A LETTER FROM THE TREE KILLING FIELDS

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Perhaps the most outrageous perversion of the highway beautification program has been the practice by the Federal Highway Administration and some of the states to allow outdoor advertising companies to destroy the public's trees on the right-of-way to give an unrestricted view of billboards. However, this policy finally was modified by the FHWA in a May 18, 1990 Memorandum signed by Associate Administrator Anthony Kane:

> We recognize that maintenance of highway rights-of-way for safety and other highway operations is a State responsibility. However, to clear vegetation solely to improve the visibility of signs subject to removal under the Highway Beautification Program is not environmentally responsive. It is Federal Highway Administration policy to be sensitive to environmental concerns, therefore such vegetation clearance can no longer be endorsed. Direction should be provided the Division offices to assist the States in rescinding their existing vegetation clearance agreement and/or permit programs.

As might be expected, this change in policy has drawn a furious response from the outdoor advertising industry, and equally predictably, the Federal Highway Administration is now backing off and talking of "compromise." The industry characterizes the protection of the public's trees in front of billboards as a "taking" of billboard industry property. The FHWA is now saying that their memorandum is only a "statement of policy," which the states may ignore. Let's look at the validity of both these arguments.

The "Takings" Issue

The outdoor advertising industry contends that refusal to cut down the public's trees on the highway right-of-way to provide a clear view for billboards located on adjacent private property constitutes a "taking" of their property. This, of course, is total hogwash. Fortunately, the courts agree.

Perlmutter v. Greene 182 N.E. 5 (1932)

About sixty years ago, Perlmutter leased land next to an approach to the Mid-Hudson bridge at Poughkeepsie, New York, on which he erected a fifty-three foot long and ten-foot high billboard advertising his furniture store. Greene, the State Superintendent of Public Works, concerned about the distraction caused by the billboard on the bridge approach, erected a screen to block the view of the billboard. Perlmutter sued. The court agreed with the state:

> [The Superintendent] may plant shade trees along the road to give comfort to motorists and incidentally to improve the appearance of highway. By so doing he aims to make a better highway than a mere scar across the land would be. If trees interfere with the view of the adjacent property from the road, no right is interfered with. . . No adjacent owner has the vested right to be seen from the street in his backyard privacy.

In a judicial period when aesthetics were not recognized as a valid basis for use of the police power, this decision also advanced the cause of aesthetic regulation:

> Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, or decency.
>
> [The Superintendent] may act reasonably in his discretion for the benefit of public travel in screening a billboard at a dangerous curve when by its enormity such a structure may divert the attention of the motorist from the road. He then interferes with no property right of the adjacent owner, and he should not be interfered with by the courts. If incidentally the outlook from the road is improved by shutting off the view of the billboard, so much the better.

Outdoor Advertising Association of Tennessee v. Shaw 598 S.W. 2d 783 (1980)

In the late 1970's there was considerable debate concerning illegal tree cutting on Tennessee highways. When the state refused to destroy the trees, the Outdoor Advertising Association of Tennessee sued, contending that planting or permitting vegetation on highway rights-of-way obstructing licensed billboards was unlawful and unconstitutional. In particular, the billboard industry argued that planting or maintaining the vegetation "in such a way as to obstruct state inspected licensed and approved sign structures and render

them non-productive constitutes a constructive condemnation of those structures without just compensating in violation of [the Highway Beautification Act]." The Court disagreed.

> This Court is unable to discern in the cited statute any intent that sign owners or property owners be compensated for any impairment of the visibility of signs or other interference with their usefulness short of "removal" or "taking all right, title or interest", in the sign or "all right to erect or maintain" a sign on land.
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> This Court has concluded that plaintiffs' complaint shows no common law, constitutional or statutory right to compensation for the impairment of the visibility of their signs on any theory of "constructive taking."
>
> **This Court is unaware of any statutory or common law which requires an adjoining land owner to refrain from planting or to actively trim vegetation on his own property to avoid obscuring the view from or to his neighbor's property.** (Emphasis added.)
>
> Plaintiffs seem to insist that the licensing of a billboard confers some special right of visibility and imposes some special duty upon the State to maintain visibility of the licensed billboard. No authority has been cited or found to sustain this novel theory which this Court is unwilling to incorporate for the first time into the law.

These two cases appear to be the only reported ones which address the issue of loss of visibility of billboards by obstructions on the public right-of-way. They certainly offer no comfort to the outdoor advertising industry. To the contrary, it is clear that the industry has no valid legal claim on this phony takings issue.

History of the Tree Destruction Program

As trees on Interstate highways, many of which were planted with funds provided by the Highway Beautification Act, gained some size, many of those located in front of billboards began to die from poisons or be cut down in the middle of the night. For example, in 1972 the Florida Department of Transportation presented testimony to Commission on Highway Beautification showing that more than 1,500 trees had been destroyed along I-75, all in front of billboards. This vandalism was addressed in the Federal-Aid Highway Program Manual Transmittal 156, dated September 26, 1975:

> Instances involving the destruction of trees and shrubs on the right-of-way in order to increase or enhance the visibility of an outdoor advertising signs and instances involving the erection and/or maintenance of signs adjacent to Interstate highways by access from the highway right-of-way are contrary to the provisions of 23 CFR 1.23 and State laws and regulations. The State highway department should take all legal and administrative action at its disposal to abate these practices...

(More about this transmittal and its reference to the Code of Federal Regulations later.)

The 1976 FHWA Policy Against Tree Vandalism and Its Reversal

In 1976, the outdoor advertising industry proposed to eliminate the problem of illegal tree cuttings by making this vandalism legal. Their "environmental consultant" proposed a "vegetation control" policy that would permit the billboard companies to destroy the public's trees in front of billboards.

To the outdoor advertising industry's dismay, FHWA's policy against tree vandalism was reaffirmed in December 1976. This resulted in a barrage of criticism and pressure from the industry and their allies in Congress, and the policy was reversed in March 1977. The reversal memorandum permitted the states to enter into "maintenance agreements" with outdoor advertising companies to destroy public property solely for private gain. This move was opposed by almost all concerned within FHWA; the only apparent support was from the sign industry. There were no public hearings held, nor were any other procedures followed for changing policy and procedures.

The Associate Administrator for Right-of-Way and Environment later defended his abrupt change of policy, stating that he met with the billboard industry's "environmental consultant" in February, and the industry representative told him:

> He believed the reference to [the Program Manual Transmittal] was not proper because this refers to illegal cuttings on rights-of-way, and his efforts with State highway departments were directed to maintaining the rights-of-way in front of signs in a legal manner."

In other words, illegal vandalism was going to be transformed into legal vandalism.

> [The outdoor advertising industry representative] said that there had been illegal cuttings of shrubbery and trees on the rights-of-way in front of signs

> by the sign owners, and to prevent this to a degree, the OAAA sign owners wanted to enter into cooperative landscaping projects with willing State highway departments to maintain the rights-of-way.

The Federal Highway Administration's tree destruction policy (euphuistically and rather cynically referred to as "vegetation control" by the outdoor advertising industry and the FHWA) supposedly permits this giveaway of public property only "if this is consistent with State maintenance policies, good landscaping practices, and the guidance provided by the AASHTO (American Association of State Highway and Transportation Officials) Maintenance Manual." Section 5.160 of that manual, Trees and Brush, encourages natural growth of trees on the edge of the right-of-way. There are no provisions encouraging, recommending, or even allowing the destruction of trees to make billboards more visible and increase their value. There is absolutely no justification for a contention that the tree destruction policy is "consistent with good landscaping practices and the guidance provided by the AASHTO Maintenance Manual."

The Inspector General and General Accounting Office Reports

In August 1984, the U. S. Department of Transportation's Office of Inspector General completed its report on audit of the Highway Beautification Act in Federal Highway Administration Region 4 (the Southeast). The report definitely gave a negative overall assessment of the program:

> We conclude that Outdoor Advertising Control Program has not significantly improved the aesthetic quality or the recreational value of the Region's primary and interstate highways.

The report specifically criticized the vegetation vandalism policy, particularly because it prolonged the life of non-conforming signs:

> FHWA and state policies permit sign owners to clear vegetation and trees on highway right-of-way to make their signs more visible to motorists. If this practice was not permitted, more nonconforming signs would be abandoned, or removed with no compensation, since highway advertising media has no economic value when obscured by vegetation growth.

They concluded:

> FHWA needs to rescind a policy statement which allows sign owners to clear trees and other vegetation on Federal-aid highway rights-of-way. This policy change would result in gradual scenic improvement at no government cost and significant reduction in any future Federal program for sign purchases. If vegetation control was not permitted, many nonconforming signs would become obscured from highway view and acquisition would not be necessary.

The General Accounting Office's report of January 1985, The Outdoor Advertising Control Program Needs To Be Reassessed, also criticized the vegetation destruction program. Even so, the Federal Highway Administration refused to take any action to rescind the policy -- until now.

FHWA's Obligations and Powers of Enforcement

Two basic questions arise regarding the Federal Highway Administration's role in insuring that the public's trees are not destroyed to provide a better view of billboards: What obligation does the FHWA have to insure that highways constructed under the federal-aid program are maintained in a manner consistent with public highway purposes? What powers does the FHWA have to force the states to conform with regulations and policies regarding maintenance of these highways?

Obligation to Maintain Federal-Aid Highways

The obligation to properly maintain highways built with federal aid is not optional, either with the states or the Federal Highway Administration. The United States Code (23 U.S.C 116) states:

> It shall be the duty of the State highway department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts. The State's obligation to the United States to maintain any such project shall cease when it no longer constitutes a part of a Federal-aid system.

"Maintenance" is defined in 23 U.S.C. 101 as:

> the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for its safe and efficient utilization.

The Code of Federal Regulations (23 CFR 1.23) states:

> All real property, including air space, within the right-of-way boundaries of a project shall be devoted exclusively to public highway purposes.

Note that "roadsides" are specifically included in the maintenance definition. Thus, it is difficult to conceive how destruction of trees and other vegetation on the highway right-of-way for the sole purpose of making billboards more visible could possibly qualify as "maintenance." What is the "public purpose?" What is the highway purpose? There is none. Allowing the outdoor advertising companies to cut down the public's trees on the right-of-way constitutes destruction of public property for a non-public, non-highway purpose. It is certainly not "consistent with sound landscape practice."

Where the highway project specifically contained landscaping elements, the Federal Highway Administration's obligation is even clearer. In 1979, the FHWA's Assistant Chief Counsel for Right-of-Way and Environmental Law determined that:

> A different question arises when the vegetation is in place as a result of Federal involvement in a landscape project, either under 23 U.S.C. section 315 or otherwise. Section 116(a) specifically imposes on the State the duty to "maintain or cause to be maintained any project constructed under the provisions of prior acts." This obligation continues until the project is no longer part of Federal-aid system. The only circumstance under which a State would seemingly be able to relieve itself of the obligation to maintain pursuant to section 116 is if the underlying system designation were changed. 23 CFR 470.111(b).
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> Relinquishment of highway facilities where Federal-aid funds participated in either right-of-way or physical construction costs of a project is regulated by 23 CFR, Part 620, Subpart B. Relinquishment is allowed only where the Federal Highway Administrator specifically agrees to such relinquishment. The relinquishment must be justified by a series of specific finding which include that "the lands to be relinquished are not suitable for retention in order to restore, preserve, or improve the scenic beauty adjacent to the highway consistent with the intent of 23 U.S.C. 319 and P.L. 89-285, Title 3, Sections 302 and 305 (Highway Beautification Act of 1965)." 23 CFR 620.203(I)(4).
>
> Where the highway facility at issue is a project specifically carried out under section 319 [the section of the code dealing with Landscape and Roadside Development], or where it is a landscape project and its purposes are consistent with section 319, it would be difficult to justify the relinquishment of the facility as consistent with the purposes of section 319.

> **The above discussion makes clear the FHWA's concurrence is required before the State can be relieved of its obligation to maintain a federally funded landscape project.** (Emphasis added). . . The removal would be governed by 23 CFR, Part 620 [Relinquishment of Highway Facilities], since such removal of vegetation would essentially amount to a relinquishment of a federally funded highway facility.
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> We recognize that landscape projects are sometimes modified for purposes relating to highway safety, redesign of the highway facility, or as part of the normal maintenance of the landscape project. This memorandum should not be read to curtail activities of this type. **Where, however, the purpose of the activity to be undertaken is diametrically opposed to the reason for the landscape project and is not directly related to some other highway purpose as defined in Title 23, the above restrictions apply.** (Emphasis added.)

Despite this clear directive, and the authorities it cites, the Federal Highway Administration has NOT taken the steps to comply. The states that wish to destroy landscaping elements to benefit the billboard companies have not been forced to follow the proper procedures. The FHWA has abdicated its responsibilities under the law.

Powers of Enforcement

The powers of the Federal Highway Administration to require that the states maintain the highways in conformance with applicable laws and regulations are quite clear. The United States Code (23 U.S.C. 116(c)) states:

> If at any time the Secretary shall find that any project constructed under the provisions of his chapter or constructed under the provisions of prior Act, is not being properly maintained, he shall call such fact to the attention of the State highway department. If within ninety days after receipt of such notice, such project has not been put in proper condition of maintenance, the Secretary shall withhold approval of further projects of all types in the State highway district, municipality, county other political or administrative subdivision of the State, or the entire State in which such project is located, whichever the Secretary deems most appropriate, until such project shall have been put in proper condition of maintenance.

The Code of Federal Regulations (23 CFR 1.36) states:

> If the Administrator determines that a State has violated or failed to comply with the Federal laws or the regulations in this part with respect to a project, he may withhold payment to State of Federal funds on account of such project, withhold approval of further projects in State, and take such other action that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State to the satisfaction of the Administrator.

That's rather clear, isn't it?

The Assistant Chief Counsel's memorandum also made this point quite clear:

> If the State were to remove vegetation in violation of the above conditions, it would be in violation of 23 U.S.C. section 116. Under that section sanctions could include withholding further project approvals until maintenance is restored. The Federal Highway Administrator has other remedies available to him short of withhold project approvals. See 23 CFR 1.36 [above] His authority to adopt appropriate corrective measures under this section has been established in a number of recent decisions, including Nebraska v. Tiemann, and South Dakota v. Adams.

Conclusions

From the above discussion of the tree destruction issue, it is apparent that:

1. The outdoor advertising industry's claim that the planting or maintenance of vegetation on the public right-of-way in front of billboards constitutes a "taking" is totally spurious.

2. The destruction of public property on the public right-of-way of federal-aid roads for a non-public, non-highway purpose is not lawful.

3. The Federal Highway Administration has not been meeting its obligations to protect the public's property, and has not been complying with the United States Code regarding maintenance, its own regulations, the directives of its Chief Counsel's office, or the findings of the Department of Transportation's Inspector General.

Even if it is implemented and enforced, the policy change set forth in the memorandum of May 18th does not go far enough, since it only protects vegetation in front of non-conforming signs. The trees growing in front of conforming billboards are still in peril. Corrective legislation and/or successful litigation are probably necessary in order to force the Federal Highway Administration and the states to really protect the public's property from the billboard industry.

Even though this policy change regarding vegetation destruction does not go far enough in protecting the public's property, we must recognize that it is the first important

positive policy reversal relating to the highway beautification taken by the FHWA in perhaps fifteen years. It took a considerable amount of bureaucratic courage on the part of Mrs. Barbara Orski, Director, Office of Right-of-way, to push for this change in policy, and she definitely deserves our praise and support. We must also recognize that if the outdoor advertising industry is successful in either overturning the policy, or in seeing that it is not enforced, then we probably will not see another positive modification in the FHWA's policies toward the highway beautification program for another fifteen years. This is not an unimportant issue.