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TROPHY HOMES AND OTHER ALPINE PREDATORS: THE PROTECTION OF MOUNTAIN VIEWS THROUGH RIDGE LINE ZONING

Lisa Healy*

The greatest good
For the greatest number
For the longest time.

—Gifford Pinchot on forest conservation

INTRODUCTION

The year is 2010. In 1995, you purchased a home in a rural town in the Rocky Mountains, hoping to get away from the traffic, pollution, crowds, and stress of life in a city.

Welcome to the future. The population of your mountain town has increased from 8,000 to 30,000.1 Fifteen years ago, you looked out your windows at dusk to see dark purple mountain ridges outlined by the sunset. Today, you see the tops of ski condos, restaurants, and radio towers. The pristine views and clean air you came here to enjoy have been replaced by subdivisions, strip malls, enormous vacation homes, and automobile pollution that ferments in the mountain valleys.

This vision of the future is one that those who run to the mountains to escape city life, those who already live in mountain towns, and those who just love visiting the mountains, must look at and consider today. Real estate developers in mountain towns from Vail, Colorado to Stowe, Vermont are providing city escapees with the rural homes

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1 JIM HOWE, ED McMHAON & LUTHER PROPSPT, BALANCING NATURE AND COMMERCE IN GATEWAY COMMUNITIES 3 (1997) [hereinafter HOWE]. "If current demographic trends continue, [mountain] communities will experience astronomical growth rates for at least the next 20 years." Id.
they want—often enormous, and usually with beautiful views. Developers are making a killing on cheap land prices, and in the process are killing the very things that the city escapees come to the mountains for: open space, beautiful views, and a pristine environment. What can mountain towns do to preserve their character and beauty, and to prevent the type of rapid, unplanned growth that can create the scenic and social ills many city dwellers are desperate to escape? This Comment examines ridge line zoning, one of many land use planning options that can be utilized by local governments to preserve scenic beauty in mountainous areas. Ridge line zoning is municipal land use regulation that restricts development on the ridge lines of mountains so that their scenic value will not be compromised. North Carolina was the first state in the country to pass mountain ridge zoning legislation, and the value of ridge preservation should convince other mountainous states, cities, and towns to follow suit. While the aesthetic and environmental reasons for preserving the scenic beauty of a rural mountain town may be enough to convince most towns that it is essential to preserve mountain views, there are also strong and convincing economic arguments for scenic preservation. For example, the U.S. Travel Data Center estimates that designating a road as a "scenic byway" generates annual tourist revenues of between $30,000 and $35,000 per designated mile. Americans spend $18 billion a year to watch wildlife, triple what they spend on movies or sporting events. Aside from tourist revenues, it is much more expensive for a town to support developed land. For every dollar of tax revenue collected from residential land uses, local governments spend an average of $1.36 to provide services to those residences. In Huntsville, Ala-

8 See Howe, supra note 1, at 3. In 1981, the average cost of an acre of land in Bozeman, Montana was $600; in 1994, that same acre was worth $10,000. Id.
4 See id.
7 See, e.g., Howe, supra note 1, at 9–22.
8 See id. at 27.
10 See id. at 87.
11 Id.
bama, city officials determined that allowing a developer to build high-priced homes on the western slope of Monte Sano Mountain (the town's most visible landmark) would cost the city about $5 million to install roads and other service infrastructure, and another $1.4 million a year to service the development. Instead of paying for the costly support of the new homes, the city chose to acquire the entire parcel for $3 million, and preserve it as a dedicated park.

In Santa Fe, New Mexico, where the local legislature passed an ordinance restricting the number of buildings on hilltops and allowing the city planning board to specify where homes can be built to minimize their intrusion on the landscape, mountain property can cost $1 million—just for the land. “Part of the reason property values are so high is that we've preserved something,” explains one city council member. “If we build on all the ridgetops, people won't come out here.” One landowner in Santa Fe has brought suit against the town, challenging that the ordinance is unconstitutional.

This Comment will examine the legal aspects of ridge line zoning. Section I will examine the municipal authority to zone. Section II will discuss the legal history of zoning for purely aesthetic purposes. Section III is an assessment of the most likely legal challenge to ridge line zoning: private property takings claims under the Fifth Amendment. Section IV will look at recent regulations protecting ridge lines through zoning, and Section V provides examples of innovative ways in which municipalities can protect the ridge line vistas in their communities.

I. CONSTITUTIONAL AUTHORITY TO ZONE—THE GENERAL WELFARE

In 1926, the United States Supreme Court determined that local governments had a constitutional right to control private land use through zoning regulations. In Village of Euclid v. Ambler Realty, the Court determined that through the police power inherent in the Tenth Amendment, local government had the authority to zone to

12 HOWE, supra note 1, at 87.
13 Id.
15 Id.
16 Id.
provide for public health, safety, morals, or general welfare. Government's authority to determine permissible uses of private property is based on the inherent police power of the states, and this authority may be delegated to local governments through state enabling legislation.

The Court in *Euclid* also stated that judicial review of zoning ordinances should be governed by an arbitrary and unreasonable standard: "before the ordinance can be declared unconstitutional, [it must be shown that] such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." This portion of Justice Sutherland's decision is indicative of the era of liberal judicial attitudes toward municipal land use regulation sparked by the *Euclid* decision. Because courts generally accepted that a presumption of constitutionality attaches to governmental legislation, after *Euclid*, a landowner wishing to challenge a zoning ordinance faced the added burden of proving that the zoning legislation was not substantially related to the health, safety, or general welfare interest it was intended to further.

II. ZONING FOR AESTHETIC PURPOSES

Justice Sutherland's landmark decision in *Euclid* provided the legal blueprint for aesthetic zoning. Aesthetic zoning is land use regulation by a municipality that strives to preserve the beauty, architectural integrity, or visual identity of an area. While health and safety concerns may be addressed by an aesthetic zoning ordinance, most often this type of zoning relies on the general welfare for its justification.

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18 See id. at 395.
21 Euclid, 272 U.S. at 395.
23 See Radice v. New York, 264 U.S. 292, 294 (1923); see also Euclid, 272 U.S. at 388. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Id.
24 See Euclid, 272 U.S. at 395.
25 See id. at 379–97.
26 See Jesse Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 Law & Contemp. Probs. 218, 223 (1955) (stating that if the regulated land use would not be offensive to a blind person, the primary objective of the regulation is aesthetic).
Traditional judicial decisions have questioned state regulation to better the general welfare, finding that the term "general welfare" is too broad and has the potential to provide the state with too much control over private land use. However, the United States Supreme Court addressed this concern in Euclid. The Court implied that the legislature is elected by the public, and hence its decisions are reflections of what the public believes is in its best interest. Therefore, legislative regulations will be given a judicial presumption of validity as furthering the general welfare. The Court in Euclid agreed that the general welfare was broad, but it stated that this breadth served an important purpose—as the world changed, the public's notion of what was in its best interest would also change. The Euclid Court recognized that government is reliant on the elasticity of the General Welfare Clause to allow it to tailor regulations to the changing needs and desires of its constituency: "Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained . . . half a century ago, probably would have been rejected as arbitrary and oppressive."

The last forty years have brought about a dramatic change in public attitudes regarding our natural environment. This increased public awareness of environmental problems and a desire to "get back to nature" have been reflected in the prevailing legislative and judicial sentiment that aesthetic regulation to preserve natural beauty, wildlife, and open space is permissible in the name of the general welfare.

28 See, e.g., Bachman v. State, 359 S.W.2d 815, 817 (Ark. 1962) (holding that automobile junkyard cannot be prohibited solely on the basis of aesthetics but must include health or safety rationale); St. Louis Gunning Advertising Co. v. City of St. Louis, 137 S.W. 929 (Mo. 1911) (ordinance banning billboards upheld because of regulatory language including public safety instead of pure aesthetics).
29 Rowlett, supra note 10, at 604.
30 See Euclid, 272 U.S. at 387.
31 See id.
32 See id. at 387.
33 See id.
34 Id.
35 See Euclid, 272 U.S. at 387 (using automobiles as an example of a technological innovation giving rise to regulations that would not have been previously necessary or acceptable under the police power).
37 See infra notes 51–74 and accompanying text.
This is exactly the type of collective social change that Justice Sutherland argued would naturally broaden the police power. A dramatic decrease in open space coupled with an increase in technology, pollution, and public interest in environmental issues combined to shift accepted legislative policy regarding land use, and consequently, courts have changed their angle when reviewing environmental legislation. As Justice Sutherland predicted, what would have been unheard of at the beginning of this century (clean air and water legislation, for example) is now commonly accepted as public necessity. The Supreme Court of New York stated that in reviewing aesthetic regulations, "circumstance, surrounding conditions, changed social attitudes, newly-acquired knowledge . . . alter our view of what is reasonable . . . ." The overwhelming majority of modern courts have upheld zoning that protects health, safety, and the general welfare through aesthetic regulations.

38 See Euclid, 272 U.S. at 387.
39 See id.
Historically, courts were reluctant to uphold land use regulation enacted to protect purely aesthetic interests. Prior to the 1950s, courts often viewed aesthetics as a luxury rather than a necessity, or considered aesthetic values to be too subjective, repeatedly stating that they refused to become "arbiters of taste" because "one man's pleasure may be another's perturbation, and vice versa." Courts worried that the vagueness of aesthetic ideals could work a denial of due process, as landowners would be unable to determine whether their use was nonconforming under aesthetic zoning regulations.

Slowly but consistently, courts have begun to change their opinions of aesthetic objectives in the area of municipal zoning. The majority position is now that aesthetic purposes may stand alone as justification for a zoning ordinance.

In moving toward this position, courts first stopped at a middle ground—aesthetic regulation would be upheld as long as it also served one of the more traditional police power objectives of protecting public health or safety. For example, regulations prohibiting junkyards in residential areas were often upheld on the grounds that they served sanitation and public health objectives, and ordinances pro-

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43 See Nancy J. Creswell, Enhancing the Vermont Townscape: Design Review, 7 VT. L. REV. 363, 383 (1982). "The regulation of private property for aesthetic reasons, while it may have served to 'secure a triumph of pleasure and perhaps beauty ... was not a matter of necessity affecting the health or safety or welfare of the common weal.'" (quoting J. MORRISON, HISTORIC PRESERVATION LAW 21 (1965)).

44 See Youngstown, 148 N.E. at 844 ("The public view as to what is necessary for aesthetic progress greatly varies. Certain legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats."); see also John Donnelly & Sons, 339 N.E.2d at 716 (aesthetic judgments "are a matter of individual taste and are thus too subjective to be applied in any but an arbitrary and capricious manner"); Raymond Robert Coletta, The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes, 48 OHIO ST. L.J. 141, 147 (1987); see generally James Charles Smith, Law, Beauty, and Human Stability: A Rose Is a Rose Is a Rose, 78 CAL. L. REV. 787 (1990).


47 See id.

48 See, e.g., Perlmutter v. Greene, 182 N.E. 5, 6 (N.Y. 1932) ("Beauty can shelter herself under the wing of safety, morality or decency.").

49 See, e.g., Bachman v. State, 359 S.W.2d 815, 817 (Ark. 1962) (holding that automobile junkyard cannot be prohibited solely on the basis of aesthetics but must include health or safety rationale).
hibiting billboards were allowed if they cloaked their true intention of preserving scenic vistas under statements that their purpose was to protect drivers from accident-inducing distractions, or to eliminate hiding places for criminals.\textsuperscript{50}

Aesthetic zoning regulations no longer have to weave health and safety language into their stated purpose. In 1954, the United States Supreme Court upheld a municipal plan to beautify an area of Washington, D.C. in the case of \textit{Berman v. Parker}.\textsuperscript{51} \textit{Berman} did for aesthetic zoning what \textit{Euclid} had done for comprehensive zoning nearly thirty years before: it gave the Supreme Court's stamp of constitutional approval to municipalities' authority to zone for purely aesthetic reasons.\textsuperscript{52} The controversy in \textit{Berman} arose out of the District of Columbia's attempt to revitalize a dilapidated portion of the city that was both a health and safety concern to city officials and citizens, and an aesthetic blight.\textsuperscript{53} In efforts to eliminate and prevent substandard housing, the city condemned and re-zoned commercial property through a comprehensive development plan,\textsuperscript{54} and the owners of property affected by the plan brought suit challenging the land use regulation.\textsuperscript{55} In deciding the controversy, the Court held that it was within the power of the legislative branch to take aesthetic considerations into account when enacting land use regulation.\textsuperscript{56} A by-product of the decision was the precedent that aesthetic purposes alone can satisfy the general welfare requirement of the police power.\textsuperscript{57} Writing for a unanimous court, Justice Douglas penned the words used by myriad courts in upholding purely aesthetic land use regulation:

\begin{quote}
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
\end{quote}

\begin{footnotes}
\item[50] See, \textit{e.g.}, St. Louis Gunning Advert. Co. v. City of St. Louis, 137 S.W. 929 (Mo. 1911) (The city's purported reasons for adopting the ordinance prohibiting billboards were protection of pedestrians from injury in case of high winds, prevention of fire hazards and elimination of hiding places for criminals.).


\item[52] See \textit{id.} at 33; see also \textit{Euclid}, 272 U.S. at 387.

\item[53] See \textit{Berman}, 348 U.S. at 30.

\item[54] See \textit{id.} at 28–29.

\item[55] See \textit{id.} at 31.

\item[56] See \textit{id.} at 32–33.

\item[57] See Pace, \textit{supra} note 22, at 581. "Although \textit{Berman} was primarily concerned with eminent domain as it related to slum clearance, the language of the Court strongly endorsed aesthetics as a basis for government action." \textit{Id.} at 584.
\end{footnotes}
healthy, spacious as well as clean, well-balanced as well as care­
fully patrolled.\(^{58}\)

The Court went on to state that legislation is a reflection of the
public interest, and that the legislature, being the main guardian of
the public, is better suited than the judiciary to decide how to protect
citizens and their surroundings through use of the police power.\(^{59}\)

The Court in \textit{Berman} stated that when a local legislature passes a
regulation furthering aesthetic values, the regulation will be pre­
sumed to further the public welfare.\(^{60}\) After \textit{Berman}, simply passing
a regulation gives it a presumption of validity under the police power,
as the legislature is assumed to be acting to protect the public welfare,
which, according to the \textit{Supreme Court}, is a very broad term.\(^{61}\) So,
although the term “general welfare” is broad, \textit{Berman} stated that it
is up to the legislature to define what is in the best interest of the
public.\(^{62}\) Legislation is a reflection of what the public wants as codified
by the pens of its elected officials, and that legislation is therefore
presumed to further the general welfare.\(^{63}\) If the legislature passes a
land use regulation the sole purpose of which is to further aesthetic
values, after \textit{Berman} the presumption is that the general welfare is
enhanced by the regulation.\(^{64}\) The \textit{Berman} decision broadened the
definition of the general welfare, holding that aesthetic goals could
stand alone as the purpose of a zoning regulation.\(^{65}\)

\textit{Berman} set off a landslide of state court decisions upholding the
validity of regulations that relied on aesthetics as their only purpose
in furthering the general welfare.\(^{66}\) The \textit{Court of Appeals of New York}
was quick to adopt \textit{Berman's} position that aesthetics could stand
alone as the sole reason for a zoning regulation.\(^{67}\) In \textit{People v. Stover},
a homeowner hung a clothesline in his front yard to protest taxation,
and added a line once a year for five years.\(^{68}\) In response to complaints
from neighbors and other town residents, the local legislature enacted
an ordinance prohibiting the placement of clotheslines in front or side

\(^{58}\) \textit{Berman}, 348 U.S. at 33.
\(^{59}\) See id. at 32.
\(^{60}\) See id. at 33.
\(^{61}\) See \textit{id.} (concept of public welfare is broad and inclusive).
\(^{62}\) \textit{Id.}
\(^{63}\) \textit{Berman}, 348 U.S. at 32.
\(^{64}\) See \textit{id.}
\(^{65}\) See \textit{id.} at 33.
\(^{68}\) See \textit{id.} at 273.
yards. In responding to the suit brought by the tax protester to challenge the constitutionality of the ordinance, the New York Court of Appeals quoted *Berman*, and stated that aesthetics could stand alone as a legitimate goal, justifying exercise of the police power. The *Stover* decision broke new ground in state law, and has been cited in most jurisdictions that have adopted the “aesthetics alone” position.

State after state followed the *Berman* and *Stover* precedent, adding strength and precedents to what is now the majority position: regulations that seek to protect or enhance the visual beauty of a community further the general welfare, and are to be given equal status with the more traditional police power objectives of furthering public health and safety. A majority of states now accept that aesthetic considerations may stand alone as the sole purpose behind zoning ordinances.

A. Aesthetic Zoning For Scenic View Protection—Prelude To Ridge Line Zoning

In the years since the *Berman* decision, Americans have experienced a widespread increase in income and leisure time, leading to an ability to indulge preferences for a more attractive environment. Legislatures across the country have reflected this public interest in aesthetics through the passage of land use and construction regula-
tions aimed at preserving and enhancing the visual landscape. These zoning ordinances generally fall into two main categories: zoning to prohibit certain uses (such as residential property being used to store junk), and zoning to preserve the scenic integrity of an area (Denver's ordinance regulating building height to preserve existing views of the Rocky Mountains). The second type of zoning ordinance is becoming more and more common, especially in areas where residents choose to purchase real estate based on the natural beauty of the surrounding landscape, and in towns where the economy is largely dependent on tourists who visit to enjoy beautiful views.

In states that have assessed the validity of zoning ordinances passed to protect or enhance scenic vistas, courts have unanimously agreed that preservation of scenic beauty furthers the general welfare and is therefore within the legitimate scope of the police power. In Asselin v. Town of Conway, the Supreme Court of New Hampshire addressed a restaurant owner's constitutional challenge to a town ordinance prohibiting internally lit signs. The court stated that in the past, it had held that towns could consider aesthetic values along with other factors when passing zoning regulations. In Asselin, the court upheld the ordinance prohibiting internally lit commercial signs, holding that aesthetic considerations could stand as the only purpose of a zoning ordinance. The court based its holding on its opinion that the preservation or enhancement of the visual environment promotes the general welfare. The facts examined by the court evidenced that the intent of the ordinance was to prevent the diminution of views, not necessarily to prohibit the signs simply because the town found them as a class to be unattractive.

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76 See, e.g., Town of Sandgate v. Colehamer, 589 A.2d 1205 (Vt. 1990); State v. Jones, 290 S.E.2d 675 (N.C. 1982).


80 See Asselin, 628 A.2d at 251.

81 See id. at 250.

82 See id.

83 See id.

84 See id. at 250–51.
It is reasonable to infer that the scenic vistas sought to be preserved by the town include the splendor of mountains at twilight and the brilliance of stars at night. . . . The evidence supports a finding that the restriction on internally lighted signs is rationally related to the town's legitimate, aesthetic goals of preserving vistas, discouraging development that competes with the natural environment, and promoting the character of a "country community."86

The Asselin decision supports the position that preservation of scenic mountain vistas is a legitimate aesthetic goal, and that aesthetic goals further the general welfare and are therefore a legitimate exercise of the police power.86

In reaching its conclusion in Asselin, the New Hampshire Supreme Court first assessed whether the ordinance was impermissibly vague such that it worked a violation of due process.87 The standard of review for this inquiry is whether a person of ordinary intelligence would have a reasonable opportunity to know what is prohibited based on the language of the ordinance.88 The court stated that in this case the language of the ordinance made its meaning plain: all signs lit from within are prohibited in the town of Conway.89

The court then confirmed that the state zoning enabling act gave the town of Conway the authority to zone for purely aesthetic purposes.90 The court stated that the enabling act conferred the broad authority to zone for the promotion of the general welfare of the community, and that the general welfare would be promoted through the preservation and enhancement of the visual environment.91 Therefore, the town of Conway had the authority to pass aesthetic zoning regulations.92

Having established that the state had conveyed to the town its police power, the court next addressed the issue of whether the sign ordinance was a reasonable exercise of the police power.93 The court stated that because the sign ordinance applied to all sign users and manufacturers in the town, the standard of review was whether the

85 Asselin, 628 A.2d at 250-51.
86 See id.
87 See id. at 249.
88 See id.
89 See id.
90 See Asselin, 628 A.2d at 249-50.
91 See id.
92 See id.
93 See id. at 250.
ordinance was rationally related to the legitimate goal of the town. The court implied that if the ordinance had applied only to a select few, the court would have used a heightened level of scrutiny in evaluating the ordinance to ensure that it did not violate the Equal Protection Clause.

Finally, the court stated that there is a presumption in New Hampshire that zoning ordinances are valid, and after assessing the evidence relied upon by the trial court in its decision to uphold the prohibition on internal sign illumination, the court affirmed. The court stated that the testimony given by an expert witness regarding the scenic interference caused by internally lit signs was sufficient to support the trial court's decision to uphold the ordinance.

The steps taken by the court in Asselin are typical of courts reviewing the validity of aesthetic ordinances.

B. Regulations to Protect Mountain Views

Several states have decided cases regarding the validity of mountain view protection statutes. The courts' decisions in these cases have recognized that mountain views are a unique resource, and that state and town governments have the right to protect those resources in order to further the general welfare of their citizens.

One of the strongest affirmations of the public's interest in zoning to protect mountain views came from the California Court of Appeals in its decision in Ross v. City of Rolling Hills Estates. In Ross, the plaintiffs submitted to the city planning board plans for putting an addition on their home. The city denied the application based on the fact that the plan would violate a zoning ordinance prohibiting block-

94 See id.
95 See Asselin, 628 A.2d at 250.
96 See id. at 249–50 (quoting Town of Chesterfield v. Brooks, 489 A.2d 600, 603 (N.H. 1985)).
97 See id. at 250.
98 See id. "[I]nternally illuminated signs appear as "disconnected squares of light" at dusk and at night, and that the 'overall effect' of an internally-lit sign is to create a visual block that is seen at some great distance sort of bobbing at the windshield', while external lights 'soften the impact' of signs in the darkness." Id.
101 See, e.g., Landmark Land, 728 P.2d at 1286; Ross, 192 Cal. App. 3d at 374.
102 See Ross, 192 Cal. App. 3d at 370.
103 See id. at 373.
The court upheld the ordinance and affirmed the denial, stating in its decision that the need to protect the scenic character of the area was a stated goal of the view protection ordinance, and that the denial of the building permit was reasonably related to this legitimate goal of the city. The Ross court accepted hillside view protection as the primary purpose of the ordinance.

The Ross decision provides legal support to communities looking to protect mountain areas and to preserve mountain views through zoning ordinances. The court did not discuss other legislative purposes stated in the town's view protection ordinance, implying that the interests of the city in preserving the rural character and scenic beauty of the hillsides were enough to warrant its utilization of the police power to regulate land use.

In Landmark Land v. Denver, the Supreme Court of Colorado went a step further than the Ross court, upholding the city of Denver's enforcement of a view protection ordinance in an area that was already highly developed. The view protection ordinance at issue in Landmark restricted the height of buildings in an office park in order to preserve Denver's view of the Rocky Mountains.

Unlike the Ross court, the court in Landmark did not rely on the legislature's interest in keeping the character of the area rural, but rather allowed the city to give value to Denver's view of the Rocky Mountains. The court stated that Denver's "civic identity is associated with its connection with the mountains," and that therefore the...

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104 See id.

106 See id.

108 See id. (treating the view protection ordinance as a zoning ordinance, stating that the two are closely related).

110 See id. at 1283–84.

112 See id. at 1285.

113 Id.
city's use of the police power to protect that connection was directly related to the general welfare of Denver's citizens.¹¹⁴

Once it established that the view protection regulation was a legitimate function for the city, the court assessed whether the ordinance itself was directly related to that goal.¹¹⁵ The court held that a direct relationship existed, stating that the specific height restrictions and gradations set out in the ordinance were narrowly tailored to serve the sole purpose of preserving Denver's view of the Rockies.¹¹⁶ The court went on to say that once the issues of whether view protection is a legitimate legislative function, and whether the regulation itself is related to that goal, are settled, the city is free to implement the regulation in any constitutional method it chooses.¹¹⁷

III. POSSIBLE LEGAL CHALLENGES TO AESTHETIC ZONING REGULATIONS

In reviewing challenges to an aesthetic zoning ordinance, a court may take any or all of the following steps.¹¹⁸ First, the court may look at the scope of the zoning authority involved.¹¹⁹ Assuming that the jurisdiction follows the majority rule that states can zone for purely aesthetic reasons, the court will ask whether the state enabling legislation gives the municipality the authority to zone for aesthetic purposes.¹²⁰ Second, the court might look at whether the regulation is a reasonable exercise of the police power.¹²¹ The two-part test for this inquiry is whether there is a legitimate state interest at stake, and if so, whether the regulation itself actually works to further that interest.¹²² In making this inquiry, courts are especially careful to examine whether the regulation is disguised to serve a forbidden purpose—for example, exclusionary zoning cloaked in aesthetic restrictions.¹²³ Finally, the court may ask whether the regulation is impermissibly

¹¹⁴ See id.
¹¹⁵ See Landmark Land, 728 P.2d at 1285–86.
¹¹⁶ See id.
¹¹⁷ See id. at 1286 (to be considered constitutional the method must not be arbitrary or capricious).
¹¹⁹ See, e.g., Landmark, 728 P.2d at 1285–86.
¹²⁰ See, e.g., Asselin, 628 A.2d at 249.
¹²¹ See id. at 250.
¹²² See, e.g., Landmark, 728 P.2d at 1285–87; Asselin, 628 A.2d at 250.
¹²³ See, e.g., Asselin, 628 A.2d at 250 (stating that the court applies heightened scrutiny to equal protection challenges).
vague such that it could work a violation of due process.\textsuperscript{124} The standard for this inquiry is whether a person of ordinary intelligence could understand what is prohibited by the regulation; if not, enforcement of the regulation is violative of due process because the violator would have been without valid notice.\textsuperscript{125}

If the regulation can withstand each of these levels of scrutiny, the court will find the regulation constitutional.\textsuperscript{126} However, the landowner challenging the aesthetic regulation may still argue that the regulation as applied to him or her is unconstitutional.\textsuperscript{127} For example, the landowner may claim that a regulatory taking has occurred because the ordinance is prohibitive to the point of leaving the land valueless.\textsuperscript{128}

B. Takings

Although the United States Supreme Court and a majority of state courts have held that local governments may regulate land use to further purely aesthetic goals,\textsuperscript{129} municipalities have not necessarily cleared all legal hurdles once they have enacted the legislation.\textsuperscript{130} If the zoning regulation is such that it prohibits or restricts a certain use of land, the landowner may claim that the use restrictions deprive her of the value of her land, and she may sue the municipality for compensation. This “takings” claim arises out of the Fifth Amendment’s guarantee that private property will not be taken for public use without just compensation.\textsuperscript{131} The rationale for providing compensation in cases where government regulation has literally or effectually taken an individual’s property is that a few citizens should not be forced to bear an unfairly disproportionate burden in advancing a public benefit.\textsuperscript{132} The Fifth Amendment reflects Americans’ conflicting

\textsuperscript{124} See id. at 249.
\textsuperscript{125} See id.
\textsuperscript{126} See, e.g., Landmark, 728 P.2d at 1286.
\textsuperscript{127} See Kessler, supra note 5, at 205.
\textsuperscript{128} See infra notes 131–88 and accompanying text.
\textsuperscript{130} See DAVID L. CALLIES, TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 3 (1996) [hereinafter CALLIES].
\textsuperscript{131} “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.
\textsuperscript{132} See Armstrong v. United States, 364 U.S. 40, 49 (1960). The “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Id. at 49. See also LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 463 (1978).
notions of private property rights, recognizing both the sanctity of private property, and the fact that under certain circumstances, the government/public interest will be greater than the private property right. The difficult legal issue is how to decide when one interest takes precedence over the other, and courts continue to struggle with this question.

The United States Supreme Court initiated the modern regulatory takings dialogue in 1922, when it decided the case of *Pennsylvania Coal v. Mahon.* The government regulation at issue in *Pennsylvania Coal* was a statute prohibiting coal mining if mining activities would cause subsidence of residential land. Prior to *Pennsylvania Coal,* the Court had only recognized actual physical invasions or appropriations of property as takings. The Court held that the regulation at issue in *Pennsylvania Coal* effected a taking because it unreasonably restricted one owner's interest in land in order to benefit the interest of another. After *Pennsylvania Coal,* a regulation can effect a taking without actual appropriation, but simply by restricting land use to the point where the owner has essentially given up the property for public benefit. Writing for the majority, Justice Holmes penned the much quoted rule that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Since the *Pennsylvania Coal* decision, courts have struggled with the question of how to decide if a regulation goes "too far." While no court has enunciated a bright line test, the assessment of a takings claim requires that the state's interest in regulating the land use be balanced with the severity of the deprivation to the property owner.

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133 *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922). "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.*


135 See *Pennsylvania Coal,* 260 U.S. at 412.

136 See *id.* at 412–13.

137 See *Callies,* supra note 130, at 6.

138 See *Pennsylvania Coal,* 260 U.S. at 416.

139 See *id.* at 414–15.

140 *Id.*


142 See *Lucas,* 505 U.S. at 1050–51 (Blackmun, J., dissenting). "[A takings finding] depended on whether the government interest was sufficient to prohibit the activity, given the significant private cost." *Id.*
interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required.\textsuperscript{143} For example, in \textit{Pennsylvania Coal}, the Court decided that although the state had an interest in saving a resident's home from subsidence, the deprivation to the owners of the mining rights that would be affected by the regulation was too severe.\textsuperscript{144} In other words, the severity of the costs to the individual landowners outweighed the public benefits that the regulation provided.\textsuperscript{145} The \textit{Pennsylvania Coal} Court implied that there was a line at which the regulation would be considered to infringe too severely on private property interests, but it stopped short of addressing the question of exactly when a regulation had gone too far.\textsuperscript{146}

In the 1970s and 1980s, the Court tried to answer the "too far" question, deciding the cases of \textit{Penn Central Transportation v. New York City} and \textit{Keystone Bituminous Coal v. DeBenedictis}.\textsuperscript{147} \textit{Penn Central} established the validity of regulatory restrictions on property as long as the land owners were left with a "reasonably beneficial" or economically viable use of their land.\textsuperscript{148} After \textit{Penn Central}, courts must weigh the facts of each individual case to determine whether any reasonably beneficial use of land exists after the regulation is enforced.\textsuperscript{149}

At issue in \textit{Penn Central} was whether a taking had occurred where the owner of Grand Central Terminal was denied a building permit pursuant to a New York City law prohibiting alteration of historic landmarks without approval.\textsuperscript{150} The owners of Grand Central Terminal, designated an historic landmark under the New York City Landmark Preservation Law, applied for and subsequently were denied a permit to construct an office building above the terminal.\textsuperscript{151} Based on this denial, the owners brought suit against the city, claiming that application of the Landmark Preservation Law had effected a regulatory taking of their property.\textsuperscript{152}

\textsuperscript{143} See \textit{Pennsylvania Coal}, 260 U.S. at 416.
\textsuperscript{144} See \textit{id}. at 413.
\textsuperscript{145} See \textit{id}. at 413–15.
\textsuperscript{146} See \textit{id}. at 415.
\textsuperscript{148} \textit{Penn Central}, 438 U.S. at 138.
\textsuperscript{149} See \textit{id}. at 124.
\textsuperscript{150} See \textit{id}. at 107.
\textsuperscript{151} See \textit{id}. at 115–16.
\textsuperscript{152} See \textit{id}. at 119.
The Court set up a case-by-case, ad hoc inquiry standard for takings decisions, stating that whether a taking has occurred "depends largely upon the particular circumstances [in that] case." The *Penn Central* decision also enunciated three factors that courts should assess when reviewing a takings claim: 1) the character of the government action; for example, a taking is more likely to be found if a physical invasion has occurred; 2) the economic impact of the government action on the claimant; and 3) the action's interference with the distinct investment-backed expectations of the claimant. The Court proceeded to highlight the importance of assessing the government interest involved in the regulation, and stated that if the general health, safety, and welfare would be promoted by the regulation's prohibition of certain uses of land, the regulation would be upheld.

After its enunciation of these required inquiries, the *Penn Central* Court found that no taking had occurred in this case: the restrictions imposed by the Landmark Preservation Law were substantially related to the promotion of the general welfare, and the owners were left with a reasonably beneficial use of their land.

Almost a decade after its *Penn Central* decision, the Court revisited the takings issue in *Keystone Bituminous Coal*. Factually similar to *Pennsylvania Coal*, the takings claim in *Keystone Bituminous Coal* involved a challenge to the Pennsylvania Subsidence Act, which required that fifty percent of the coal beneath certain structures be left intact to prevent destructive subsidence. Companies and organizations with interests in coal mining brought suit, claiming that the regulation deprived them of the beneficial and profitable use of support estates (their rights to the coal directly beneath the surface of the land). In assessing the takings claim presented in *Keystone Bituminous Coal*, the Court distinguished *Pennsylvania Coal*, and then used its reasoning to find that the Pennsylvania Subsidence Act had not effected a taking of property. The Court's analysis was based on two basic factors: 1) whether the land use regulation in question substantially advanced a legitimate state interest; and 2)
whether the regulation denied the landowner all economically viable use of the property.161 The Court in *Keystone Bituminous Coal* found that based on these takings test requirements, no taking had occurred.162 First, the regulation was a result of the Pennsylvania legislature “act[ing] to arrest what it perceives to be a significant threat to the common welfare.”163 Second, in assessing whether the owner retained any economically viable use for the land, the Court compared the value of what had been taken from the property with the value that remained.164 The Court stated that for takings law purposes, the owners could not divide their interests in the land to assert that all economically viable use had been taken from one interest within the estate.165 Looking at their estate as a whole, the Court found that economically valuable uses remained, and denied the takings claim.166

*Keystone Bituminous Coal* is an exception to recent Supreme Court takings decisions, in which the Court has begun to weight the takings scale in favor of the individual landowner.167 Several decisions written during Chief Justice Rehnquist’s tenure echo Reagan—era sentiments favoring private interests over government regulation.168 In 1992, the Court decided *Lucas v. South Carolina Coastal Council*, and effected a major shift in takings jurisprudence.169 In *Lucas*, Justice Scalia wrote for the majority, deciding that a coastal protection statute denied a beach-front land owner all economically beneficial use of his lots, and consequently resulted in a taking.170 The majority held that the loss of all economically beneficial use of real property constitutes a regulatory taking under the Fifth Amendment, unless the principles of the regulating state’s existing property and nuisance law give rise to the restrictions on the land’s use.171

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161 See id. at 485 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
162 See *Keystone Bituminous Coal*, 480 U.S. at 485.
163 Id.
164 See id. at 497.
165 See id. at 498.
166 See id.
170 See *Lucas*, 505 U.S. at 1031–32. See also Erin L. Daley, *Land-Use Regulations that Deny Landowners All Economic Value Can Effectuate a Taking*, 27 SUFFOLK U. L. REV. 157, 162 (1993) (stating that the *Lucas* decision marked the first time the Supreme Court had found that a land use regulation rendered real property without economic value).
171 See generally *Lucas*, 505 U.S. at 1003.
Court stated that a taking categorically occurs when there is 1) a permanent physical invasion of property, or 2) a regulation denies all economically beneficial or productive use of land.\(^{172}\)

A few examples of the many changes in takings analysis mandated by the Lucas decision make clear why the decision is considered revolutionary. First, before Lucas, the Court consistently held that a regulatory challenge was not ripe for judicial review until a final decision had been made regarding the permissible uses of the property.\(^{173}\) However, the Lucas Court allowed review before the exhaustion of available administrative remedies, stating that the landowner was not precluded from bringing suit to demand compensation for past deprivations, even though, under a 1990 amendment to the regulation that he was fighting, he could have applied for a variance and had failed to do so.\(^{174}\) Consequently, Justice Scalia implied that a landowner no longer has to exhaust all administrative remedies prior to bringing a constitutional takings claim.\(^{175}\)

Secondly, the Lucas Court held that a landowner was owed compensation when there was a total deprivation of beneficial use, and defined “beneficial” to mean economically profitable.\(^{176}\) Justice Scalia summed up his opinion of how land should be valued by quoting, “[f]or what is the land but the profits thereon?”\(^{177}\) He expanded on this by stating that regulations that require “land to be left substantially in its natural state” leave the owner without economically beneficial or productive options, and therefore often result in a taking.\(^{178}\)

Most revolutionary, however, was Justice Scalia’s inference that a partial regulatory taking (where only a portion of a piece of property is regulated) could be found to be compensable if the “regulation has interfered with [the owner’s] distinct investment-backed expectations.”\(^{179}\) Consequently, after Lucas, it is possible that a court could...

\(^{172}\) Id. at 1015.
\(^{173}\) See id. at 1041 (Blackmun, J., dissenting).
This [ripeness] rule is required by the very nature of the inquiry required by the Just Compensation Clause, because the factors applied in deciding a takings claim simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Id.

\(^{174}\) See id. at 1011.
\(^{175}\) See Lucas, 505 U.S. at 1011.
\(^{176}\) Id. at 1017, 1019.
\(^{177}\) Id. at 1017.
\(^{178}\) Id. at 1018.
\(^{179}\) See id. at 1019 n.7.
find that a municipal action that merely diminishes, rather than ex­
tinguishes, the economic value of property constitutes a compensable
taking.¹⁸⁰

This is especially relevant to ridge line zoning. Depending on how
the zoning ordinance is formulated, construction may not be allowed
above a certain elevation, precluding a developer, who owns a parcel
that runs both above and below the ridge line, from building on part,
but not all, of the land. After Lucas, it is possible that if investments
had been made in anticipation of building above the ridge line, this
landowner could successfully argue that a regulatory taking had oc­
curred, even though the regulation affects only a portion of the parcel
of land.¹⁸¹

Third, The Court stated that a taking would exist where the regu­
lation denies a landowner of all economically valuable land use, unless
the regulation prohibits a use already forbidden under the state’s
property or nuisance law.¹⁸² “A law or decree [that prohibits all eco­
nomically beneficial use of land] must . . . do no more than duplicate
the result that could have been achieved in the courts . . . under the
State’s law of private nuisance . . . .”¹⁸³ The Court used the example
of a lake-bed owner, who would have no takings claim if a regulation
was passed prohibiting landfilling, since that use of the land would
have flooded adjacent property, and would therefore already have
been prohibited by state nuisance law.¹⁸⁴ The Court stated that the
government can avoid its duty to pay just compensation to the land­
owner only if the “proscribed use interests were not part of his title
to begin with.”¹⁸⁵

This portion of the Lucas decision severely restricts state legisla­
tive power by forcing the state to pay compensation when it passes
legislation that imposes greater restriction on land use than that
already imposed by existing state nuisance law.¹⁸⁶ In his concurrence,
Justice Kennedy astutely observed that there could be pressing en­
vironmental dangers that would justify new regulation beyond the

¹⁸⁰ See Lucas, 505 U.S. at 1019 n.7.
¹⁸¹ See id.
¹⁸² See id. at 1029.
¹⁸³ Id.
¹⁸⁴ See id.
¹⁸⁵ Lucas, 505 U.S. at 1027.
¹⁸⁶ See id. at 1029–30. “When . . . a regulation that declares ‘off-limits’ all economically produc­
tive or beneficial uses of land goes beyond what the relevant background principles would
dictate, compensation must be paid to sustain it.” Id. at 1030.
state's common law, and that the Court should not inhibit states from enacting regulatory initiatives in response to changing environmental conditions.\textsuperscript{187}

However, after \textit{Lucas}, the question remains: when is a landowner left with no viable economic use of his or her land? The way that courts choose to answer this question has serious repercussions for ridge line zoning. If, for example, a court adopts and expands upon Justice Scalia's inference that the taking be measured considering only the value of the portion affected (as opposed to the whole piece of property), municipalities would be reluctant to prohibit construction above a certain elevation.\textsuperscript{188} The municipality could minimize the risk of losing a takings suit by abandoning absolute prohibitions, and adopting building height or size restrictions instead.\textsuperscript{189}

\textbf{IV. AN EXAMPLE OF RECENT REGULATORY SCHEMES TO PROTECT RIDGE LINES THROUGH ZONING: NORTH CAROLINA'S MOUNTAIN RIDGE PROTECTION ACT}

In 1983, North Carolina passed the nation's first comprehensive statute regulating construction on mountain ridges.\textsuperscript{190} The Mountain Ridge Protection Act (Ridge Act) was born when an out-of-state developer began construction of a ten-story condominium complex at the top of Little Sugar Mountain, one of the tallest peaks in the Avery County region of North Carolina.\textsuperscript{191} Public opposition to the project prompted the North Carolina General Assembly to draft and pass legislation that mandated local government action regarding mountain ridge protection.\textsuperscript{192} The Ridge Act created a regulatory framework for controlling the height of construction anywhere within 100 feet of the crest of a mountain ridge.\textsuperscript{193}

\textsuperscript{187} See \textit{id.} at 1035 (Kennedy, J., concurring) (stating that unique problems like constantly changing patterns of coastal erosion warrant flexible regulatory power).

\textsuperscript{188} See \textit{id.} at 1019 n.7.

\textsuperscript{189} See, e.g., N.C. GEN. STAT. §§ 113A-206 to -214.

\textsuperscript{190} See \textit{id.}

\textsuperscript{191} See Kessler, supra note 5, at 205.


\textsuperscript{193} See N.C. GEN. STAT. § 113A-206 ("Ridge" means the elongated crest or series of crests at the apex or uppermost point of intersection between two opposite slopes or sides of a mountain, and includes all land within 100 feet below the elevation of any portion of such line or surface along the crest. "Crest" means the uppermost line of a mountain or chain of mountains from which the land falls away on at least two sides to a lower elevation or elevations).
The Ridge Act serves as interesting sample legislation in that it gives local governments great flexibility in how they put the law into effect in their community.194 Under the Ridge Act, mountain counties could select from three options under the Act: a total prohibition on construction, a more flexible local permit system, or a referendum to allow voters to decide to opt out of the Act.195 Within these options, the counties were also given a number of more detailed choices, such as whether to measure a mountain from sea level or from the valley floor.196

Through the Ridge Act, the state of North Carolina gave local governments flexible options regarding enactment and implementation.197 First, a county or city could choose between a total prohibition on construction, or a more flexible local permit system to provide local control over ridge construction.198 Under the Ridge Act, if a county or city did not adopt a permit system one year from the enactment of the Ridge Act, a total prohibition on construction automatically became effective.199

Secondly, the Ridge Act offers local governments the opportunity to expand coverage to areas not expressly covered under the state statute.200 Under the Act, a county can eliminate the 3000-foot elevation requirement, and expand coverage to all ridges with elevations at least 500 feet above the adjacent valley floor.201

Finally, a county or city covered by the Ridge Act could choose to exempt itself from coverage of the Act by a binding referendum to be voted on before a date specified in the Act.202 Any county that had removed itself from the Act’s coverage could opt to reverse this decision, again by a binding referendum vote.203 Only one county in North Carolina chose to hold a referendum vote to opt out of the Act.204 The referendum was voted down, however, and the county remains under the Ridge Act’s prohibitions on construction.205

194 Id. §§ 113A-208, -214.
195 See id.
196 See id.
197 See Heath, supra note 191, at 188.
198 See id.
200 Id. §§ 113A-206(6), -208(d).
201 Id. § 113A-206(6).
202 Id. § 113A-214(a).
203 Id. § 113A-214(b).
204 See Heath, supra note 192, at 189.
205 See id.
For counties that adopted the Act, construction within 100 feet of their mountain ridges is limited to buildings that are three stories high. For buildings that are already standing (and would violate the Act), repairs can be made, but no new construction, addition, or modification is allowed if it would put the structure in violation of the Act.

The Ridge Act recognizes that land use planning and zoning have traditionally been dealt with at the local level. However, it provides excellent guidance for local governments' implementation of the Act.

The Ridge Act also provides comprehensive enforcement options. The Act contains broad statutory citizen suit provisions, and authorizes not only injured parties, but any citizen residing in a county where a violation occurs, to bring a civil action against an alleged violator. According to the Act, an action for an alleged violation may seek injunctive relief, an enforcement order, and damages. The violator is also subject to criminal sanctions under the Act. Finally, counties that come under the Act's construction prohibition cannot authorize construction of a violating structure, or authorize utility service to the structure.

A. Potential Legal Challenges

Because the Ridge Act restricts the use of real property, it is a certain target for legal challenges—most likely regulatory takings, due process, or equal protection claims. However, in the fourteen years since the Ridge Act was passed, there has not been a single reported decision of a legal challenge to the Act. Perhaps this is

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206 See id. at 190.
207 N.C. GEN. STAT. § 113A-210(1) and (2).
208 See Kessler, supra note 5, at 200.
210 See id. § 113A-211.
211 Id.
212 Id.
213 Id.
214 See Heath, supra note 192, at 194.

The reach of these prohibitions is worth emphasizing. For example, a county health department sanitarian cannot grant a septic tank permit to a building that violates the Act; the sanitarian who does so could be prosecuted for violating the Act, ordered to deny the permit, or be held liable for damages or other civil relief in a citizen suit.

Id.

215 See Kessler, supra note 5, at 205–20.
because of the way the Act was designed, but most likely the lack of litigation stems from the fact that although the Act restricts the height of buildings constructed above a certain elevation, it does not prohibit construction entirely.216 A total ban on development, while better suited to further the aesthetic purposes of ridge line zoning, would almost certainly give rise to takings challenges.217

V. A SAMPLING OF METHODS TO PROTECT RIDGE LINES

While ridge line zoning appears to be the most direct method for the legislative preservation of scenic ridge lines, mountain towns across the United States have utilized a number of innovative approaches to preserve the scenic beauty of their surroundings.218 The following are a few examples:

• Teton County, Wyoming, is home to one of the most famous scenic mountain ranges in the United States, the Teton Range, and to Jackson Hole, the ski resort with the biggest vertical drop (4,100 feet) of any in the country.219 The town of Jackson is situated in a high elevation valley, 50 miles long, and at its widest point, ten miles wide.220 In recent years, Jackson has become extremely popular, especially with wealthy visitors whose “trophy” homes of 10,000 and 20,000 square feet have begun to change the character and pristine beauty that visitors come to Jackson to enjoy.221

Concerned by the rapid growth and changing character of their town, Jackson residents held a public workshop on land use planning in 1990.222 By 1995, Teton County and the town of Jackson adopted radical new land use regulations.223 The regulations reflected the resi-

218 See generally Howe, supra note 1, at 47–139.
219 See id. at 54.
220 See id.
221 See id. In the 1970s alone, the population of Teton County doubled. Id.
222 See Howe, supra note 1, at 56.
223 See id.
224 See id.
225 See id.
226 See id.
227 See Howe, supra note 1, at 56.
228 See id.
229 See id. at 57.
230 See id.
231 See id.
232 See Howe, supra note 1, at 76.
233 See id. at 76–7.
dents’ desire to preserve a small town flavor, and the area’s natural beauty, unique wildlife, and pristine views of the Teton Range. 224

The new land use plans combine local regulations with financial incentives for developers and home owners. 225 For example, before the 1995 regulations, rural zoning in Teton County required only three to six acre lots. 226 The county’s new zoning code requires that lots in rural zoned areas be no smaller than 35 acres. 227 However, if the owner of a rural lot agrees to set aside a large portion of the property as permanent open space, the county will allow three to six homes to be cluster-developed on the 35 acres. 228

The county has also designated scenic areas in which developers must meet building standards designed to preserve views of the mountains. 229 These building standards regulate the location, size and height of structures. 230 Finally, the county has limited the size of new homes to 8,000 square feet in order to reduce the impact of “eyesores on the ridge lines.” 7221

• In the Rocky Mountain ski towns of Vail and Crested Butte, Colorado, residents have approved a real estate transfer tax to be used for the purchase of open-space. 232 In Vail, the tax generates approximately $2 million a year for open space acquisition. 233 In 1997, the town of Vail owned and managed nearly 1,000 acres of preserved open space. 234

• Conservation easements are an effective legal tool for preserving open space, and protecting ridge lines on privately owned property. 235 A conservation easement allows a landowner to gain financial benefit from property without selling or subdividing it. 236 Because a property interest is really a bundle of legal rights, a landowner can separate some rights from the bundle and transfer them to another owner—for example, the right to mine under their land. 237

A conservation easement is the sale or donation of the property’s development rights, often to a municipality or a land bank like The Nature Conservancy. 238 The easement runs with the land and permanently extinguishes the possibility that the land will be developed. 239

Conservation easements offer significant tax benefits to landowners. 240 A property owner who donates an easement or sells it

224 See id. at 77.
225 See id. at 79.
226 See id.
227 See Howe, supra note 1, at 79.
228 See id.
229 See id.
230 See id.
231 See id.
232 See id.
233 See id.
234 See id.
235 See id.
236 See id.
237 See id.
238 See id.
239 See id.
240 See id.
below market value can receive income tax deductions for the value of the charitable donation. The property owner can also benefit from lower estate and property taxes because the land no longer includes development rights.

**Conclusion**

It is well established that state and municipal governments have the right to zone for purely aesthetic purposes. Ridge line zoning furthers legitimate government interests, and courts have held that the protection of mountain views furthers the general welfare. However, while government has the right to regulate land use to preserve mountains and scenic vistas, individuals may still challenge the regulation. Most often these challenges will include regulatory takings claims, and the *Lucas* decision gives the landowner strong judicial support. After *Lucas*, it is possible that a court would find that the government must compensate the landowner even if the property value has been only partially diminished.

Because of the current judicial climate for takings reviews, states and municipalities should be careful to draft ridge line zoning ordinances precisely but flexibly. Provisions like those found in the North Carolina Mountain Ridge Protection Act, which allow citizens to vote by referendum regarding the adoption of the ridge line zoning ordinance in their community, are more likely to be upheld based on the fact that landowners had a direct opportunity to control the legislation's enactment. If drafted and enforced effectively, ridge line zoning ordinances could serve to protect the beauty of mountainous regions, and to preserve their spectacular views for present and future generations to enjoy.

241 See id.
242 See Howe, supra note 1, at 79.