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FEDERAL LAND USE CONTROLS FOR CLEAN AIR

By Kathleen King*

INTRODUCTION

The federal government has been involved in air pollution control since 1955.1 Until 1970, the federal approach had been to study the dimensions of the air pollution problem and to encourage, through technical and financial assistance, state efforts to control pollution. However, in 1970, Congress recognized that air pollution had become a serious problem and that:

the growth in the amount and complexity of air pollution brought about by urbanization, industrial development and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property and hazards to air and ground transportation.2

This recognition of the critical nature of the air pollution problem resulted in the enactment of the 1970 Clean Air Act Amendments,3 which changed the federal role from one of minimal involvement to one of aggressive leadership.

Because the Clean Air Amendments have been the subject of extensive analysis in both legal and environmental journals,4 this article does not attempt to deal comprehensively with the Act. Rather it focuses on the legal problems which result from a somewhat subtle mandate appearing in Section 110 of the Act: that land use and transportation controls be used as pollution control strategies by the states.5 When read in the context of the federal government's involvement in the promulgation of state air pollution plans,6 such a requirement expands federal powers to encompass traditionally local decisions such as zoning.

Moreover, the United States Supreme Court in Fri v. Sierra Club7 recently upheld a Federal District Court ruling that the Clean Air Act, by implication, embodies a policy of non-degradation. Non-degradation, as explained by the lower court, means that the quality
of air in a given area should not be allowed to "significantly deteriorate" regardless of more lenient standards under the Act. In effecting such a policy, the federal government will have to encroach further on the traditional right of state and local governments to regulate development.

The expansion of federal involvement in air pollution control has occurred because both the Congress and the public have recognized that air pollution has national as well as local aspects. Thus, although air pollution control was originally thought to be a responsibility of the states, in the late 1960's Congress found that the states were not effectively controlling air pollution. As the dynamic nature of the atmosphere allows polluted air to travel across state lines, Congress relied on its broad powers under the commerce clause to deal with the problem in the Clean Air Act.

In recognition of the national aspects of the air pollution problem, the 1970 Clean Air Act sets out uniform national standards of air quality, which are necessary to effect at least minimum standards of air quality in all parts of the country. The Act recognizes that if air quality standards are not nationally determined, they may differ from state to state, creating "polluter havens" where standards are lenient.

The basic framework for administering the Clean Air Act is the device of primary and secondary ambient air quality standards which quantify the goals of the Clean Air Act. These standards are set by the Environmental Protection Agency [EPA] and the states must achieve them within a specified time period. As defined by the Act, primary ambient air quality standards are "... standards the attainment of which ... allowing an adequate margin of safety, are requisite to protect the public health." Similarly, secondary ambient air quality standards "... shall specify a level of air quality the attainment and maintenance of which ... is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such pollutant(s) in the ambient air."

Thus, primary and secondary ambient air quality standards are numerical levels of pollution below which public health and welfare are protected from adverse effects. They are national non-variable standards which all states must meet.

The definitional connection of primary and secondary standards with the protection of health and welfare is critical. As a consequence of this connection, any program designed to maintain the quality of air which is cleaner than secondary standards must be
based on considerations other than health and welfare. The power of Congress to regulate these other considerations is one of the major difficulties in construing the basic policy of the Clean Air Act to be non-degradation.

I. THE FRI DECISION: NON-DEGRADATION AND THE CLEAN AIR ACT

In *Fri. v. Sierra Club*, the Supreme Court affirmed, 4-4, and without opinion, the holding of the Federal District Court of the District of Columbia that the 1970 Clean Air Act is based on a policy of non-degradation of existing clean air, i.e., keeping clean air clean. Although the decision itself does not comment on the merits and is of weak precedential value, it is significant because it allows the reasoning and holding of the lower court to stand as a resolution of the issues. On its face, the *Fri* decision states that the authority of the Clean Air Act extends to the protection of clean air even if health and welfare are not involved.

It is useful to look at the decision itself to understand how the court came to its conclusion. The Sierra Club brought the suit under Section 304, the citizen suit provision of the Clean Air Act which states: "any person may commence a civil action on his own behalf—. . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." The theory of the action was that the Administrator was failing to perform a non-discretionary duty by his failure to require that state implementation plans assure no significant deterioration of clean areas. The District Court agreed with the Sierra Club and enjoined the Administrator from approving state plans which would not prevent significant deterioration of the air. It also ordered him to review previously approved plans, and to disapprove those which would not have prevented deterioration of the air. The Administrator was further ordered to promulgate regulations to guide the states in the prevention of deterioration.

The Clean Air Act does not explicitly state the policy of non-degradation. However, the lower court issued the injunction because it concluded that the Act implicitly includes a policy of non-degradation of clean air. Non-degradation is a term of art which means simply that under no circumstances will the existing air quality in a given area be permitted to deteriorate. Non-degradation is to be implemented by the technique of preventing significant deterioration. A "no significant deterioration" standard implies some flexibility because presumably some deterioration is
acceptable until it reaches significant proportions. The lower court in *Fri*, however, used both terms interchangeably in the decision. The injunction was framed in terms of no significant deterioration, but the policy of the Act was discussed in terms of non-degradation.23

While the court rested its decision on statutory construction, the real concern may have been that without a non-degradation policy, a "clean air" statute does not make sense. Without a non-degradation policy, the Clean Air Act would authorize clean areas to become polluted, at least to the limit of secondary standards, and cause a "graying of America."24 Factories and other developments unable to locate in already polluted areas would be free to locate in clean areas, making urban sprawl and increased rural development inevitable. Thus, the alternative to a nondegradation policy is a "clean air" statute which allows clean air to become dirty and recognizes a right to pollute the air up to secondary standards. If this policy argument is the real basis for the court’s decision, however, the decision is perhaps answering questions which Congress should answer by clarifying the Clean Air Act through amendment.25

To find a policy of non-degradation, the District Court looked to the introductory language of the Act which states: "The purposes of this subchapter are to *protect and enhance* the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population."26 (emphasis added). On its face, the term protect means keeping clean areas clean; the term enhance means making clean the polluted areas. To the lower court in *Fri*, this language embodied a non-degradation policy.27

The court found support in the legislative history for its reading of the language.28 Specifically, the District Court cited the Senate Public Works Committee Report: "In areas where current air pollution levels are already equal to and better than the air quality goals, the Secretary should not approve any implementation plan which does not provide to the maximum extent practicable for the continued maintenance of such ambient air quality."29 This language supports a non-degradation construction to some extent, but the words "to the maximum extent practicable" imply that the practicalities of a situation may override the air quality interests.

Furthermore, as then Administrator Ruckelshaus said in the 1972 hearings on the implementation of the Act, this language came out before either a time frame for achieving air quality goals or the idea of a secondary standard was incorporated into the Act.30 Mr. Ruckelshaus further pointed out that a non-degradation policy
does not make sense in the context of air quality standards which by definition protect against all adverse effects of pollution.31

The case of *Izaak Walton League of America v. St. Clair*,32 presents a problem which parallels the *Fri* situation to a certain extent, and the reasoning of the Federal District Court of Minnesota in that case parallels the *Fri* approach to the policy of the Clean Air Act. In *Walton*, plaintiffs challenged defendants’ mining activities in the Boundary Waters Canoe Area (BWCA), which is officially designated as a Wilderness Area. Plaintiffs argued that even though the mining activities were expressly allowed by the Wilderness Act,33 such activities were inconsistent with the stated objectives of the Wilderness Act, namely, the preservation of wilderness areas.34 The court agreed with the plaintiffs and enjoined defendants’ mining activities.35

The District Court in *Walton* was confronted with a wilderness preservation statute which by its own terms would allow mining in wilderness areas. The District Court in *Fri* was confronted with a clean air statute which, without a non-degradation policy, would allow clean air to become polluted. The court in *Walton* handled the problem by holding that the policy statement of the Wilderness Act had to control:38 "The court is aware of the general rule of construction that the specific controls the general and that the provision relating to mineral rights are (sic) more specific. Nevertheless, if the Act means anything, the BWCA was established by Congress to secure for future generations the beauty, pristine quality and primitiveness of one of the few remaining small areas of this country"37 (emphasis added). Thus the court in *Walton* gave a broad construction and overriding significance to the general policy language of the Wilderness Act.

Similarly, the District Court in *Fri* gave a broad construction and overriding significance to the “protect and enhance” language of the Clean Air Act. Even though the non-degradation construction was not supported by express language in the Act, without that construction the Clean Air Act would allow clean air to become polluted. Thus the courts in both *Walton* and *Fri* relied on the purpose language of the respective statutes in order to strengthen the ultimate goal of each statute.

One difficulty with the *Fri* opinion is that Congress could have directly stated a non-degradation policy if that was their intent.38 Other pollution legislation, namely the Federal Water Pollution Control Act Amendments of 1972 (FWPCA),39 has used direct language to announce a non-degradation policy.40
The FWPCA is a useful comparison because of the similarities between the air and water pollution problems and because the federal action taken to combat both problems is similar. Water and air both can be polluted by emissions of dirt and waste. Both problems have a national aspect and a local aspect; the solution of both problems requires federal standard setting and state standard implementation. Indeed under the FWPCA, as under the Clean Air Act, the EPA administrator has the exclusive authority to establish and revise standards of quality, and the states have the responsibility to implement and enforce these standards.

The crucial difference between the FWPCA and the Clean Air Act arises from the standard which each Act requires. As has been discussed, the standards of the Clean Air Act are minimum ambient air quality standards. The standard of the FWPCA, in contrast, is a no-discharge policy, which is essentially a non-degradation policy for water. Prior to 1972, the FWPCA established water quality standards which were analogous to the current ambient standards under the Clean Air Act, but Congress adopted the no-discharge standard in 1972 because the water quality standards approach had not been effective. Under the new no-discharge policy, water quality is an interim measure of program effectiveness and performance, but no-discharge is the ultimate goal and standard. The effectiveness of the no-discharge policy has yet to be seen, but its statement in the Act is clear. The FWPCA states that "It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985," that "... the discharge of any pollutant by any person shall be unlawful," and that a standard of performance under the Act includes, "... a standard permitting no discharge of pollutants." Indeed, as the Senate Public Works Committee Report on the FWPCA pointed out, the Act made it clear that no one has the right to pollute, and that pollution continues because of technological limitations, not because of any inherent right to use waterways for disposing of wastes. Thus, as the FWPCA illustrates, a non-degradation standard can be specifically stated and established as the basic framework of a pollution control act. The Clean Air Act does not do this.

Another difficulty with the non-degradation gloss in the Clean Air Act is the serious inequalities it may create among the states. The major impact of a non-degradation policy will fall on areas of relatively clean air. In polluted areas, or those areas which presently do not meet secondary standards, the present emphasis must be on
reducing existing pollution. With control technology rapidly improving, these areas should be able to achieve secondary standards in the near future. As this air becomes cleaner, new developments and their concomitant pollution should be allowed, as long as secondary standards are not violated.\textsuperscript{49}

Clean areas, on the other hand, will have to maintain their current air quality. As a result, their economic development will probably be restricted, because even with improved technology, any major development is likely to adversely affect the air quality in a clean air region. Under a policy of preventing significant deterioration, these clean areas have little potential for heavy industrial development, and even residential or commercial development may be seriously restricted. If Congress had intended to treat different areas differently because of their current air quality, it probably would have set up a specific mechanism for so doing in the Act itself. Nevertheless, at present the holding in \textit{Fri} is law.

II. THE CLEAN AIR ACT AND LAND USE CONTROLS

The \textit{Fri} decision requires that the non-degradation policy be achieved specifically through state implementation plans.\textsuperscript{50} The section of the Clean Air Act which authorizes state implementation plans also authorizes the land use controls.\textsuperscript{51} In fact, land use controls seem to be the most effective technique for achieving non-degradation.

The more traditional pollution control techniques attempt to reduce emissions from a single source. To a certain extent traditional techniques, like the new source emission standards of the Clean Air Act,\textsuperscript{52} help to prevent deterioration of existing air quality in that they require specified control technology in any new source.\textsuperscript{53} However, a collection of new sources, each of which complies with new source standards, can pollute the air because the new source standards are not "no-discharge" standards,\textsuperscript{54} as in the FWPCA. Thus, a group of new sources, all emitting relatively low levels of pollution, can cumulatively create deterioration of air quality. Herein lies the necessity for land use controls which deal with groups of pollution sources and patterns of development.

The key to achieving non-degradation of clean air, then, is some type of land use control based on air quality considerations. This type of land use control is generally called air quality zoning, and it is designed to control air quality by regulating the use of the subjacent land. Air has a certain capacity to assimilate contaminants without becoming polluted. Up to this point, the ambient air
cleans itself; beyond this point the air quality deteriorates as emissions increase.

The key to air quality zoning is the assimilative capacity of the air column above the specific area of land. Until assimilative capacity has been reached, new development will not harm air quality. If this capacity has been reached, then further development will degrade air quality. Further development will be forbidden, under a non-degradation policy, unless there is technology available to make existing emissions cleaner. Of course, air quality zoning could also be based on an allowable percentage of degradation of the air column. The principle of air quality zoning, in any case, is the relationship of new development and new uses of land to the assimilative capacity of the ambient air.

Under Section 110 of the Clean Air Act, which requires each state to prepare an implementation plan, the federal government has an opportunity to become involved in air quality zoning. The Administrator of EPA is to approve the plan only if it meets certain requirements, one of which is that it include land use and transportation controls as may be necessary to achieve primary and secondary ambient air quality standards. However, when a state does not act to promulgate an approvable plan, the Administrator is required, and presumably is authorized, to promulgate a plan for the state. Since one of the requirements of an approvable plan is the inclusion of land use and transportation controls, the Administrator must therefore be required to promulgate land use and transportation controls when a state does not do so.

However, this degree of federal involvement is inconsistent with the balance of state and federal roles envisioned by the general language of the Act's introductory section, which states that "the prevention and control of air pollution at its source is the primary responsibility of states and local governments." Under the Act, the role of the federal government is seen as "Federal financial assistance and leadership [which] is essential for the development of cooperative Federal, State, regional and local programs to prevent and control air pollution." As in earlier legislation, federal assistance includes a national research and development program, and incentives to establish regional air pollution control programs.

By granting the federal government the power to promulgate land use controls when a state does not do so, Section 110 goes beyond the apparent intent of the introductory section. However, there is an acceptable rationale for this grant of authority. State governments may be reluctant to impose controls which are inconvenient
or expensive. The state governments may favor clean air, but they may decide that economic progress is as important as clean air. Indeed, state governments may decide that the best interests of the state demand industrial expansion at the expense of clean air; they may see clean air as a luxury rather than a necessity.

In order to avoid the ineffectiveness of prior air pollution legislation which depended solely on state initiatives, the federal government needs the authority to impose pollution controls. Effective air pollution control depends on a balance of state decision-making and action and a clear federal presence, which Section 110 attempts to establish. Although Section 110 may be inconsistent with the introductory section, the scheme of Section 110 is necessary to the effectiveness of the pollution controls it authorizes.

However, the grant of federal authority to impose land use controls potentially authorizes federal intrusion into areas which have previously been considered to be beyond federal control. Regulation of local development strategies is not within the scope of federal power, unless such an intrastate activity has interstate impact. On the other hand, the federal power to control air pollution, derived from the commerce clause, is potentially broad and flexible. Such power could accommodate the extension of federal influence into land use planning, given the interstate ramifications of air pollution, the previous inability of the states individually to solve the problem, and the critical relationship between air pollution and land development.

The scope of the authority under the Clean Air Act to impose land use controls is currently in doubt. The exact wording of the statute connects the land use power with the attainment of primary and secondary standards. It requires "other measures as may be necessary to insure attainment and maintenance of such primary or secondary standards, including but not limited to, land use and transportation controls." (emphasis added). The Fri decision, however, suggests that the federal power under the Clean Air Act can be exercised in order to keep clean air clean as well as to achieve primary and secondary standards.

Although the statute clearly does not connect land use regulation with non-degradation, the Fri decision makes this connection necessary for two reasons, if the court's mandate is to be followed. First, the best, if not the only method of achieving non-degradation is some kind of land use control. Second, the Fri opinion specified implementation plans as the vehicle for achieving non-degradation, and the Clean Air Act specifically connects land use controls with
implementation plans. Arguably, then, despite Section 110's clear language, Fri extends the land use power to the achievement of non-degradation.

Indeed, EPA reacted to the decision by issuing a set of proposals for planning state development to insure prevention of significant deterioration. However, in proposing these regulations, EPA emphasized that there had not been a definitive judicial resolution of the issue of whether the Clean Air Act requires prevention of significant deterioration. EPA is currently of the view that Section 110 of the Act requires it to approve state plans which attain and maintain ambient air quality standards and no more.

Despite its opinion that Fri is not definitive, in July, 1973, EPA did suggest four alternative schemes for deterioration control: an air quality increment plan; an emission limitation plan; a local definition plan; and an area classification plan.

Recently, EPA has abandoned these proposals in favor of an even more flexible plan, which leaves all decisionmaking up to the states. The new plan would require states to classify land into one of three zones. Zone I would encompass counties where development is not likely to occur or where it is desirable to protect pristine air. Zone II would include counties where modest changes in air quality would be tolerated. Zone III would encompass urban areas where the air quality is better than secondary standards. For Zone III areas, EPA would allow pollution up to secondary standards. For Zone I and II areas, EPA would set specific amounts by which pollution could increase from existing base levels.

The essence of the proposal is state designation of zones. In effect there is no federal standard as such. States would be free to select non-degradation or a less stringent standard of air quality. The EPA's proposal would allow deterioration unless the state chooses otherwise. Thus the EPA's proposal does not assure that significant deterioration will not occur, and this assurance is what Fri requires.

The proposal marks a retreat to the scheme of federal-state responsibilities under prior air pollution legislation. The federal government suggests a scheme of control; and the states choose, without compulsion, whether to adopt the scheme. Certainly, this approach minimizes federal intrusion into local matters. If the state wants federal advice or funding, the state requests the federal presence; otherwise, the state is on its own. Indeed, the philosophy behind this proposal, federal help at state request, is the philosophy embodied in the proposed National Land Use Act, which is the first significant national planning legislation. Certainly state responsi-
bility and decision making should be primary, but in order to insure that significant deterioration will not occur, there should be stronger federal requirements. If Fri is to be followed, the federal role should be more forceful than it seems to be under the EPA proposal in order to encourage both cooperative and non-cooperative states to act.

III. LAND USE CONTROLS FOR PREVENTION OF DETERIORATION

If land use controls are used for the prevention of significant deterioration, that use raises important constitutional and policy issues. Since federal land use planning is necessary and proper to control the interstate aspects of air pollution, Section 110 of the Clean Air Act is an appropriate exercise of the power of Congress under the commerce clause.72 However, federal land use planning may infringe other constitutional limitations on federal power, namely the Fifth Amendment’s prohibition of unlawful takings.

The Constitution is no barrier to the use of land use controls to promote environmental concerns. Indeed, recent cases have specifically upheld land use controls based on environmental factors. In the 1973 case of In re Spring Valley Development,73 the Supreme Judicial Court of Maine sustained the constitutionality of that state’s Site Location of Development Law.74 The law requires persons intending to construct or operate a development which may substantially affect the local environment to notify the State Environmental Improvement Commission of their plans. If the Commission determines that a hearing is necessary, the developer has the burden of satisfying the Commission that the development will not substantially affect the environment or pose a threat to the public’s health, safety, or general welfare. If the development threatens the environment, it will be restricted.

In determining the constitutionality of the State’s exercise of power under the law in the Spring Valley case, the Supreme Judicial Court of Maine found it “indisputable that the limitation of use of property for the purpose of preserving from unreasonable destruction the quality of air, soil, and water for the protection of the public health is within the police power.”75 The court asserted that this principle is “self-evident” in these times of increased awareness of the relationship of the environment to human health and welfare.76

Thus Spring Valley holds that the protection of environmental quality is a state interest which justifies restrictions on the use of land. In fact, the Clean Air Act itself espouses the Spring Valley philosophy. The Act acknowledges that air quality is a problem with which the government must be concerned;77 and it authorizes land
use controls as one possible solution.\textsuperscript{78} In general, then, zoning or restriction of land use to protect air quality seems to be a constitutional exercise of governmental power.

Air quality zoning to achieve primary and secondary air quality standards is authorized by Section 110 of the Clean Air Act.\textsuperscript{79} This type of regulation similarly violates no constitutional principle. The police power concerns of public health and welfare justify zoning ordinances which necessarily limit the rights of land owners. In 1926, the Supreme Court of the United States upheld the constitutionality of a comprehensive zoning ordinance in the case of \textit{Euclid v. Ambler Realty}.\textsuperscript{80} The Court stated that the governmental power to interfere with the rights of the landowner by restricting the character of the use of his land through zoning is valid only if it bears a substantial relation to the public health, safety, morals or general welfare.\textsuperscript{81} Air quality zoning to achieve primary and secondary standards is, by the definition of primary and secondary standards, regulation to protect public health and welfare. It is therefore a valid exercise of governmental power.

The Clean Air Act does not explicitly authorize land use control through air quality zoning to prevent significant deterioration of air quality. As has been discussed, this authorization can be inferred from the \textit{Fri} decision because air quality zoning would seem to be the primary method of achieving non-degradation of clean air.\textsuperscript{82} However, air quality zoning to achieve non-degradation may be an unconstitutional exercise of governmental power. In the definitional framework of the Clean Air Act, controls which go beyond the achievement of secondary standards are controls protecting the aesthetic quality of the air.

By definition, air meeting primary ambient air quality standards protects the public health;\textsuperscript{83} air meeting secondary standards protects the public welfare from any known or anticipated adverse effects.\textsuperscript{84} Furthermore, public welfare is a broad concept and within the Clean Air Act specifically “includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal well-being.”\textsuperscript{85} As EPA itself has stated, “the basis for preventing significant deterioration therefore lies in a desire to protect aesthetic, scenic and recreational values, particularly in rural areas.”\textsuperscript{86} Thus land use controls for the prevention of significant deterioration would be based on goals definitionally not related to public health or welfare. These controls fall into
the category of aesthetic zoning regulations.

Aesthetic zoning, under certain circumstances, is not unconstitutional. The early cases consistently held that aesthetic zoning was beyond the police power of the state, and therefore an unjust taking by the state. Recently many courts have been willing to find that aesthetic values are a valid legislative concern and that reasonable legislation to promote aesthetic ends is a permissible exercise of the police power.

The case of *Berman v. Parker* involved the condemnation of plaintiff's property under the District of Columbia Redevelopment Act of 1945. It is important to note that *Berman* involved the power of the federal government. The plaintiff argued that taking his property to develop a better balanced, more attractive community was a taking for a non-public purpose and was therefore unconstitutional. The Supreme Court of the United States disagreed, and held that the purpose was public and the taking constitutional. As Mr. Justice Douglas stated in the majority opinion in *Berman*: "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 . . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." Thus *Berman* stands for the proposition that aesthetic concerns can be a legitimate governmental purpose.

The criteria for determining the validity of aesthetic zoning regulations have not been decided in an air quality zoning case. Therefore, it is necessary to refer to traditional aesthetic zoning cases, although the facts differ from the facts which would be involved in an air quality zoning case. A regulation forbidding unsightly clotheslines, for example, is hardly comparable to a regulation forbidding the building of a new power plant in the Berkshire Mountains of Massachusetts. Nevertheless, since there is no case law on aesthetic air quality zoning, the clear principles announced in the traditional zoning cases at least provide a guide for evaluating aesthetic air quality zoning regulations.

The cases upholding aesthetic zoning have required that the aesthetic considerations relate to health or welfare considerations. A typical case is *People v. Stover*, decided by the New York Court of Appeals. At issue was a city ordinance prohibiting clotheslines in a front or side yard abutting the street. In upholding the validity of the ordinance, the Court of Appeals concluded that a zoning law is not necessarily invalid because its primary, if not its exclusive
objective, is the aesthetic enhancement of the particular area involved, so long as it is related, if only generally, to the economic and cultural setting of the regulating community.  

In a more recent case, the same court upheld an ordinance restricting non-accessory signs. Here, the Court of Appeals emphasized that not just any aesthetic consideration can justify state regulation. Rather, only aesthetic considerations which bear substantially on the economic, social, and cultural patterns of a district can validly support such regulation. The principle, then, is that aesthetic zoning is valid when it relates to the welfare of the community involved.

Air quality zoning to prevent significant deterioration does not seem to satisfy this condition of validity. By definition, any zoning provisions set forth by an implementation plan under the Clean Air Act will be based on exclusively aesthetic considerations because air meeting secondary standards is protected against all known or anticipated adverse effects of air pollution. Non-degradation does relate to the public welfare because pristine air is good for people. However, the definitional framework of the Clean Air Act precludes connection of the aesthetic considerations of non-degradation with health and welfare considerations.

Furthermore, there are strong arguments that these aesthetic considerations relate adversely to the economic welfare of the region affected. Non-degradation could severely restrict development in all but the polluted areas of the country. At the least, a national policy of preventing significant deterioration would have a substantial impact on the nature, extent and location of future industrial, commercial and residential development throughout the country. To use the example quoted by Administrator Ruckelshaus in the 1972 hearings, non-degradation in a clean area could require EPA to deny a state the right to put up a coal-fired powerplant. Under the principles which upheld the clothesline ordinance in , this EPA requirement could be seen as an impermissible aesthetic zoning regulation because it is definitionally unrelated to health and welfare considerations.

Thus air quality zoning to achieve non-degradation could inhibit the economic welfare of a state which is relatively undeveloped. If such state desires to encourage industrial and commercial development, it will not be anxious to impose strict development controls for the purpose of keeping its air pure forever. With its citizens' economic welfare in mind, the state might make the judgment that some development is worth some deterioration of air quality. How-
ever, concerning the same state, the EPA according to *Fri* must insure that no significant deterioration of air quality occurs. If the state is not preventing air quality deterioration, EPA must promulgate regulations to do so.

In such a head-on conflict of state and federal decisions, theoretically the state has the stronger position. Given the aesthetic zoning nature of land use controls for the prevention of significant deterioration, a state could successfully argue that such aesthetic considerations are wholly unrelated to the economic welfare of the state and therefore do not support valid regulation. The *Clean Air Act* arguably authorizes land use controls to prevent deterioration, but this authorization would not make the controls valid in this case. On the other hand, non-degradation to the maximum extent possible should be the policy of the *Clean Air Act*; and land use controls to implement this policy are essential.

**CONCLUSION**

In order to insure the validity of land use controls to achieve non-degradation, the *Clean Air Act* requires a change. The change would have to replace primary and secondary standards as the ultimate goals of the Act. As has been shown, the definitional connection of primary and secondary standards potentially invalidates land-use controls which go beyond secondary standards.

To accomplish the necessary change, Congress must clearly state that non-degradation is the goal of the *Clean Air Act*, just as no-discharge is the goal of the FWPCA. The proposed change would potentially vest in the federal government tremendous decisionmaking power over state development. Congress may have the constitutional power to do this, but there are reasons for limiting federal power in local development decisions.

This proposed change would prevent "the graying of America" because it would establish non-degradation as the national goal of air pollution control and authorize control techniques to achieve this goal. However, it potentially vests in the federal government tremendous decisionmaking power over state development. Congress may have the constitutional power to do this, but there are reasons for limiting federal power in local development decisions. Pristine air is probably not worth such an extension of federal power.

It may be possible to achieve non-degradation through a more moderate approach, along the lines of the EPA proposals. Such an
approach would set a flexible concept of non-degradation as the goal. The federal government could set guidelines which would make air quality a factor in land use decisions; it could help to pay for land use planning. However, it would not be authorized to force the states to accept federal decisions on planning and development. Rather it could condition funding on the degree to which the states comply with the policy of non-degradation. The states would thus have the final decisionmaking power. This approach would not insure that significant deterioration would not occur, but it would probably prod the states into taking some action to keep clean air clean.

The federal government should have a strong hortatory role in land use planning for air quality, but not the final word. However, the scope of federal land use planning power is a policy determination for Congress to make. As the Clean Air Act and its meagre case law now stand, the scope of this federal power is not clear, and land use controls for air quality are being ignored. If Congress acts to clarify the land use power of the Clean Air Act, then it is likely that the important strategy of land use controls will be implemented.

Footnotes

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1 See Act of July 14, 1955, Ch. 360, 69 Stat. 322-23, the first federal air pollution statute.


9 Id.
The power to regulate water pollution is analogous, based on the interstate nature of the waters. See Illinois v. City of Milwaukee, 406 U.S. 91 (1972), recognizing as valid not only the regulation of water pollution but also the development of federal common law in water pollution.


They are non-variable in the sense that they may be revised only by the Administrator in the same manner as promulgated. 42 U.S.C. §§1857c-4(b)(1) and (b)(2) (1970).

This is President Nixon's suggestion: he has proposed that Congress amend the Clean Air Act to exclude a policy of non-degradation.

353 F. Supp. 698.
36Id., at 715.
37Id.
38See 2 Eco. L.Q. 801, 821-822 (1972) for the suggestion that Senate proponents of the bill feared that a non-degradation bill would be defeated in the Congress; and that they “built” a record in subcommittee hearings which would later support a judicial interpretation favoring non-degradation.
40It is interesting to note Senator Baker’s comment: “Non-degradation is a concept that is commensurate with a national emission standard system. It is not consistent with a national ambient criteria system and the Congress decided on the latter instead of the former and thereby laid aside the concepts of non-degradation.” Implementation Hearings, supra n.30, at 275.
43See text, supra at n.14-18.
49The air over approximately 80% of the nation is cleaner than secondary standards. WALL STREET JOURNAL, February 14, 1974, at 4, col. 1.
50344 F. Supp. 253, 256.
53EPA has argued that this section fulfills the non-degradation requirement. See 2 Eco. L.Q. 801, 815 (1972).
5742 U.S.C. §1857c-5(a)(2)(B) (1970) states that the plan must include: “emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment of such primary or secondary standard, including, but not limited to, land-use and transportation controls.”
It is worthwhile to point out that promulgation does not mean enforcement, but merely the setting down of the regulations which the state must enforce.

See Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 475 F.2d 968, 970 (D.C. Cir. 1973), in which the court held that EPA must move ahead in approving transportation plans for the states.


See text, supra at n. 19.
Id.

Id. Under the air quality increment plan, significant deterioration would be defined as a finite decrement in air quality with the same definition applying to all sections of the country. Under the emission limitation plan, emissions would be distributed in a certain density over an air quality control region; there would be no set federal standard of allowable density. Under the local definition plan, a state would classify all areas as belonging to one of two zones of allowable deterioration, one with stringent requirements, the other with more lenient requirements.

Wall Street Journal, February 14, 1974, at 4, col. 1. The regulations have not been formally proposed in the Federal Register as of April 1, 1974.

This bill was recently defeated in the House after having passed the Senate. See, Healy, M., National Land Use Proposal: Land Use Legislation of Landmark Environmental Significance, 3 Environmental Affairs 355 (1974).

300 A.2d 736, 748.
Id. at 746.
Id.
272 U.S. 365 (1926).
Id., at 395.
The distinction between regulation and taking has created much litigation and little precision of line-drawing. As expressed by Mr. Justice Holmes, "The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 415 (1922).


Involved was the power of Congress under the United States Constitution, Art. I, Section 8 to govern the District of Columbia.

People v. Stover, supra n. 88.


225 N.E.2d 749, 755.

Id.

See text, supra at n. 18-19.

See text, supra at n. 24.

See text, supra at n. 67-71.