premise prohibition in a predominantly commercial district would not be enacted if legitimate business interests had been balanced against those of nonexistent or minority private residences.

How much support the reasoning of Donnelly will receive in other jurisdictions remains to be seen. The opinion, in any event, should add impetus to the trend of protecting aesthetic values as a valid sole police power objective to promote the general welfare. Donnelly is clearly the most progressive opinion to-date dealing with restriction of outdoor advertising.

III. BILLBOARDS AND THE FIRST AMENDMENT

Outdoor advertisers often argue that regulatory sign ordinances infringe upon their right of free speech guaranteed by the First Amendment. The constitutional issue presented is whether First Amendment protection should be afforded to purely commercial speech. The First Amendment protects many forms of communication of a noncommercial nature, but before 1975, it was not considered protective against government restraint of purely commercial speech. The Supreme Court in Valentine v. Chrestensen emphasized this distinction in denying an advertiser's attempt to gain constitutional protection for his commercial handbill by placing a noncommercial political message on its back, in order to evade the effect of a prohibitory ordinance. The Court upheld the ordinance, reasoning that the advertiser's practice, if permitted under color of the First Amendment, would allow every merchant to "append a civil appeal, or a moral platitude to achieve immunity from the

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2 316 U.S. 52 (1942). On one side of the handbill was commercial advertising while the other side contained a protest against the action of the City of New York for refusing to allow plaintiff the use of city facilities.
law's command."

The outdoor advertisers were encouraged in 1975, when the Supreme Court distinguished Valentine in Bigelow v. Virginia and announced that advertising was entitled to some constitutional protection. The Court in Bigelow pointed out that "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." Bigelow does not, however, denounce all regulation of commercial speech. The Court emphasized the special nature of the type of speech, a newspaper advertisement for out of state abortions: "The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear 'public interest'. . . ." The holding of Bigelow narrowed the First Amendment protection of commercial messages to only those of "public interest." The issue then became the very difficult one of determining what messages were in the public interest.

This problem, however, lasted only until the decision in Virginia Board of Pharmacy v. Virginia Citizens Consumer Council. The Supreme Court held in Board of Pharmacy that the advertising of prescription drug prices, although commercial speech, was protected by the First Amendment. The Court all but rejected the "public interest" requirement for the constitutional protection, noting that "society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, although entirely commercial, may be of general public interest." The Court thus afforded constitutional protection to almost all commercial advertising by expanding "public interest" to include the

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63 Id. at 55. Notice how much noncommercial advertising a typical outdoor advertising company displays. "Donnelly's general manager and vice president testified that at any one time 3-5% of its space is donated to public service advertising." John Donnelly & Sons v. Outdoor Advertising Bd., Mass. Adv. Sh. 3450, 3451, 339 N.E.2d 709, 711 n.2 (1975).
64 421 U.S. 809 (1975).
65 Id. at 826.
66 Id.
67 Id. at 822. For a discussion of commercial speech and the First Amendment before 1976 see Comment, Recent Developments—Constitutional Law, 42 Tenn. L. Rev. 573 (1975).
69 Id. at 761-73. The Court posed the question as follows: Our question is whether speech which does no more than propose a commercial transaction . . . is so removed from any exposition of ideas, . . . and from truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of Government . . . that it lacks all protection. Our answer is that it does not.
70 Id. at 1826 (citations omitted).
71 Id. at 764.
Although the First Amendment interest of outdoor advertisers now justifies constitutional protection, it still competes with another significant governmental interest, that of promoting the community's general welfare by providing a safe and visually pleasing environment. The Supreme Court has declared: "The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself." Board of Pharmacy thus did not render government powerless to regulate particular kinds of intrusive advertising. Advertising might still be restricted in time, place, and manner provided that the restrictions "are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." The ultimate issue becomes whether aesthetics alone affects the general welfare sufficiently in a given case to be a permissible police power objective.

Board of Pharmacy did not improve the outdoor advertising industry's First Amendment position because it still must prove that the commercial interest outweighs the governmental interest in providing an aesthetically pleasing environment. The only significant restriction that Board of Pharmacy placed on an aesthetically concerned legislature was that regardless of the compelling nature of its interest, an alternative medium for the advertising message must remain available. In light of today's varied network of communication channels, few problems should follow most bans of off-premise billboard messages. Board of Pharmacy had the welcome effect of relieving the courts of the difficult task of deciding which advertisements were in the public interest. Billboard regulation already in-

71 Kovacs v. Cooper, 336 U.S. 77, 88 (1949). A recent Massachusetts opinion articulated the test as follows: "First Amendment freedoms may be constitutionally abridged if the governmental regulation furthers an important or substantial governmental interest and 'if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.'" Opinion of the Justices, 363 Mass. 909, 916, 298 N.E.2d 829, 834 (1973), quoting United States v. O'Brien, 391 U.S. 367, 377 (1968). See also Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968).

volves a difficult aesthetic value judgment; to have added a public interest value judgment would have forced the courts to balance two elusive intangibles. Advertisers and the public can be more certain of the law if such judicial discretion is minimized.

Although *John Donnelly & Sons v. Outdoor Advertising Board* was decided before *Board of Pharmacy* it is unlikely that the latter would have materially changed treatment of the First Amendment issue in *Donnelly*. *Donnelly* previews *Board of Pharmacy* by announcing that a "[s]tate or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content."73 Also, as *Board of Pharmacy* requires, other channels of communication were open to the billboard clients of the *Donnelly* plaintiff. The *Donnelly* court instructed that "there are degrees of protection accorded speech and, depending on the circumstances, a State may legitimately regulate or even prohibit advertising if the First Amendment interest is outweighed by the governmental interest. . . ."74 The protection granted purely commercial speech in *Board of Pharmacy* probably would not have outweighed the governmental interest in providing an aesthetically pleasing environment before the *Donnelly* court.

*Donnelly* held further that regardless of the extent to which constitutional protection is afforded commercial advertising, no person can be compelled to listen against his will.75 This cardinal rule was exemplified by Justice Douglas' concurring opinion in *Lehman v. City of Shaker Heights*,76 which sustained a municipality's prohibition of political advertisements and allowance of nonpolitical advertisements on its buses. Douglas reasoned that the degree of captivity and resulting invasion of privacy is significantly greater for a passenger on a bus than for a pedestrian on the street and that the Constitution grants no right to force a message upon a captive audience.77 Whether or not billboards are equally as privacy invasive as advertising on buses is debatable.

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74 Id. at 3478, 339 N.E.2d at 721.
75 Id. at 3480, 339 N.E.2d at 722. See also Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975); Bigelow v. Virginia, 421 U.S. 809, 828 (1975).
76 418 U.S. 298 (1974). The issue was whether the City of Shaker Heights obligated itself to accept all advertising on its buses by creating a "public forum." The Court held that no public forum had been established and that the decision to limit advertising to nonpolitical messages was discretionary.
77 Id. at 307 (Douglas, J., concurring).
IV. THE ON-PREMISE DISTINCTION

The courts have always distinguished off-premise and on-premise signs as distinct categories, subject to different regulation.\(^{78}\) The favored status of on-premise signs derives from their special function of identifying the products or services offered at the site.\(^{79}\) Although outdoor advertisers often claim that off-premise billboard ordinances based upon aesthetics are discriminatory because on-premise signs may be equally ugly,\(^{80}\) the unique nature of outdoor advertising and the nuisances created by off-premise billboards justify the separate classification of these structures for the purposes of governmental regulation.\(^{81}\)

The off-premise advertising sign is not maintainable as a matter of right and may even be prohibited altogether, but the authority to conduct a business in a particular zoning district inherently carries with it the right to maintain an on-premise business sign subject to reasonable regulation.\(^{82}\) Since the on-premise sign is allowed as a matter of right it may be reasonably regulated, but may not be prohibited. What constitutes reasonable regulation is uncertain but the courts have usually upheld on-premise regulatory ordinances regarding size and location on the basis of the special characteristics of the locale, traditional police power objectives, and more recently on the basis of aesthetics.\(^{83}\)

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\(^{79}\) See, e.g., Haw. Rev. Stat. §445-112(4) (1968). Note that billboards are rarely used as on-premise signs, which are often an integral part of the building.


\(^{82}\) United Advertising Corp. v. Borough of Raritan, 11 N.J.144, 150, 93 A.2d 362, 365 (1952). This is a private property right guaranteed by the Fourteenth Amendment. To prohibit on-premise signs would prevent easy customer access to the business and would unconstitutionally deprive the business of the use of its property, thus constituting an uncompensated taking. 1 Nichols, Eminent Domain § 4.5 [2] (3d ed. 1976).

\(^{83}\) The use of such [on-premise] signs for advertising purposes is often done with little regard for their natural or man-made environment. Their garishness often intrudes on a citizen's visual senses. Property owners do have the right to put their property to profitable use. But, we do not think that the right to advertise a business is such that a businessman may appropriate common airspace and destroy common vistas. Nor do we believe that the right to advertise a business means the right to interfere with the landscape and the
The courts have applied much the same reasoning to on-premise sign regulation as they have in the off-premise sign decisions.\textsuperscript{44} The only difference in treatment between the categories is that total prohibition of on-premise signs cannot be constitutionally achieved. In light of Board of Pharmacy, a prohibition of on-premise signs would also violate the First Amendment by denying the only available channel of communication to one trying to identify, rather than merely to advertise his business.

An aesthetically based ordinance regulating on-premise signs would be clearly arbitrary and unreasonable if it discriminated between signs causing the same aesthetic evil. For example, regulating size on the basis of square footage alone would be discriminatory. Such a regulation would exempt aesthetically offensive signs of equal peripheral measurement but fewer square feet (e.g., large, single standing letters). It would also be discriminatory to make distinctions between different types of on-premise signs, for example, by exempting roof signs.\textsuperscript{45} So, too, if an ordinance regulates off-premise signs on the basis of aesthetics, it should also regulate on-premise signs to a degree short of prohibition to fulfill the purpose of the statute. No private interest in huge, garish on-premise signs should outweigh the governmental interest in providing for an aesthetically pleasing and safe environment. For a sign ordinance to be effective in enhancing the general welfare it must regulate both categories of signs according to community standards, although not necessarily to the same extent in light of the stronger property right inherent in the on-premise category.

The problem with representative governments’ promoting public aesthetic ideals does not lie in the legislators’ capacity to recognize views along public thoroughfares.


\textsuperscript{44} Unfortunately, many of the on-premise decisions also apply the same discriminatory reasoning by upholding regulations on the basis of the urban-rural distinction rather than on community standards of aesthetics. People v. Goodman, 31 N.Y.2d 262, 266, 290 N.E.2d 139, 142, 338 N.Y.S.2d 97, 101 (1972), upheld the ordinance of a community which banned all commercial signs greater than four square feet. The court reasoned that the regulation, premised upon aesthetics, would be upheld because it bore “substantially upon the economic, social and cultural patterns of the community or district [a scenic resort community].” Again a court concluded that only those areas where beauty is expected should remain beautiful and those areas where ugliness is commonplace should remain ugly. See note 36, supra, and accompanying text. On-premise signs should be as small as deemed by community standards within constitutional bounds, see note 83, supra, and not as small as dictated by prior history and natural beauty of the surroundings.

\textsuperscript{45} See City of Sarasota v. Sunad, Inc., 181 So.2d 11, 14 (Fla. 1965). Such reasoning is applicable to off-premise sign regulations as well.
community ideals, but in their willingness to implement and enforce them despite pressure from special interest groups. The outdoor advertising industry musters a formidable lobby, while aesthetically motivated groups usually lack the legal and financial resources to influence legislation.

V. MODEL STATEWIDE REGULATION

Most states delegate to local communities the authority to regulate outdoor advertising for off-highway areas, and statewide sign legislation is typically limited to the borders of the interstate highway system. However, Hawaii and Vermont have passed unusual statutes which effectively eliminate off-premise private advertising within those states. Examination of these statutes will be useful to suggest what form future legislation might take.

The economies of Hawaii and Vermont depend on the tourist trade attracted in substantial part by the abundance of natural beauty found within their borders. It is because of the strong connection between their economic and environmental well-being that such statutes were enacted in the two states.

Hawaii's statute is not limited to billboards, but generally proscribes any outdoor "symbol" which draws the attention of persons in any public place. The effect of the statute is to prohibit the erection or display of any outdoor advertising with certain exceptions which include: postings of official public notices; announcements of meetings displayed on the premises; on-premise business identification signs; on-premise signs advertising services or property offered on the premises; advertisements carried by people or

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86 See note 4, supra, and accompanying text.
87 Statutes enacted to comply with the federal Highway Beautification Act, 12 U.S.C. §§ 131(a) et seq. (Supp. V 1975), include, e.g., KAN. STAT. ANN. §§ 68-2231-2234 (1972); WYO. STAT. ANN. §§ 24-110-124 (Supp. 1975); NEV. REV. STAT. §§ 410.220-410 (1975). A few states have statewide size and spacing regulations for on and off-premise signs; however, these regulations apply only to certain districts. E.g., to signs visible from state highways, OR. REV. STAT. §§ 377.735(3), 377.745, 377.755 (1975); to signs in business zones, KAN. STAT. ANN. § 68-2234 (1972).
89 See VT. STAT. ANN. tit. 10, § 482 (1973) for legislative findings.
91 Id. § 445-112(1).
92 Id. § 445-112(2).
93 Id. § 445-112(3).
94 Id. § 445-112(4).
by vehicle; noncommercial signs advertising places of natural beauty, history, or culture; political campaign signs near the time of an election; and signs on public buildings announcing cultural or educational events within the state. Enforcement of the statute is by civil suit for injunctive relief brought on behalf of the state by the attorney general, the county, or by the owner or tenant of any land, building, or apartment from which the outdoor advertisement is visible.

Vermont's statute, on the other hand, not only limits outdoor advertising but also provides alternative means of publicizing the same information without significantly detracting from the natural beauty of the state. The statute brought off-premise advertising under the exclusive distribution and control of the state, replacing indiscriminate private outdoor advertising with state provided guidebooks, official information centers, and official "business directional signs." Such signs are designed, erected, and maintained by state authorities to indicate to the travelling public the route and the distance to public accommodations, commercial services, and places of scenic, historic, cultural, religious, and educational interest. All lawful businesses and points of interest are eligible for these signs and if such signs are too numerous at a

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95 Id. § 445-112(7).
96 Id. § 445-112(8).
97 Id. § 445-112(9).
98 Id. § 445-112(11).
99 Id. § 445-112(10).
100 Id. § 445-120.
102 VT. STAT. ANN. tit. 10, § 484(c) (1973). Id. § 490 states:
The travel information council shall regulate the size, shape, color, lighting, manner of display and lettering of official business directional signs. Distinctive signs shall be established to the extent considered practicable by the council for each type of service or facility, different from those for other types; and appropriate signs shall be provided for each eligible applicant within a given category. The travel information council is made up of seven members representing the secretary of state, the restaurant industry, the recreation industry, the lodging industry, the Department of Highways, the Department of Agriculture and the Scenery Preservation Council.
103 The travel information council is created to make rules consistent with the statute on all matters including sign location. "In making those rules it shall consult with the scenery preservation council as to preservation of scenic and aesthetic values. . . ." Id. § 484(b).
104 Id. § 481(2).
105 Id. § 489.
particular site they are located at sign plazas adjacent to the roadway where vehicles may stop to inspect them. Only four signs per business are licensed and only one of the signs may be visible to traffic moving in any one direction, unless hardship would result. In locating these signs, considerations of safety, convenience, and aesthetics are of foremost importance.

The Vermont statute exempts a few of the same types of signs as the Hawaii statute. It further exempts signs advertising county fairs, signs away from highways advertising church and civic meetings, and directional signs no larger than four square feet giving directions to farms selling produce to the public.

Broad state regulation of on-premise signs also has been achieved in Vermont. The Vermont statute limits on-premise sign area to one hundred fifty square feet, and sign height to twenty-five feet above ground level and ten feet above roof level. The figures used by Vermont are the legislature's best estimate of local community standards of aesthetics.

Neither the Hawaii nor the Vermont legislation has yet been challenged by private outdoor advertising interests. According to a spokesman for the Agency of Environmental Conservation in Vermont, implementation of the legislation there has proceeded smoothly and without significant protest.

More statewide regulation of outdoor advertising is needed, but a slightly different approach than that taken in Hawaii or Vermont might be more effective. Both of these statutes have the effect of unnecessarily eliminating outdoor advertising in areas purely commercial while concurrently allowing some inequitable exceptions to necessary aesthetic protections. The exceptions, especially those in

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106 Id. § 490.
107 Id. § 491.
108 Id. § 492.
109 Id. § 494(1),(2),(7).
110 Id. § 494(11).
111 Id. § 494(4).
112 Id. § 494(12).
113 Id. § 493.
114 Id. § 493(1). Note that square footage requirements alone fail to ensure aesthetic goals and can lead to discrimination. See note 85 and accompanying text, supra.
115 Id. § 493(2).
116 Similar bills are presently pending before the New York and Pennsylvania legislatures. In these two states, programs are reportedly being tried on an experimental basis. Conversation with spokesman for the Agency of Environmental Conservation, Vt. (Feb. 1977).
Hawaii, seem arbitrary. For example, the size of some signs of excepted content is unlimited; however, although the excepted content may warrant a small sign, it may not merit a billboard. Permitted political campaign signs and government information signs atop public buildings are as aesthetically offensive as commercial signs. Such distinctions under an aesthetically based statute should not be drawn. The interest in an aesthetically pleasing environment should outweigh any competing governmental interest in allowing nonemergency messages on billboards. Political and cultural messages, like commercial, may be communicated by alternative, less visually damaging channels. Unfortunately the Hawaii and Vermont legislatures applied public interest distinctions reminiscent of those made in Bigelow v. Virginia.117

State statutes offer many advantages over local ordinances. Statewide legislation, by setting forth clearly defined standards for communities and the outdoor advertising industry to follow, could decrease the amount of litigation fostered by the enactment of diverse local regulations and increase the possibility of regulation founded on altruism rather than on special interest influence. The problems of ineffective local enforcement occasioned by the apathy of local officials or the policies of overly liberal variance-granting can be avoided. Above all, statewide regulation would ensure all communities the right to an aesthetically pleasing and natural environment free from unnecessary eyesores. To regulate on-premise signs in a way affording at least minimum protection requires state action, while at the same time allowing more stringent home rule regulation if the local communities so desire. This might be accomplished by a state licensing procedure geared to enforce compliance with state regulations.

The following guidelines for statewide regulation of outdoor advertising are suggested as more equitable and effective in reflecting proper community standards of aesthetics:

(1) All outdoor off-premise advertising displays are prohibited in any zoning district where not more than fifty percent of the district is commercial or industrial, determined by the number and type of district dwellings.118

117 421 U.S. 809 (1975). First Amendment protection was given to commercial abortion referral ads because they were deemed to be in the “public interest.” See notes 66-67, and accompanying text, supra.

118 In areas more than fifty percent commercial, private residents’ rights would be out-
(2) No permitted off-premise outdoor advertising display in a commercial, nonresidential zone as determined in (1) shall be larger than poster board (12'3'' by 24'6'') size.\(^{119}\)

(3) No permitted off-premise outdoor advertising display in a commercial, nonresidential zone as determined in (1) shall be plainly visible from another district which is not commercial, nonresidential.\(^{120}\)

(4) All outdoor advertising displays adjacent to or visible from any public park or recreational area shall be prohibited.\(^{121}\)

(5) The following off-premise signs are exempt from the requirements of this chapter:

   (a) Official notices and signs, posted by court order or by order of any public officer in the performance of his duty when such notice cannot be communicated effectively by other means.\(^{122}\)

   (b) Any outdoor advertising device carried by persons or placed upon vehicles used for the transportation of persons and goods.\(^{123}\)

   (c) Any outdoor advertising device warning the public of dangerous conditions near where that condition exists.\(^{124}\)

   (d) All official traffic control and directional signs.

The remainder of the statute should parallel Vermont’s by establishing a state authority to provide for business directional signs, sign plazas, and visitor information centers along its highways. The

\(^{119}\) Figures are used merely as illustration. OR. REV. STAT. § 377.745 (1975) reads in part: “Limitations on form and size of signs. (1) An outdoor advertising sign shall not exceed (a) a length of 48 feet; (b) a height, excluding foundation and supports, of 14 feet; or (c) a sign area of 825 square feet.” Spacing of signs allowed in a commercial, nonresidential district need not be regulated because outdoor advertising is ineffective if cluttered amongst competing signs. Interview with William McBain, Counsel for John Donnelly & Sons, Inc., in Boston, Mass. (Nov. 26, 1976).

\(^{120}\) The purpose of the statute, which is to prevent visual pollution in districts where outdoor displays are inappropriate, would otherwise be thwarted. Vermont businesses maintaining signs in New Hampshire visible only from Vermont which would be illegal if erected in Vermont, violate the Vermont statute. OR. VT. ATT’Y GEN. 126 (1972).

\(^{121}\) Many public parks are located amidst commercial districts, e.g., the Boston Common in Boston, Mass.

\(^{122}\) Cf. HAW. REV. STAT., § 445-112(1) (1968).

\(^{123}\) See id. § 445-112(7). The intrusion on privacy and the damage to the aesthetic welfare is most significant in the case of stationary outdoor advertising signs.

\(^{124}\) See id. § 445-112(8). The interest of public safety should be paramount to any other governmental interest in promoting commerce. See text at notes 2, 60, supra, and quote at note 51, supra.
legislation should be enforced by requiring state licensure of billboards granted upon receipt of a certificate of compliance with the chapter. Such a method of enforcement would be more effective than depending upon the initiative and budgets of public officials and private individuals to seek injunctive relief as in Hawaii. More regulations concerning public safety requirements could also be added to the statute. Such regulations would include location, construction, maintenance, and lighting requirements for permitted signs.

CONCLUSION

The courts have enunciated the right to live in an aesthetically pleasing environment as well as the state's right to use its police powers to preserve the environment. Aesthetics is recognized as a valid police power objective and is considered important enough to outweigh even First Amendment liberties infringed by outdoor advertising regulations. The public aesthetic welfare is affected by intrusive signs, regardless of their type.

The determination of what is aesthetically acceptable is best left to community standards incorporated into the laws by our elected representatives. In their evaluation of public aesthetic ideals, they must bear in mind the needs of residential and purely commercial environments, preserving what is essential to each locale, and controlling the balance of commercial and residential interests. It is their duty to provide for the general welfare, and their enactments should guarantee all communities the minimum of protection they need from garish on-premise and ill-placed off-premise signs. Hopefully, the states will adopt legislation similar to that suggested in this article and thereby achieve a controlled environment in which all communities enjoy horizons visually acceptable to their citizens.

125 See id. § 445-120.