

**CASE NOTE: PROPERTY LAW—OUTDOOR
ADVERTISING CONTROL ACTS SLICE CITY FUNDS
INTO THE BUNKER—*IN RE DENIAL OF ELLER MEDIA
COMPANY’S APPLICATIONS FOR OUTDOOR ADVERTISING
DEVICE PERMITS IN THE CITY OF MOUNDS VIEW***

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“I want to make sure that the America we see from these major highways is a beautiful America.”

President Lyndon B. Johnson,
January 1965.¹

I. INTRODUCTION

President Johnson’s commitment to highway beautification has had a lasting impact on the landscape of America. During the first half of the twentieth century, the road system in America experienced unprecedented growth. With this expansion came an explosion of billboards along the country’s highways, affectionately dubbed by environmentalists as “visual pollution,” “sky trash,” “litter on a stick,” and “the junk mail of the American highway.”² President Johnson took notice of the public’s disgust at the marred national landscape. In 1965 he introduced the Highway Beautification Act, aimed to induce state regulation of billboards along major highways.³ Instead of a wholesale ban on billboards, the legislation limits their use to areas zoned for either commercial or industrial activities.⁴ Since the enactment of the Highway Beautification Act, there are 875,000 fewer signs along controlled highways.⁵

In a recent case, *In the Matter of the Denial of Eller Media Company’s Applications for Outdoor Advertising Device Permits in the City of Mounds View*, a city-owned golf course encountered financial difficulties.⁶ The City of Mounds View attempted to increase the course’s revenue through the sale of billboard space on golf course land adjacent to a major highway.⁷ The Minnesota Department of

1. Federal Highway Administration, *How the Highway Beautification Act Became a Law*, at <http://www.fhwa.dot.gov/infrastructure/beauty.htm>.

2. Scenic America, *Billboards*, at <http://www.scenic.org/billboardsign/billboardsign.htm> (last visited Nov. 3, 2004).

3. Pub. L. No. 89-285, 79 Stat. 1028, 1028-33 (1965) (codified as amended at 23 U.S.C. § 131 (2000)).

4. *See id.*

5. Outdoor Advertising Association of America, *Laws and Regulations*, at <http://www.oaaa.org/government/laws.asp#fhwa>. An estimated 500,000 billboards exist along major American highways today. Scenic America, *Fight Billboard Blight: Billboards by the Numbers*, at <http://www.scenic.org/billboardsign/blightnumbers.htm> (last visited Nov. 3, 2004).

6. 664 N.W.2d 1 (Minn. 2003) [hereinafter *Eller Media*].

7. *Id.* at 4.

Transportation⁸ denied the city's permits on the ground that the erection of billboards on the golf course violated the Minnesota Outdoor Advertising Control Act.⁹ By the time the case reached the Minnesota Supreme Court, the court faced the multi-faceted issue of whether a municipally owned golf course qualifies as a "business area" under the Minnesota Outdoor Advertising Control Act, in light of the definition of an "industrial or commercial zone" under the Highway Beautification Act.¹⁰

This note first examines a brief history of the municipal development of the comprehensive plan and outdoor advertising control legislation,¹¹ the federal government's promulgation of the Highway Beautification Act,¹² and the Minnesota Outdoor Advertising Control Act.¹³ Upon review of the background of the *Eller Media* case,¹⁴ this note highlights the opinion rendered by the Minnesota Supreme Court.¹⁵ An analysis of the supreme court's interpretation in light of the outdoor advertising control acts and regulations follows,¹⁶ including an examination of the policies that underlie the pertinent statutes.¹⁷ This note concludes that based on the state of the golf course today, the supreme court's strict interpretation of the advertising control statutes focused too narrowly on the zoning label instead of the actual land use.¹⁸

II. HISTORY

As the construction of American highways progressed, cars allowed the public to navigate the country with ease and the use of billboards skyrocketed.¹⁹ To some, these signs detracted from the

8. The Minnesota Department of Transportation is charged with issuing permits for billboards along major highways.

9. *Eller Media*, 664 N.W.2d at 2.

10. *Id.* at 6.

11. *See infra* Part II.A.

12. *See infra* Part II.B-C.

13. *See infra* Part II.D.

14. *See infra* Part III.A.

15. *See infra* Part III.B.

16. *See infra* Part IV.A-C.

17. *See infra* Part IV.D.

18. *See infra* Part V.

19. The origin of American billboards can be traced to New York, where, in 1835, Jared Bell printed large outdoor posters for a circus. Outdoor Advertising Association of America, *About Outdoor*, at <http://www.oaaa.org/outdoor/sales/history.asp> (last visited Nov. 3, 2004) [hereinafter *About Outdoor*]. At first, roadside signs advertised local establishments and services. *Id.* The medium gained popularity in 1900 when a standardized billboard structure was developed.

American landscape.²⁰ By the mid-1920s, signs lined America's highways and public outcry against billboards intensified.²¹ In May of 1923, members of the New York State Federation of Women's Clubs began a protest-by-letter campaign against billboards.²² The movement gradually spread to other states.²³ The women sent more than 4,000 letters per month to the top four advertisers in the country, urging the advertisers to confine signs to commercial locations in order to protect America's scenic beauty.²⁴ The campaign resulted in fourteen national advertisers pledging to remove their highway billboards upon the expiration of their contracts.²⁵ The beautification movement took flight.

A. Municipalities Recognize the Need for Zoning Regulation and Demand Outdoor Advertising Control Legislation

The rapid and unpredictable growth of cities in the late nineteenth and early twentieth centuries created a need for municipalities to control city development.²⁶ The City of New York was the first to do so through the enactment of a comprehensive

Id. The standardized billboards were twelve feet high and twenty-five feet long. PHILLIP TOCKER, *Standardized Outdoor Advertising: History, Economics and Self-Regulation*, in *OUTDOOR ADVERTISING HISTORY AND REGULATION* 11, 39 (John W. Houck ed., 1969). This standardization created a boom in national billboard campaigns by allowing advertisers like Palmolive, Kellogg, and Coca-Cola to mass-produce billboards for the national market. *About Outdoor*, *supra*.

20. Scenic America, *Fighting Visual Pollution*, at <http://www.scenic.org/billboardsign/billboardcontrol.htm> (last visited Nov. 3, 2004). Besides scarring natural beauty along highways, billboards also have other negative effects. *Id.* Billboards have been shown to harm the health of Americans by contributing to commuter stress. *Id.* A recent Texas A&M University study concluded that commuters driving on roads blighted by billboards, sprawl, and strip development had higher blood pressure, heart rate, respiration, and increased eye movements and facial muscle activity compared to driving on rural roads. *Id.* Billboards are also considered safety hazards because they are designed to distract motorists' attention from the road. *Id.* Some companies go so far as to remove trees to increase the visibility of their billboards from the highway. *Id.* Billboards have a negative economic impact on the areas in which they are built. A study in Pittsburgh, Pennsylvania, found that property values rose as much as 255% after the removal of nearby billboards. *Id.*

21. Jean Buraet Tompkins, Letter to the Editor, *Billboards or Scenery?*, N.Y. TIMES, Aug. 15, 1923, at 16.

22. *Club Women Rally to Billboard Fight*, N.Y. TIMES, Dec. 16, 1923, at E15.

23. *Id.*

24. *Id.*

25. *Offensive Outdoor Advertising*, N.Y. TIMES, Mar. 27, 1924, at 18.

26. 1 KENNETH H. YOUNG, *ANDERSON'S AMERICAN LAW OF ZONING* § 1:2 (4th ed. 2004).

zoning plan in 1916.²⁷ Through the comprehensive plan, the city created several zoning districts, such as commercial, residential, and industrial, and assigned different types of uses to each zone.²⁸ Zoning regulation was necessary for cities to implement their respective comprehensive plans.²⁹

Zoning spread rapidly, especially after the Standard State Enabling Act was enacted in 1922.³⁰ This legislation empowered municipalities to divide themselves into zones and permitted regulations to vary between the zones.³¹ The Enabling Act simultaneously restricted the zoning power of municipalities by requiring that zoning ordinances be enacted in accordance with a comprehensive plan.³² Zoning that benefited individual landowners, thus not in accordance with the comprehensive plan, was labeled “spot zoning.”³³ Spot zoning has been deemed “the very antithesis of planned zoning.”³⁴

Municipal regulation of advertising signs was similarly common during the early 1900s.³⁵ The popular demand for billboard regulation was so great that thirty-three states adopted regulatory statutes during the 1920s.³⁶ By 1958, every state had

27. *Id.*

28. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 958 (5th ed. 2002).

29. 1 YOUNG, *supra* note 26, § 5:2. Zoning is defined as the “legislative division of . . . a municipality into separate districts with different regulations within the districts for land use, building size, and the like.” BLACK’S LAW DICTIONARY 1649 (8th ed. 2004).

30. DUKEMINIER, *supra* note 28, at 959.

31. *Id.* at 971.

32. *Id.* A comprehensive zoning plan is defined as a “general plan to control and direct the use and development of a large piece of property.” BLACK’S LAW DICTIONARY 304 (8th ed. 2004).

33. Spot zoning is described as a zoning change, usually to a small piece of land, which creates an island within a larger zoned district that is not consistent with the surrounding uses. *State v. City of Rochester*, 268 N.W.2d 885, 891 (Minn. 1978).

34. *Jones v. Zoning Bd. of Adjustment*, 108 A.2d 498, 502 (N.J. Super. Ct. App. Div. 1954) (classifying spot zoning as “improper permission” to use a small piece of land); *see also* DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 136-37 (2d ed. 1986), *reprinted in* DUKEMINIER, *supra* note 28, at 1005.

35. 3 YOUNG, *supra* note 26, § 16:1. Municipalities have no inherent power to regulate billboards, so such authority must be granted by the state legislature. Henry W. Proffitt, *Public Esthetics and the Billboard*, 16 CORNELL L. Q. 151, 160 (1931).

36. Proffitt, *supra* note 35, at 168. California prohibited advertisements on public property without consent. *Id.* at 169. North Carolina required that written consent of the owner of private property must be obtained to place advertisements

outdoor advertising control legislation.³⁷ At first, the courts did not approve of controlling land use for aesthetic purposes.³⁸ However, courts began to uphold sign control regulations based on the advancement of public health and safety, the preservation of property values, and the promotion of tourism.³⁹ Today, billboard regulation based on aesthetic concerns alone is an accepted and legitimate use of police power.⁴⁰

on that property. *Id.* New York permitted anyone to remove advertisements from areas along public highways which had been placed there without governmental permission. *Id.* at 169-70. Vermont required licenses for anyone conducting outdoor advertising business within the state. *Id.* at 170. Colorado prohibited the erection of billboards within 300 feet of intersections or sharp curves if the signs would interfere with a driver's view. *Id.* Arkansas prohibited the erection of billboards within 100 yards of a state highway unless permission of the State Highway Commission was granted. *Id.* at 170-71. Connecticut prohibited billboards within 300 feet of any state highway having any word used to give warning to traffic, unless under the authority of Highway Commissioner. *Id.* at 171.

37. Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463, 468-69 (2000).

38. *See, e.g., City of Passaic v. Paterson Bill Posting, Adver. & Sign Painting Co.*, 62 A. 267, 268 (N.J. 1905), *overruled in part by State v. Miller*, 416 A.2d 821 (N.J. 1980). "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." *Id.*

39. 3 PATRICK ROHAN, ZONING AND LAND USE CONTROLS § 17.03[2] (Eric Damian Kelly ed. 1978). In 1917, the United States Supreme Court upheld an Illinois Supreme Court decision which justified a billboard regulation on the basis of public health and safety. *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 529-31 (1917). The Illinois court found that deposits behind billboards can breed disease which may be scattered by the wind, immoral practices occur under cover provided by billboards, and fires can start from combustible material that gathers around billboards. *Id.* at 529; *see also St. Louis Gunning Adver. Co. v. City of St. Louis*, 137 S.W. 929, 942 (Mo. 1911) (holding that billboards are "constant menaces to the public safety and welfare of the city; they endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants").

40. *See John Donnelly & Sons, Inc. v. Outdoor Adver. Bd.*, 339 N.E.2d 709, 717 (Mass. 1975) (reasoning that a visually satisfying city tends to contribute to the health of the citizens). The evolution of the change in judicial attitudes can be divided into three stages: the early period, where aesthetics was not a basis for zoning; the middle period, where aesthetics could be a basis if other grounds were present; and the modern period, where aesthetics are acceptable without the need for other grounds. RUTHERFORD H. PLATT, LAND USE AND SOCIETY 286-87 (1996). The development of the modern attitude toward aesthetics took a major turn in 1954 when Justice Douglas opined that the concept of public welfare encompasses spiritual, physical, aesthetic, and monetary values. *Berman v. Parker*, 348 U.S. 26, 31-32 (1954). The just compensation requirement and free speech restrictions are the most controversial aspects of billboard control regulations, but are beyond the scope of this article. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514

B. The Federal Government, Billboard Control, and the Bonus Act

By the mid-1950s, the federal government felt that its leadership was necessary to control outdoor advertising along highways due to the varied scope and effectiveness of the state regulations.⁴¹ Lawmakers were concerned that uncontrolled advertising along the Interstate System would decrease highway efficiency, impair highway safety, and hinder the enjoyment of drivers.⁴² The federal government justified its involvement in billboard regulation along the Interstate System because it provided ninety percent of the System's construction funds.⁴³

After two failed attempts, the federal government finally made real accomplishments in outdoor advertising control with the adoption of the Federal-Aid Highway Act of 1958.⁴⁴ This Act prohibited outdoor advertising within 660 feet of the Interstate System, but allowed for specific advertising in a narrow set of categories.⁴⁵ The Act earned its nickname, the Bonus Act, from a

(1981) (holding that the city must allow noncommercial billboards in commercial and industrial zones because it cannot distinguish between contents of noncommercial speech); *Eller Media Co. v. Montgomery County*, 795 A.2d 728, 739 (Md. App. 2002) (holding that fair compensation must be paid for the removal of billboards despite a reasonable amortization period).

41. S. REP. NO. 85-1407 (1958), *reprinted in* 1958 U.S.C.A.N. 2367, 2385.

42. *Id.*

43. *Id.* at 2386. The Interstate System was proposed by President Franklin Roosevelt in 1944. Albert, *supra* note 37, at 481. States were not permitted to add exits and entrances to the Interstate System without federal consent, and the number of Interstate miles was limited. *Id.* at 474.

44. Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 89 (1958). The first federal level movement in billboard control was led by Senator Richard L. Neuberger (D-Ore.), who wrote an amendment to the Federal-Aid Highway Act of 1955 that would enable the Secretary of Commerce to acquire exclusive advertising rights on land adjoining the Interstate System in certain states. Clifton W. Enfield, *Federal Highway Beautification: Outdoor Advertising Control, Legislation and Regulation*, in *OUTDOOR ADVERTISING HISTORY AND REGULATION* 149, 150 (John W. Houck ed., 1969). This provision was eventually deleted from the bill. *Id.* at 151. The Federal-Aid Highway Act of 1956 did not contain any billboard control provisions. *Id.* Public response to this omission encouraged further consideration of the issue. *Id.* at 152. In 1957, Senator Neuberger once again introduced a bill to control outdoor advertising signs. *Id.* This bill would have prohibited all outdoor advertising within 750 feet of the Interstate System except directional and other official signs, signs advertising the sale or lease of property on which they are located, signs advertising activities conducted on the land on which they are located, and signs on land zoned commercial or industrial. *Id.* at 154. Instead of penalizing states for not complying with the legislation, the complying states would be rewarded with a 0.75% increase in federal highway aid. *Id.* The Senate Committee on Public Works took no action on the bill. *Id.* at 156.

45. Advertising was allowed if it involved directional and other official signs,

provision that increased Federal-Aid highway funds by five percent to complying states.⁴⁶

Critics of the Bonus Act believed that stronger, more effective provisions should have been included.⁴⁷ Others were concerned that the Bonus Act would bribe states into passing legislation that they might not otherwise pass in order to obtain federal funds.⁴⁸ During its seven-year existence, the Bonus Act improved only 195 miles of highway.⁴⁹ By the time it expired on June 30, 1965, almost \$2 million in bonus money had been paid to fourteen states.⁵⁰

In 1965, President Johnson, who believed the Bonus Act to be ineffective, called a White House Conference on Natural Beauty to discuss, among other topics, outdoor advertising control.⁵¹ The day

signs advertising the sale or lease of property on which they were located, signs advertising activities being conducted within twelve miles of the signs, and signs designed to give information in the specific interest of people traveling on the highway. Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 89, 95 (1958). While the bill was in the Senate, Senator Robert S. Kerr (D-Okla.), attempted to amend it to strike provisions related to advertising control. Enfield, *supra* note 44, at 160. This amendment was defeated by a vote of forty-one yeas to forty-seven nays. *Id.* President Johnson, then a Senator and the Senate majority leader, voted in favor of this amendment. *Id.*

46. Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 89, 96 (1958).

47. See S. REP. NO. 85-1407 (1958), reprinted in 1958 U.S.C.C.A.N. 2367, 2396 (stating that the provisions of the bill were at the bare minimum that could be done to help interested state governments to act). The Bonus Act was weakened by a provision that excluded portions of the Interstate System constructed on rights-of-way that were acquired on or before July 1, 1956, from outdoor advertising control. Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 89, 96 (1958). As a result of this amendment, only 65% of the Interstate System could be regulated under the Bonus Act. Joseph C. Ingraham, *Billboard Battle*, N.Y. TIMES, Feb. 5, 1961 at XX1.

48. S. REP. NO. 85-1407 (1958), reprinted in 1958 U.S.C.C.A.N. 2367, 2400 ("The pattern is set here for the total destruction of the rights of the States by the offering of Federal money to them to take action."). The successor to the Bonus Act, the Highway Beautification Act, served as a model for other federal statutes, including the national 21-year-old legal drinking age and the 55-mile-per-hour speed limit. Albert, *supra* note 37, at 494, n.135.

49. William D. Bruton, *Billboard Legislation and the Takings Issue*, GEO. U. L. CTR. CONTINUING LEGAL EDUC. n.11 (2001), at <http://www.scenicflorida.org/bblegistakings.html#n11> (last visited Nov. 3, 2004). Only 40,000 miles of new Interstate System roads were protected by the Bonus Act, amounting to less than 3% of the approximately 1,500,000 miles of surfaced public roads and highways. S. REP. NO. 85-1407 (1958), reprinted in 1958 U.S.C.C.A.N. 2367, 2396.

50. Enfield, *supra* note 44, at 167.

51. *Id.* at 168. President Johnson said, "The roads themselves must reflect, in location and design, increased respect for the natural and social integrity and unity of the landscape and communities through which they pass." Albert, *supra* note 37, at 476 (quoting Special Message to the Congress on Conservation and the

after the conference, President Johnson sent a message to Congress that recommended new legislation for outdoor advertising control, soon to be known as the Highway Beautification Act of 1965 (“Beautification Act”).⁵² The Beautification Act was a product of President Johnson’s Great Society initiatives.⁵³ President Johnson and the First Lady wanted to bring beauty to the nation’s highways by controlling billboards and junkyards.⁵⁴ At the time, some senators speculated that Lady Bird Johnson was the driving force behind the bill, which President Johnson once suggested by stating that he “must have it for Lady Bird.”⁵⁵

C. *The Highway Beautification Act*

Upon signing the Beautification Act on October 22, 1965, President Johnson promised that as long as he was president, “what has been divinely given by nature will not be recklessly taken away by man.”⁵⁶ He was not without opposition. Critics of the bill

Restoration of Natural Beauty, 1 Pub. Papers 159 (Feb. 8, 1965)).

52. Enfield, *supra* note 44, at 168. In his letter to the President of the Senate and the Speaker of the House, President Johnson said that “by acting to bring beauty to our roads, by making nature and recreation easily accessible, our highway system can become immensely more valuable in serving the needs of the American people . . . [a]nd those needs include the opportunity to touch nature and see beauty.” H.R. REP. NO. 89-1084 (1965), *reprinted in* 1965 U.S.C.A.N. 3710, 3711.

53. Timothy J. Fete, Jr., Comment, *Illegal Billboards: Why the General Assembly Should Revise the Outdoor Advertising Control Act to Comply with North Carolina Easement Law*, 80 N.C. L. REV. 2067, 2070 (2002). Other agendas included in the Great Society program were “aid to education, attack on disease, Medicare, urban renewal, . . . conservation, development of depressed regions, a wide-scale fight against poverty, control and prevention of crime and delinquency, [and] removal of obstacles to the right to vote.” The White House, *Lyndon B. Johnson*, at <http://www.whitehouse.gov/history/presidents/lj36.html>.

54. Albert, *supra* note 37, at 490.

55. *Billboard Curbs Backed in Senate*, N.Y. TIMES, Sept. 4, 1965, at 23. The Senate passed the bill (known as the Beauty Bill) on September 16, 1965, and the House began debating on October 7, 1965. Federal Highway Administration, *How the Highway Beautification Act Became a Law*, at <http://www.fhwa.dot.gov/infrastructure/beauty.htm> (last visited Nov. 3, 2004). Members of Congress and their wives were invited to attend a Salute to Congress at the State Department and a White House reception that same evening, and they hoped to bring the bill with them as a gift to Lady Bird. *Id.* After hours of debates with their wives waiting, the members of the House passed the Beauty Bill at one o’clock in the morning. *Id.* Some legislators eventually made it to the White House for an early morning celebration. *Id.*

56. John D. Pomfret, *President Signs Scenic Road Bill*, N.Y. TIMES, Oct. 23, 1965, at 28.

believed it was so weak that it did more harm than good.⁵⁷ Billboard opponents pointed to the billboard industry's strong Washington presence to explain the deficiencies of the anti-billboard legislation.⁵⁸ Others were critical of the White House for pushing the bill through the legislature without full consideration of all the issues and parties affected.⁵⁹ Opposition aside, the Highway Beautification Act was enacted with the general purpose of encouraging states to effectively control outdoor advertising and thus to "protect the public investment in . . . highways, to promote the safety and recreational value of public travel, and to preserve natural beauty."⁶⁰ The Beautification Act includes three programs: outdoor advertising control, junkyard control, and landscaping and scenic enhancement.⁶¹

The Beautification Act controls all advertising within 660 feet of the Interstate System and the primary highway system.⁶² However, signs within 660 feet of a highway are allowed if they are directional and official signs, signs that are determined to be landmarks, or signs located on areas zoned industrial or

57. PBS, *Lady Bird Johnson, Shattered Dreams, The Beautification Campaign*, at http://www.pbs.org/ladybird/shattereddreams/shattereddreams_report.html (last visited Nov. 3, 2004).

58. Scenic America, *Billboard Control, Fighting Visual Pollution*, at <http://www.scenic.org/billboardsign/billboardcontrol.htm> (last visited Nov. 3, 2004) [hereinafter *Scenic America*]. "[T]he outcome of the legislative process had more to do with favoring the interests of the billboard industry than with really putting effective control into place." Albert, *supra* note 37, at 494 n.133. During the 1989-90 election cycle and the first six months of 1991, campaign contributions to House Public Works Committee members totaled over \$800,000. *Scenic America, supra*. House Transportation Committee Chairman Bud Shuster (R-PA) received over \$65,000 in contributions from the billboard industry in the 1993-94 election cycle. *Id.*

59. H.R. REP. NO. 89-1084 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3710, 3736.

60. The Highway Beautification Act ("Beautification Act"), 23 U.S.C. § 131(a) (2000). Aesthetics were the main concern of the proponents of the Beautification Act. Albert, *supra* note 37, at 479. The safety rationale was included to persuade senators and congressmen who were not sold on the aesthetic rationale. *Id.* Safety also provided a valid basis for states to exercise legislative power. *Id.* *But see* H.R. REP. NO. 89-1084 at 3712 (stating that the outdoor advertising control act is "not in any sense to be construed . . . for the use of police power").

61. Pub. L. No. 89-285, 79 Stat. 1028, 1028-33 (1965) (codified as amended at 23 U.S.C. § 131 (2000)).

62. 23 U.S.C. §§ 131(a)-(c) (2000). The distance of 660 feet was chosen because anti-billboard proponents believed it would not be economically possible to construct a billboard large enough to be seen from beyond 660 feet. Albert, *supra* note 37, at 507. "Today billboards are larger than they were in 1965" and are visible from more than 660 feet. *Id.*

commercial under state law.⁶³ Signs are also allowed if they specifically advertise the sale or lease of property upon which they are located, activities conducted on the property on which they are located, or free coffee by nonprofit organizations.⁶⁴ The Beautification Act penalizes states that fail to comply with its regulations by reducing their respective allocated federal highway funds by ten percent.⁶⁵

D. The Minnesota Outdoor Advertising Control Act

Minnesota amended its existing outdoor advertising control legislation in 1971 to create the Minnesota Outdoor Advertising Control Act (“The Minnesota Act”).⁶⁶ The Minnesota Act attempts

63. 23 U.S.C. §§ 131(c)-(d) (2000).

64. *Id.* A 1965 House Report on the Highway Beautification Act expressed concern over the inconsistencies between on-premises and off-premises signs: “[T]he most offensive signs are those advertising activities conducted on the property on which they are located. All of the Members of this body can visualize the ugly appearance of signs, displays, and devices maintained upon the top side, and around beer joints, filling stations, general stores, etc.” H.R. REP. NO. 89-1084 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3710, 3728. Another concern was that the Beautification Act would hinder motorists from locating facilities in unfamiliar areas. *Id.* at 3730. Furthermore, the elimination of signs other than “on premise” signs and signs within commercial and industrial areas was feared to cause “the bankruptcy of thousands of small businesses which are dependent upon the patronage of highway users for their existence.” *Id.*

65. 23 U.S.C. § 131(b) (2000). As of the year 2000, “no state ha[d] been penalized for noncompliance.” Albert, *supra* note 37, at 467. One of the main differences between the Beautification Act and the former Bonus Act was the manner in which states were induced to comply. The Bonus Act gave states that complied a five percent increase in federal highway aid, while the Beautification Act penalized non-complying states by reducing federal highway aid by ten percent. *Compare* Pub. L. No. 85-381 (1958), 72 Stat. 89, 96 (1958) with 23 U.S.C. § 131(b) (2000). At first, President Johnson proposed to cut 100% of federal highway aid to states that did not establish effective control of billboards by January 1, 1968. Eric Wentworth, *President’s Plan to Combat Highway Blight Draws Support of Billboard Owners’ Group*, WALL ST. J., May 25, 1954, at 8. Under this version, if none of the states complied, the lost aid would have amounted to \$3.8 billion per year in 1965. *Id.* This penalty was too large for many legislators and was subsequently changed to a ten percent reduction in federal highway aid. Another difference between the Beautification Act and the Bonus Act was the amount of area affected. The Beautification Act applied to the entire 41,000 miles of the Interstate System and 228,000 miles of the primary system, while the Bonus Act applied only to those portions of the Interstate System built on land acquired after 1956. Enfield, *supra* note 44, at 174.

66. The Minnesota Outdoor Advertising Control Act, MINN. STAT. §§ 173.01-.27 (2002). The original legislation, designed to comply with the Bonus Act, was enacted in 1965 before President Johnson’s Beautification Act. 1965 Minn. Laws ch. 827. “If you are going to have control you may as well comply with federal

to effectively and reasonably control the erection of advertising devices near highways to conserve the “natural beauty” of the surrounding land.⁶⁷ The language of the Minnesota Act recognizes not only natural beauty but also the commercial importance of outdoor advertising.⁶⁸ Like the Beautification Act, the Minnesota Act allows outdoor advertising where “business and commercial activities are conducted.”⁶⁹ “Business areas” are those areas zoned for business, industrial, or commercial activities; these areas collectively create the business area exception to Minnesota’s

regulations so that we can receive a bonus to help defray the costs.” Senator Knudson, Minutes from the Senate Subcommittee on Billboards, Mar. 17, 1965 (on file with the Minnesota Historical Society). Norman Larson, Chairman of the Public Highways Committee, summarized the legislation in a report to the Minnesota Senate.

[The bill] controls advertising along the interstate highway system and provides for scenic areas where billboard advertising will be at a minimum. In scenic areas established, the control will be, wherever practicable, as stringent as the federal law and federal rules and regulations require in order that the state may receive federal participation in the cost of acquisition of the necessary easements. Outside of the scenic areas established, the advertising along the highway will be controlled to a point where only approximately four advertising devices on each side of the highway will be allowed. Certain advertising that would interfere with safety would be eliminated immediately. Other advertising in place at the effective date of passage of the bill would be allowed to remain in place until 1969, at which time they will be removed to the extent necessary so that the spacing requirements set forth in the bill will be effective.

Letter from Norman Larson, Chairman of Public Highway Committee, to the senators of the 89th Congress 8 (May 21, 1965) (on file with the Minnesota Historical Society) (summarizing the bills enacted during 89th legislature that affected highways).

67. MINN. STAT. § 173.01 (2002).

68. “[O]utdoor advertising is an integral part of the business and marketing function, an established segment of the national economy, and a legitimate commercial use of property . . . it should be allowed to operate where other business and commercial activities are conducted.” *Id.* Outdoor advertising control legislation in many, but not all, states includes similar language. *See, e.g.*, ALA. CODE § 23-1-272 (1975) (“The Legislature hereby finds and declares that outdoor advertising is a legitimate use of private property adjacent to roads and highways.”); GA. CODE ANN. § 32-6-70 (2001) (“The General Assembly recognizes that the outdoor advertising industry is a bona fide commercial function.”); KAN. STAT. ANN. § 68-2231 (2002) (“[O]utdoor advertising is a legitimate, commercial use of private property.”); MO. ANN. STAT. § 226.500 (2004) (“The general assembly finds and declares that outdoor advertising is a legitimate commercial use of private property adjacent to the interstate and primary highway systems.”); NEV. REV. STAT. 410.220 (2002) (“The erection and maintenance of outdoor advertising signs . . . is a legitimate commercial use of private property.”).

69. MINN. STAT. § 173.01 (2002).

prohibition on outdoor advertising.⁷⁰ The business area exception of the Minnesota Act was not litigated in Minnesota until the *Eller Media* dispute arose.⁷¹ Its application, however, was to be in compliance with the Highway Beautification Act⁷² and all applicable federal regulations.⁷³

III. THE *ELLER MEDIA* DECISION

A. *Backdrop to the Eller Media Decision*

In 1995, the City of Mounds View opened The Bridges, a municipally owned golf course that was originally financed by a revenue bond.⁷⁴ The land on which the golf course was built was a combination of two zoning districts: an Industrial district and a Conservancy, Recreation, and Preservation (“CRP”) district.⁷⁵ The golf course was profitable but unable to pay its full debt payments

70. A business area is “any part of an adjacent area which is (a) zoned for business, industrial or commercial activities under the authority of any law of this state or any political subdivision thereof; or (b) not so zoned, but which constitutes an unzoned commercial or industrial area as herein defined.” *Id.* § 173.02, subd. 17. Other exceptions include directional and other official signs, signs advertising the sale of the property on which the sign is located, signs advertising activities conducted on the property on which the sign is located, signs stating the name and address of the owner of the property, public utility signs, service club and religious notices, signs which are not visible from the adjacent road, and community identification signs. *Id.* § 173.08, subd. 1.

71. In Minnesota, the Beautification Act has been the subject of only a few cases. *See, e.g.*, *State v. Hopf*, 323 N.W.2d 746, 755 (Minn. 1982) (holding that a provision of the Minnesota Act that prohibits signs near schools and churches but permits signs in business areas was constitutional under the First and Fourteenth Amendments); *State v. Lutsen Resorts, Inc.*, 310 N.W.2d 495, 496-97 (Minn. 1981) (holding that condemnation of signs pursuant to the Minnesota Act did not deny sign owners equal protection, despite the state's continued maintenance of its own signs); *State v. Weber-Connelly, Naegele, Inc.* 448 N.W.2d 380, 382-83 (Minn. Ct. App. 1989) (holding that condemnation under the Minnesota Act requires compensation for lost income).

72. 23 U.S.C. § 131 (2000).

73. *See* 23 C.F.R. §§ 750.701-713 (2004).

74. *Eller Media*, 664 N.W.2d 1, 3 (Minn. 2003).

75. *Id.* In 1988, the State of Minnesota quitclaimed CRP-zoned land, which was later developed into the golf course, to the city. *Id.* “The deed contained a provision that the property would revert back to the state if it was not used for a public purpose.” *Id.* The other portion of the golf course was acquired from Sysco Foods in 1989, which was rezoned from Industrial to Public Facilities. *In re* Denial of Eller Media Co.’s Applications for Outdoor Adver. Device Permits in the City of Mounds View, 642 N.W.2d 492, 496 (Minn. Ct. App. 2002), *rev’d*, 604 N.W.2d 1 (Minn. 2003).

in both 1998 and 1999.⁷⁶ After supplementing golf course revenue with money from the city's general fund, the Mounds View City Council contemplated utilizing revenue-generating billboards that would be visible to cars on the highways that border the golf course.⁷⁷ Zoning ordinances, however, rendered the proposition difficult.

At the time, Mounds View's comprehensive zoning plan did not allow billboards in any zoning district.⁷⁸ The city council thus adopted three ordinances during the fall of 1999 and the spring of 2000 to amend the Mounds View City Zoning Code to permit billboards within CRP, Public Facilities ("PF"),⁷⁹ and Planned Unit Development ("PUD") districts.⁸⁰ Additionally, a limited-use district was created on The Bridges Golf Course property along Highway 10 where the billboards were to be allowed.⁸¹ The planning commission unanimously voted to recommend that the city deny the proposed ordinance, but the city ignored this recommendation and approved the ordinance with an automatic termination provision to satisfy concerns that the billboards would remain after the need for the revenue ended.⁸² Ordinance 655 was thus introduced at a March 2000 city council meeting, when the entire city-owned golf course was rezoned to a PF district because

76. *Eller Media*, 664 N.W.2d at 3.

77. *Id.* The city hoped these signs would generate enough revenue to enable the golf course to make its payments without assistance from the city's general funds. *Id.*

78. *Id.*

79. In 1984, the city rezoned the large majority of all city-owned property into "Public Facilities" ("PF") districts. *Id.* This designation limited use of the land to public buildings, public uses, public parks, playgrounds, athletic fields, parking areas, golf courses, public sewers, water lines, water storage areas, public streets, easements, public ways, highways, thoroughfares, treatment and pumping facilities, and other public utility and public service facilities. MOUNDS VIEW, MINN., ZONING CODE § 1118.02 "2000), available at <http://www.ci.mounds-view.mn.us/docs/ZONING2.pdf>.

80. *Eller Media*, 664 N.W.2d at 4-5. The city attorney recommended the inclusion of PUD districts in this ordinance to avoid spot zoning concerns. *Id.* at 5.

81. *Id.* at 4.

82. *Id.* The planning commission provided four reasons for its recommendation. First, the CRP and PF districts are "intended to provide recreational opportunities, open space and protect the natural environment where possible," thus billboards "are more appropriate to commercial and industrial zoning districts." *Id.* Second, billboards "can be visually distracting." *Id.* Third, "the city cannot limit billboards to city-owned properties only." *Id.* Fourth, "[s]tate statutes restrict [billboards] to commercial and industrial zoning districts" and the proposed sites were not so zoned. *Id.* at 4-5.

its former zoning classifications, CRP and Industrial, were deemed inconsistent with the city's comprehensive plan.⁸³

In May 2000, Eller Media, an outdoor advertising company, applied for six permits with the Minnesota Department of Transportation ("MNDOT") to construct billboards on the golf course.⁸⁴ MNDOT denied the permits on the ground that the proposed location did not comply with the Minnesota Outdoor Advertising Control Act.⁸⁵ Eller Media challenged this denial before an administrative law judge, and the city intervened in the proceeding.⁸⁶

The administrative law judge recommended that the permits be issued, and a subsequent report was submitted to the Commissioner of MNDOT.⁸⁷ The Commissioner, however, denied the permits on three grounds: Mounds View's actions amounted to spot zoning and violated 23 C.F.R. § 750.708(b);⁸⁸ the commercial use of the golf course was merely incidental and violated 23 C.F.R. § 750.708(d);⁸⁹ and the golf course was not a "business area" under the Minnesota Act.⁹⁰ The City of Mounds View appealed.

The Minnesota Court of Appeals reversed the Commissioner and directed MNDOT to issue the permits.⁹¹ The court of appeals found that the golf course was a "business area" under the Minnesota Outdoor Advertising Control Act on the basis that Minnesota's Act focuses on the use of the land rather than the zoning label.⁹² The court reasoned that not only was the golf course engaged in "business activity," but the PF zone specifically listed "golf courses," which are engaged in business activity, and

83. *Id.* at 5-6.

84. *Id.* at 6.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See infra* Part IV.B.1.

89. *See infra* Part IV.B.2.

90. *Eller Media*, 664 N.W.2d at 6.

91. *In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits in the City of Mounds View*, 642 N.W.2d 492, 504 (Minn. Ct. App. 2002), *rev'd*, 604 N.W.2d 1 (Minn. 2003).

92. *Id.* at 499-500. "The commissioner's deputy's interpretation that 'business area' does not include municipal owned land adds something to the statute that the legislature did not impose. This goes beyond interpretation of the statute and represents its will not its judgment and is thus arbitrary and capricious." *Id.* at 501. The court of appeals also noted that MNDOT had previously granted permits for billboards on government-owned land in another municipality's PF district. *Id.* at 497.

thus rendered the property “zoned for business.”⁹³

The court further held that in applying the necessary federal regulations, the golf course was not an “incidental use” of the land because the golf course business was the sole activity conducted on the land.⁹⁴ The city’s actions similarly did not constitute spot zoning, which the federal regulations expressly prohibit.⁹⁵ The court of appeals reasoned that Mounds View operated under a comprehensive zoning plan and therefore the fact that the action was created to permit outdoor advertising was not determinative.⁹⁶ MNDOT petitioned the Minnesota Supreme Court for review.⁹⁷

B. *The Decision of the Minnesota Supreme Court*

Upon review, the Minnesota Supreme Court employed a substantial evidence test,⁹⁸ giving deference to the Commissioner of MNDOT, but reserved the right “to review de novo errors of law which arise when an agency decision is based upon the meaning of words in a statute.”⁹⁹

93. *Id.* at 500.

94. *Id.* The court applied 23 C.F.R. § 750.708(d) which specifies that zones “in which limited commercial or industrial activities are permitted as an incident to other primary land uses [are] not considered to be a commercial or industrial zone for outdoor advertising control purposes.” *Id.*

95. *Id.* at 501-02. The regulation states that the outdoor advertising exception will not be permitted if the action was not part of the comprehensive plan *and* the action occurred primarily to permit outdoor advertising structures. 23 C.F.R. § 750.708(b) (2004) (emphasis added). The city rezoned the golf course to a PF district to bring it into consistency with the comprehensive plan. *In re Denial of Eller Media Co.’s Applications for Outdoor Adver. Device Permits in the City of Mounds View*, 642 N.W.2d at 501-02. The FHWA refuted this interpretation, stating that a zoning action, although consistent with the comprehensive plan, violates the Beautification Act if the underlying purpose is to permit billboards. U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, *Legal Opinion on the FHWA’s Interpretation of 23 CFR § 750.708(b), Acceptance of State Zoning for Purposes of the Highway Beautification Act*, <http://www.fhwa.dot.gov/realestate/zoningop.htm> (last modified May 4, 2004) (legal opinion requested by the State of Minnesota in connection with the *Eller Media* case) [hereinafter *Legal Opinion*].

96. *In re Denial of Eller Media Co.’s Applications for Outdoor Adver. Device Permits in the City of Mounds View*, 642 N.W.2d at 501.

97. *Eller Media*, 664 N.W.2d 1, 3 (Minn. 2003).

98. *Id.* at 7. In reviewing an agency decision, Minnesota courts are to exercise judicial restraint, “lest [they] substitute [their] judgment for that of the agency.” *Id.* They will not disturb an agency’s decision “as long as the agency’s determination has adequate support in the record as required by the substantial evidence test.” *Id.*

99. *Id.* at 6-7.

The court first rejected Eller Media's and Mounds View's argument that the industrial characteristics of the surrounding areas were significant.¹⁰⁰ The court found that because these areas were not located in the City of Mounds View, their zoning designations were irrelevant.¹⁰¹ Eller Media and Mounds View also argued that activities such as a water treatment plant, a city office complex, a water tower, and a golf course are conducted in PF districts, so PF districts are zoned for commercial or business activities under the Minnesota Act.¹⁰² The court similarly rejected this argument, holding that a use permitted in both PF and business districts does not make the PF district "most appropriate" for commerce.¹⁰³

The court applied the Minnesota Outdoor Advertising Control Act, the Highway Beautification Act, and the City of Mounds View's comprehensive plan to reverse the court of appeals.¹⁰⁴ The Minnesota Act mandates compliance with federal law; thus the majority opinion held that the use of a PF-zoned golf course must also comply with the Beautification Act's definition of commercial or industrial use.¹⁰⁵ The majority, relying on the Commissioner of MNDOT's findings, found that the PF district was not the "most appropriate" use for commerce, industry, or trade because other districts existed in Mounds View that the city's comprehensive plan had zoned specifically for business and industrial purposes.¹⁰⁶ "The overriding purpose of land use in Mounds View's PF districts is the public character of the land use and dedication to public needs and access . . . [thus] Mounds View intended to make [its PF] district distinct from its business district."¹⁰⁷ The court reasoned that if the city believed that the golf course was appropriate for commerce, industry, or trade, it would have designated it as a business area.¹⁰⁸ The court concluded that the golf course was not "zoned for business, industrial, or commercial activities" and therefore was not a "business area" as required by the Minnesota

100. *Id.* at 9.

101. *Id.*

102. *Id.*

103. *Id.* at 9-10.

104. *Id.* at 7, 10.

105. *Id.* at 7.

106. *Id.* at 10.

107. *Id.*

108. *Id.*

Outdoor Advertising Control Act.¹⁰⁹

In dissent, Justice Hanson took another approach to applying the control acts by liberally interpreting the Highway Beautification Act not as a mechanism to control outdoor advertising, but as a mechanism to provide incentives to states to implement laws that effectively control advertising devices.¹¹⁰ Unlike the majority, Justice Hanson did not defer to the Commissioner of MNDOT's decision because the underlying facts were not in dispute.¹¹¹ Instead, he concluded that the critical issue, whether or not a municipal golf course qualifies as a "business area" or a district "most appropriate for commerce, industry, or trade," was a question of law.¹¹² Justice Hanson determined that the Minnesota Act effectively controls outdoor advertising devices and that the only question to be determined was whether the language of the statute permits such signs on a PF-zoned public golf course.¹¹³ Focusing on the use of the property and not on ownership or labels, Justice Hanson reasoned that the zoning actions of the city were an effort to comply with the comprehensive plan and, therefore, no spot zoning had occurred.¹¹⁴ Most importantly, the dissent concluded that The Bridges Golf Course, despite being publicly owned, was operated as a business and that these activities effectively made the golf course a business area.¹¹⁵

109. *Id.* The court reasoned that the local government should zone an area for commerce to provide for such activities. *Id.* According to the court, commercial activities that are permitted in a non-commercial zone do not render the zone commercial. *Id.* at 9. The court rejected Eller Media's and Mounds View's contention that the properties surrounding the golf course were zoned industrial, warehouse, or office park, and, therefore, the PF district is zoned for business or commercial activities under the definition in the Minnesota Act. *Id.* It held that surrounding areas do not dictate the zoning category of adjacent property, especially when those areas are located in different municipalities. *Id.* "To conclude otherwise would eviscerate the very power given to municipal officials to govern within their jurisdiction and could create a domino effect with one governing body's decisions affecting the zoning decisions in neighboring communities." *Id.*

110. *Id.* at 12 (Hanson, J., dissenting).

111. *Id.* at 11.

112. *Id.*

113. *Id.* at 13.

114. *Id.* at 14. Justice Hanson reasoned that the use of the property was not incidental because the golf course was the primary use of the zoned land. *Id.* at 14-15.

115. *Id.* The city's PF designation was based on ownership, not on use. The outdoor control acts "are indifferent to ownership . . . [and rely] on the activities conducted on the property." *Id.* at 15.

IV. ANALYSIS

As a matter of first impression, the Minnesota Supreme Court interpreted the business area exception to the Minnesota Outdoor Advertising Control Act in conjunction with the Federal Highway Beautification Act.¹¹⁶ The court faced the difficult task of reconciling these laws with the City of Mounds View's comprehensive zoning plan.¹¹⁷ Analysis of the court's decision must begin with the regulations that have been promulgated by the Federal Highway Administration because the Minnesota Act is to be construed in light of the policies behind the Highway Beautification Act.¹¹⁸

A. *The Minnesota Act in Light of the Highway Beautification Act*

In 1975, the Federal Highway Administration ("FHWA") promulgated policies and regulations to implement the Beautification Act.¹¹⁹ The stated purpose of these regulations is "to assure that there is effective *State* control of outdoor advertising in areas adjacent to Interstate and Federal-aid primary highways."¹²⁰ The FHWA regulations define "commercial" and "industrial" zones as those districts that *states* determine are "most appropriate for commerce, industry, or trade, regardless of how labeled."¹²¹ The language suggests that the use of the land, not the zoning label, is important for Beautification Act purposes.¹²²

The Minnesota Supreme Court reasoned that Minnesota's definition of a "business area"¹²³ must be interpreted in light of the Beautification Act, which it was enacted to implement.¹²⁴ The Beautification Act defines commercial and industrial zones as "those districts established by the zoning authorities as being most appropriate for commerce, industry, or trade, *regardless of how labeled*."¹²⁵ Instead of focusing on the "regardless of how labeled"

116. *Id.* at 7.

117. *See id.*

118. MINN. STAT. § 173.185 (2002).

119. *See* 23 C.F.R. §§ 750.701-713 (2004).

120. *Id.* § 750.701 (emphasis added).

121. *Id.* § 750.703(a) (emphasis added).

122. *See id.*

123. A business area is "any part of an adjacent area which is zoned for business, industrial, or commercial activities." MINN. STAT. § 173.02, subd. 17 (2002).

124. *Eller Media*, 664 N.W.2d 1, 7 (Minn. 2003).

125. 23 C.F.R. § 750.703(a) (emphasis added).

language, the majority emphasized the “most appropriate” language, stating that the commercial use must be so prevalent that the City of Mounds View would have labeled it as a commercial or industrial zone.¹²⁶ The court determined that the Mounds View comprehensive plan created both PF and business districts in order to distinguish between public and commercial purposes.¹²⁷ The court thus concluded that the city specifically intended PF districts to be separate from those districts designated for commercial, industrial, or business activities.¹²⁸

In reality, Mounds View’s comprehensive plan distinguished PF districts based on ownership; land actually used for *any* use was zoned PF because it was owned by the city.¹²⁹ Therefore, the Public Facilities (“PF”) designation is *most appropriate* for any city-owned land, including land on which commercial activities take place.¹³⁰ As such, the majority should have reasonably interpreted the comprehensive plan as naming several districts as *most appropriate* for business and commercial activities: business districts, industrial districts, and PF districts.

B. Controlling Abuse of the Highway Beautification Act

Because the Beautification Act gave states the power to zone areas as commercial or industrial, legislators naturally feared that municipalities would zone land as such for the sole purpose of circumventing the Beautification Act, abusing the allowance of billboards in these zones.¹³¹ The FHWA, therefore, promulgated

126. *Eller Media*, 664 N.W.2d at 10.

127. *Id.*

128. *Id.*

129. “[A]ll city owned property is ‘supposed’ to be zoned PF, according to the City Code.” JAMES ERICSON, CITY OF MOUNDS VIEW STAFF REPORT, at <http://www.ci.mounds-view.mn.us/PF-report.pdf> (relaying the results of the “Public Hearing to Consider the Introduction and First Reading of Ordinance 720, an Ordinance Rezoning all Parcels Currently Zoned PF, Public Facilities”).

130. See MOUNDS VIEW, MINN., ZONING CODE §§ 1118.01-.02 (1997) (PF, the Public Facilities District), <http://www.ci.mounds-view.mn.us/docs/ZONING2.pdf>.

131. *Legal Opinion*, *supra* note 95. “Some witnesses . . . speculated that the States, if left to themselves in this matter, would engage in ‘strip zoning’ and thus zone large stretches of highways as industrial solely for the purpose of outdoor advertising.” *Id.* During final discussions of the HBA in 1965, Senator Jennings Randolph explained the extent of a state’s zoning powers in light of the commercial exception. *Id.* “This language, of course, does not mean that a state or local authority could place a label ‘zoned commercial or industrial’ on land adjacent to the Interstate and primary systems solely to permit billboards or junkyards and thereby frustrate the intent of Congress.” *Id.*

regulations specifically to differentiate between legitimate, comprehensive zoning versus actions that are not true zoning; legitimate commercial and industrial zones versus limited purpose areas created primarily to allow outdoor advertising; and legitimate zoning actions versus actions that appear to be part of comprehensive zoning but are actually schemes to allow outdoor advertising.¹³² Two provisions of the FHWA's regulations, discussed below, are specifically aimed to prevent sham or phony zoning.¹³³

In rejecting Mounds View's applications for billboard permits, the Commissioner of MNDOT held that the city's zoning actions violated these regulations.¹³⁴ Both the dissent and the court of appeals disagreed.¹³⁵ The supreme court did not specifically consider these rules because once it found that the PF zone was not "most appropriate for commerce, industry, or trade," the issue of sham or phony zoning was irrelevant.¹³⁶ Upon examination of the *Eller Media* situation, it is apparent that the City of Mounds View's zoning actions were legitimate and that an inquiry into the actual use of the land was, and is, imperative.

1. The Mounds View Comprehensive Plan and C.F.R. Section 750.708(b)

The first FHWA regulation, section 750.708(b), addresses spot zoning concerns and states that zoning which is not part of a comprehensive plan, but is conducted primarily to allow outdoor advertising, will not qualify as a commercial or industrial zone under the Beautification Act.¹³⁷ The FHWA issued a report that

132. See *Legal Opinion*, *supra* note 95. The FHWA looks at a variety of factors, beyond a zone's label, to determine if the underlying purpose of a zoning action is to circumvent the Beautification Act. *Id.* These factors include the expressed reasons for the zoning change, the zoning for the surrounding area, the actual land uses nearby, the existence of plans for commercial or industrial development, the availability of utilities in the newly zoned area, and the existence of access to roads or dedicated access to the newly zoned area. *Id.* A combination of the above factors determines whether the FHWA will consider the zoning action as legitimate under the Beautification Act. *Id.*

133. 23 C.F.R. § 750.708(b) (discussed *infra* Part IV.B.1.); 23 C.F.R. § 750.708(d) (discussed *infra* Part IV.B.2).

134. *Eller Media*, 664 N.W.2d 1, 6 (Minn. 2003).

135. *Id.* at 10 (Hanson, J., dissenting).

136. *Id.*

137. 23 C.F.R. § 750.708(b) (2004). Litigation over this regulation has occurred in several states. See, e.g., *Files v. Ark. State Highway & Transp. Dep't*, 925 S.W.2d 404, 409 (Ark. 1996) (holding that a commercial zoning designation was given for the purpose of constructing billboards based on evidence that

expanded the scope of the regulation after the State of Minnesota requested an opinion on the correct interpretation of the rule.¹³⁸ According to the FHWA, “[a]ctions that are facially part of comprehensive zoning, but in fact are merely schemes to allow outdoor advertising in rural or residential areas, are not accepted by the FHWA as valid zoning for purposes of control of outdoor advertising.”¹³⁹ Section 750.708(b) mandates that a zoning action be a legitimate exercise of zoning powers in accordance with the municipality’s planning goals, instead of sham zoning for the primary purpose of permitting outdoor advertising.¹⁴⁰

Furthermore, the report states that despite an area being comprehensively zoned, if pockets of land are zoned as commercial or industrial based solely on the commercial or industrial nature of outdoor advertising, the result is spot zoning.¹⁴¹ Such a result would violate the Beautification Act.¹⁴² Section 750.708(b) therefore aims to prevent spot zoning by restricting billboards to legitimately zoned commercial and industrial areas.¹⁴³ The intent behind this regulation is to prevent municipalities from hiding behind a comprehensive plan when zoned areas are not truly

adjacent commercially zoned land with billboards was being used only for agricultural purposes and that the plaintiff, a known billboard entrepreneur, admitted that he had no plans to develop the land at issue); *Lamar Outdoor Adver. Inc. v. Ark. State Highway & Transp. Dep’t*, 133 S.W.3d 412, 415 (Ark. Ct. App. 2003) (holding that the zoning action was taken to permit the construction of billboards); *United Outdoor Adver. Co. v. Bus., Transp., Hous. Agency*, 746 P.2d 877, 882 (Cal. 1988) (holding that the area was zoned for the sole purpose of constructing billboards, and thus violated the Beautification Act); *Redpath v. Mo. Highway & Transp. Comm’n*, 14 S.W.3d 34, 39 (Mo. Ct. App. 1999) (holding that 23 C.F.R. § 750.708 (b) requires a determination of why a particular area was zoned commercial or industrial); *Penn Adver. Inc. v. Dep’t of Transp.*, 608 A.2d 1115, 1116 (Pa. Commw. Ct. 1992) (holding that even though an area was zoned commercial, it violated the Beautification Act because the city had illegally spot zoned the area).

138. *Legal Opinion*, *supra* note 95. This report was issued after both the Minnesota Court of Appeals and the Minnesota Supreme Court issued decisions on the situation at hand. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* South Dakota comprehensively zoned all areas along Interstate and Federal-aid primary systems as commercial or industrial when most of the surrounding areas were used for agricultural purposes. *South Dakota v. Volpe*, 353 F. Supp. 335, 340 (D.S.D. 1973) (holding that although the land was comprehensively zoned, the strip zoning violated the purpose of the Beautification Act and thus billboards were not permitted).

143. 23 C.F.R. § 750.708(b) (2004).

commercial or industrial. This regulation demands a close look at the use of the land to determine if the land is actually used for commercial or industrial purposes.¹⁴⁴

In this case, Mounds View acted pursuant to its comprehensive plan to correctly rezone the golf course, a city-owned property, as a PF district. In addition, the commercial nature of the PF zone does not arise solely from the commercial nature of billboard activities. Despite being publicly owned, The Bridges Golf Course is a commercial use of land.¹⁴⁵ Mounds View's actions are not in violation of section 750.708(b).

2. *Incidental Use and C.F.R. Section 750.708(d)*

The second FHWA regulation, section 750.708(d), states that areas on which "commercial or industrial activities are permitted as an incident to other primary land uses are not considered to be . . . commercial or industrial" zones under the Beautification Act.¹⁴⁶ A Wisconsin court has interpreted this regulation to determine if a conditional use is incidental to primary use.¹⁴⁷ The court found that a conditional use that is expressly permitted by an ordinance is not inconsistent with other uses in the zone and therefore is not subordinate to primary use.¹⁴⁸ The use is itself a primary use and can be considered for Beautification Act purposes.¹⁴⁹ A use that is specifically permitted is neither subordinate nor automatically deemed "incidental."¹⁵⁰

Ascertaining the actual use of the land is essential to a correct determination of whether a commercial or industrial use is

144. *See Volpe*, 353 F. Supp. at 340.

145. The course generates revenue from green fees, lessons, merchandise, and food. *Eller Media*, 664 N.W.2d 1, 15 (Minn. 2003) (Hanson, J., dissenting). The city residents do not receive any discount, and in fact, golfers pay some of the highest green fees in the area for a round at The Bridges. *Id.* Green and range fees at The Bridges for the 2004 season are \$15 for nine holes of golf and \$10 for a jumbo bucket of balls. The Bridges Golf Course, *Rates*, <http://www.bridgesgolf.com/rates.htm> (last visited Nov. 3, 2004).

146. 23 C.F.R. § 750.708(d) (2004). Something is incidental if it has a minor role or is "subordinate to something of greater importance." BLACK'S LAW DICTIONARY 777 (8th ed. 2004).

147. *Wis. Dep't of Transp. v. Office of Comm'r of Transp.*, 400 N.W.2d 15 (Wis. Ct. App. 1986).

148. *Id.* at 16-17; *see also Alper v. State*, 621 P.2d 492, 495 (Nev. 1980) (holding that the actual and contemplated uses of the zoned land should be examined instead of just the zoning label).

149. *Wis. Dep't of Transp.*, 400 N.W.2d at 16-17.

150. *Id.*

incidental.¹⁵¹ The Minnesota Court of Appeals correctly did so and opined that because the golf course is not only expressly permitted in a PF-zone but is also the sole activity conducted on the land, it cannot constitute an incidental use.¹⁵² The golf course, a business area, is actually located on the area where the billboards are to be constructed. In no way can it be reasoned that the commercial nature of the revenue-generating public golf course is incidental to the revenue potentially generated by billboard advertising.

C. The Crucial Step: What is the Actual Use?

As discussed above, the FHWA regulations mandate an examination of the actual use of the land. The majority opinion, however, overlooked this step and construed the definition of “business area” from the Minnesota Act to mean that the label of the district must be commercial, industrial, or business.¹⁵³ The court would have been wise to look beyond the name of the zone to the actual use of the land and the reasons behind the zoning ordinances.¹⁵⁴ Granted, if the land in question had been zoned for commercial or industrial activities and no actual development was planned or contemplated for the near future, the area should be restricted by the Beautification Act.¹⁵⁵ However, if an area such as

151. The Nevada Supreme Court has held that this regulation demands an examination beyond the zoning label to the actual use of the area. *Alper*, 621 P.2d at 495. *Cf.* *Drayton v. Dep’t of Transp.*, 62 P.3d 430, 434 (Or. Ct. App. 2003) (reversing the Department of Transportation’s finding that “[i]n short . . . the land at the location of the sign is at most an incidental storage facility, in place as an attempt to qualify the land for signing purposes”).

152. *In re Denial of Eller Media Co.’s Applications for Outdoor Adver. Device Permits in the City of Mounds View*, 642 N.W.2d 492, 500 (Minn. Ct. App. 2002), *rev’d* 664 N.W.2d 1 (Minn. 2003). *But see Drayton*, 62 P.3d at 434 (holding that the use of the land in question was as a storage facility, incidental to the main business located in another location and constructed for the sole purpose of allowing billboards).

153. *In re Denial of Eller Media Co.’s Applications for Outdoor Adver. Device Permits in the City of Mounds View*, 642 N.W.2d at 500. “The city has recognized a difference between areas zoned for business and areas zoned for public purposes . . . and clearly knew how to zone for business, commercial, and industrial areas and ha[s] specifically done so in its comprehensive plan.” *Id.*

154. As did the dissent. *Eller Media*, 664 N.W.2d 1, 10 (Minn. 2003) (Hanson, J., dissenting) *see also* *Files v. Ark. State Highway & Transp. Dep’t*, 925 S.W.2d 404, 408-09 (Ark. 1996) (holding that the department should look behind zoning labels to the purposes of the zoning ordinances); *Alper*, 621 P.2d at 495 (holding that a “determination should [be] made as to the status of the area on which each billboard is located”).

155. *See Alper*, 621 P.2d at 495.

The Bridges is zoned and actually used or contemplated for commercial purposes, then billboards ought to be permitted.¹⁵⁶ By overlooking this crucial step, the court misapplied the Minnesota Outdoor Advertising Control Act in light of the regulations that have been promulgated by the FHWA. But what about the public policy concerns that originally sparked enactment of outdoor advertising control legislation?

D. Theory versus Fact: The Policies Behind Outdoor Advertising Control

The result of the *Eller Media* decision does theoretically comply with the overall hope of President Johnson to “protect the public investment in . . . highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.”¹⁵⁷ It is plausible that the Beautification Act permitted billboards in commercial and industrial areas because they are not as aesthetically pleasing or worthy of protection as other areas.¹⁵⁸ The Bridges’ situation is unique, however, because although the area is used for a legitimate commercial or industrial purpose, a golf course is inherently a beautiful, green space, and the view from the adjacent highway could be marred if billboards were constructed.

Although the *Eller Media* decision may have preserved the natural beauty of the golf course, the decision disregarded the fact that the Beautification Act, the Minnesota Act, and the FHWA regulations are meant to allow states to utilize outdoor advertising in those areas legitimately used for commercial or industrial purposes.¹⁵⁹ The Beautification Act seeks to balance the conflicting interests of commerce and conservationists. Municipalities that properly follow the mechanics of these laws should be permitted to construct billboards as the laws expressly permit. Furthermore, Minnesota has effectively controlled outdoor advertising by enacting the Minnesota Act and allowing billboards only in “business areas.”¹⁶⁰ The Bridges Golf Course, although zoned for

156. *See id.*

157. The Highway Beautification Act, 23 U.S.C § 131(a) (2000).

158. “There is no extensive discussion of the rationale for the industrial/commercial exception in the hearings or in the congressional debates,” but one possible rationale is that “industrial and commercial areas are not inherently attractive and hence are not worthy of beautification protection.” Albert, *supra* note 37, at 508.

159. *See* 23 U.S.C § 131(a); MINN. STAT. §§ 173.01-27 (2002); 23 C.F.R. § 750.701 (2004).

160. *See* MINN. STAT. § 173.01.

“Public Facilities,” is just such a business area. By not permitting the use of billboards in a legitimate business area, the *Eller Media* decision tipped the balance in favor of conservationists and ignored legitimate commercial interests.

V. CONCLUSION: THE BRIDGES IN 2004

John C. Kluczynski, chairman of the House Subcommittee on Roads, said in reference to the Beautification Act, “I believe we have enacted a can of worms.”¹⁶¹ The veracity of his statement certainly is exemplified by the *Eller Media* case. The Minnesota Supreme Court struggled to untangle the outdoor advertising control acts and regulations. As a result, the City of Mounds View was forced to jump through hoop after hoop to achieve the result to which it was legally entitled.

On October 13, 2003, the Mounds View City Council approved and adopted two ordinances to rezone the PF areas into designations consistent with the actual use of the land instead of ownership.¹⁶² On July 8, 2004, after a four-year battle with MNDOT and the Minnesota court system, having spent over a million dollars in internal loans to the golf course, the City of Mounds View received approval from MNDOT to erect billboards on The Bridges Golf Course.¹⁶³ Despite the additional revenue from the billboards, the golf course was still unable to meet its debt payments by \$40,000 to \$50,000.¹⁶⁴

161. Enfield, *supra* note 44, at 150.

162. MOUNDS VIEW, MINN., CITY ORDINANCES §§ 720-721 (Oct. 13, 2003), available at <http://www.ci.mounds-view.mn.us/ords.htm>. The Bridges is now designated as “Light Industrial” (LI). *Id.* The city added its name to the golf course to assure residents that it was still tied to the city. Allen Powell II, *All Options on Table for Mounds View Golf Course*, ST. PAUL PIONEER PRESS, May 22, 2004, at 6B. Other uses permitted in PF districts were also rezoned. City parks and city wells are now zoned “Residential” (R-1). JAMES ERICSON, CITY OF MOUNDS VIEW STAFF REPORT, at <http://www.ci.mounds-view.mn.us/PF-report.pdf> (last viewed July 11, 2004). City hall and the community center are now zoned “Highway Business Commercial” (B-3). *Id.* Golf courses, public works garages, and water towers are now zoned “Industrial” (I-1). *Id.*

163. Allen Powell II, *Golf Course Billboards OK'd*, ST. PAUL PIONEER PRESS, July 9, 2004, at B3. Clear Channel Outdoors plans on constructing six billboards, which will be forty-five feet tall, along U.S. Highway 10 on the golf course property for about \$250,000 per year. *Id.*

164. *Id.* The city is considering redeveloping portions of the golf course to raise additional revenue. *Id.* In October 2004, after signing a lease with Clear Channel, the city asked that the billboard construction be postponed until at least March 2005 because an unidentified company had expressed an interest in

The Minnesota Supreme Court's interpretation of Minnesota's business area exception to the outdoor advertising control acts resulted in an extremely inefficient outcome because the decision focused on the zoning label instead of the actual use of the land. If the majority had employed a reasonable interpretation of Minnesota's Outdoor Advertising Control Act, instead of an unduly strict interpretation, the City of Mounds View could have maintained effective control over outdoor advertising by employing the legislatively recognized economic power of billboards to resolve its budget issue.

erecting an office building on the property. Allen Powell II, *Mounds View Municipal Golf Course, City Wants Billboard Construction Postponed, Lease Clashing with Development Plans*, ST. PAUL PIONEER PRESS, Oct. 7, 2004, at B4. In 1988, the State of Minnesota quitclaimed fifty-five acres of the golf course with a reverter clause that requires the city to use the property for a public purpose or the state will retake control. Allen Powell II, *Golf Course Review Pondered, Environmental Survey, Development Possible*, ST. PAUL PIONEER PRESS, Sept. 12, 2004, at B1. The city must now determine whether an office building constitutes a public purpose, and if not, whether legislative action could void the reverter clause. *Id.*