The Legal History of Zoning for Aesthetic Purposes

If eyes were made for seeing,
Then beauty is its own excuse for being.[1]

Since the beginning of the twentieth century, unparalleled urban growth coupled with the age-old sanctity of real property have joined to create American cities of uncontrolled ugliness. Zoning is a legislative attempt to guide the development of the urban environment. "The power to zone arises from the police power—the power of government to protect citizens. The need to zone arises because humanity clustered in cities demands a form of protection which is of no importance to humanity dispersed."[2]

Zoning has been recognized as a valid exercise of the police power since 1926.[3] The power of a municipality to institute zoning ordinances[4] arises from legislative enactment of zoning enabling acts. A typical enabling statute might read as follows:

> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general walfare . . . . Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encour-

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[1]From *The Rhodora*, by Ralph Waldo Emerson, *found in* THE COMPLETE ESSAYS AND OTHER WRITINGS OF RALPH WALDO EMERSON (Brooks Atkinson ed. 1940).

[2]F. BAIR & E. BARTLEY, THE TEXT OF A MODEL ZONING ORDINANCE, (2d ed. American Society of Planning Officials 1960).

[3]In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), a general zoning ordinance created a residential district and excluded businesses of various types. The ordinance was held not to be in violation of the due process and equal protection clauses of the United States and Ohio Constitutions.

[4]The validity of zoning ordinances depends generally upon the reasonableness of the restrictions and a balancing of such factors as:

(1) Existing uses and zoning of nearby property;
(2) Destruction of property values;
(3) Relative gain to the public as compared to hardship to the individual property owner;
(4) Suitability of the property for the purposes zoned; and at times,
(5) Motivation behind the restriction, that is whether the restriction is founded primarily on aesthetic considerations.

Roth, *The Place of Aesthetics in Zoning*, 14 DEPAUL L. REV. 104, 105 (1964).

aging the most appropriate use of land throughout such municipality.[5]

Most zoning enabling acts recognize the need to restrict the use of land for the "health, safety, morals or general welfare" of the community, but do not specifically mention aesthetics or beauty as a valid criterion for the imposition of regulation on the use of land.[6] Courts must rely upon the general welfare term in lieu of a more clear manifestation of legislative approval of zoning for aesthetic purposes. Unfortunately, many courts have been unwilling to accept the general welfare term as a justification for use of the police power as readily as they accept the health, safety, and morals justifications. The traditional view is that aesthetic considerations are not within the scope of the general welfare. Even recently, some courts have not allowed aesthetic restrictions based solely on the general welfare clause, in part because of the difficulty in defining what the general welfare is, and in part because of the fear that aesthetic considerations are too subjective. Offenses to the senses of hearing and smelling have long been recognized because of the ease with which sound and odors can be measured; however, such is not the case with things offensive to sight.

This Note will survey the case law as it relates to aesthetic zoning and thus to the urban environment. The cases are classified in four categories: (1) Cases holding that aesthetic considerations are an invalid basis for zoning ordinances, (2) cases holding that aesthetic considerations are a valid secondary basis for zoning ordinances, (3) cases holding that aesthetic considerations are a valid basis for historic preservation zoning ordinances, and (4) cases holding that aesthetic considerations are a valid basis for zoning ordinances.

In some instances a case will be cited in more than one of these categories. The first and the last classifications are mutually exclusive, but otherwise a decision may stand for more than one principle.

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[5] ADVISORY COMMITTEE ON ZONING, A STANDARD STATE ZONING ENABLING ACT § 3 (Department of Commerce 1926).

[6] *See, e.g.*, IND. CODE § 18-7-4-1 (1974), which provides in part:

> [I]t is the object of this legislation to encourage local units of government to cooperatively improve the health, safety, convenience, and the welfare of their citizens and to plan for the future development of their communities to the end that highway systems be more carefully planned; that new communities grow only with adequate street, utility, health, educational and recreational facilities; that the needs of agriculture, industry, and business be recognized in future growth; that residential areas provide healthy surroundings for family life; and that the growth of the community is commensurate with and promotive of the efficient and economical use of public funds.

I. Aesthetic Considerations Improper

Early courts were not receptive to the idea of zoning for aesthetic purposes. In 1905, the New Jersey Court of Appeals, in *Passaic v. Patterson Bill Posting, Advertising, & Sign Painting Co.*[7] characterized aesthetic zoning as a luxury, referring to aesthetic considerations as matters of indulgence rather than as matters of necessity. The court felt that only necessity would justify the exercise of police power. This sentiment was echoed by the New York Court of Appeals four years later in a case in which the court held an ordinance invalid because the municipality failed to show that the ordinance was reasonably related to the protection of the public interest.[8] Thus, courts adhering to the traditional view of zoning narrowly construed the zoning enabling acts and refused to expand the already too-broad scope of the general welfare term to include aesthetic regulation.

Even today, most jurisdictions do not recognize the validity of zoning ordinances based solely on aesthetic considerations. The Supreme Court of Pennsylvania stated its opinion of the weight to be given aesthetics by saying:

> [N]either aesthetic reasons nor the conservation of property values or the stabilization of economic values in a township are, singly or combined, sufficient to promote the health or the morals or the safety or the general welfare of the township or its inhabitants . . . .[9]

In California, the requirement that a fence surrounding a junkyard be solid was held to be for aesthetic reasons only and thus not valid.[10] Further, in Kansas, mere aesthetic considerations were declared not to bear such a relationship to the public welfare as to sustain zoning restrictions and ordinances.[11]

In more recent cases, there is a recognition of the importance of aesthetics in zoning and possibly even a desire to uphold ordinances so created, but the doctrine of stare decisis is restraining many courts. In a 1968 New Jersey case, *Piscitelli v. Township Committee*,[12] the 1905 *Passaic* decision formed the basis for the de-

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[7]72 N.J.L. 285, 62 A. 267 (N.J. Ct. App. 1905). *See also* Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909); Willison v. Cooke, 54 Colo. 320, 130 P. 828 (1913); Chicago v. Gunning System, 214 Ill. 628, 73 N.E. 1035 (1905).

[8]Wineburg Adv. Co. v. Murphy, 195 N.Y. 126, 88 N.E. 17, 113 N.Y.S. 854 (1909). The ordinance was designed to regulate "sky signs" within the limits of the city. The court noted that the ordinance did not appear to be enacted in the interest of public health or safety and thus was unauthorized.

[9]Appeal of Medinger, 377 Pa. 217, 221, 104 A.2d 118, 122 (1954).

[10]People v. Dickenson, 171 Cal. App. 2d 872, 343 P.2d 809 (1959).

[11]Miller v. Kansas City, 358 S.W.2d 100 (Kan. Ct. App. 1962).

[12]103 N.J. Super. 589, 248 A.2d 274 (1968).

cision of the court to hold invalid an ordinance creating a board to review the aesthetic compatibility of proposed structures.[13] Justice Feller noted:

> There is no doubt, and the law is well settled, that aesthetic value plays an important role in modern-day zoning legislation. Nevertheless, in this State it has been held that zoning power may not be exercised for purely aesthetic considerations.[14]

A Connecticut court made reference to the difficulty in defining and applying the term "aesthetics" and commented that vague and unidentfied aesthetic considerations have been and are an insufficient basis upon which to invoke the police power.[15]

Thus, there is a reluctance by many courts to break from the decisions of the past and allow aesthetic considerations as the sole justification for zoning regulation. The courts should take cognizance of increased public awareness of the need for aesthetic control and be more willing to disregard ancient precedent where the public interest has shifted. Many courts have, however, gradually recognized the applicability of aesthetic zoning to a general welfare clause or have allowed aesthetics as a secondary justification in upholding an ordinance if a more traditional basis can be found. Cases in the following section will show courts straining to sustain an ordinance on grounds other than aesthetics.

II. Aesthetics Proper as a Secondary Basis

A. Health and Safety

The most common situations in which courts have conceded the importace of aesthetics in zoning are the ones in which some relationship to the health and safety of the public can be shown.

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[13]In *Piscitelli*, the City of Scotch Plains had adopted an ordinance establishing an architectural review board. The purpose of the board was to review applications for building permits and to deny the application if the proposed structure did not aesthetically conform to the surroundings. In effect, the ordinance placed aesthetic values first and by doing so was held to create an unjustifiable precondition to the issuance of the building permit.

In *Passaic*, a city ordinance required the placing of billboards at least ten feet from the street line. This also was held an unjustifiable restriction because it was not related to public health or safety. The court surmised that the regulation was aesthetically motivated and thus not reasonable.

It should be noted that the court in *Piscitelli* did recognize aesthetics as a legitimate secondary purpose for zoning, whereas the *Passaic* court completely discounted the value of aesthetic considerations.

[14]103 N.J. Super. at 597, 248 A.2d at 278.

[15]DeMaria v. Enfield Planning & Zoning Comm'n, 159 Conn. 534, 271 A.2d 105 (1970).

Many courts adopted this line of reasoning in sustaining the regulation of billboards,[16] the control of junkyards,[17] and the exclusion of businesses from residential areas.[18] What may be of more importance is the trend of many courts toward the recognition of aesthetics as a valid secondary justification for the enactment of zoning regulations. At the very least, most jurisdictions hold that the entry of aesthetic considerations into the legislative process will not invalidate an otherwise valid ordinance.[19] The courts have recognized the significance of aesthetic considerations in comprehensive zoning programs. What is of interest is the reasoning by which ultimate judicial approval of the ordinance is reached.

The imposition of setback lines is generally regarded as important to the aesthetic appeal of a neighborhod. But, this is not sufficient justification in most courts today to uphold the setback requirements found in many zoning ordinances; rather, such ordinances are rationalized on the basis of health and safety.[20] Similarly, minimum lot size regulations have been litigated and upheld on the basis of their relation to the public health and safety.[21] Some courts have also recognized the aesthetic value of minimum floor space requirements, although they have failed to decide the cases solely on that ground.[22] In *Lionshead Lake v. Wayne Township*,[23] the court talked in the familiar health and safety language, but also spoke of the aesthetic considerations taken into account when zoning ordinances are enacted.

> It requires as much official watchfulness to anticipate and prevent suburban blight as it does to eradicate city slums. . . . The size of the dwellings in any community inevitably affects the character of the community and

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[16]St. Louis Gunning Adv. Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911).

[17]City of St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475 (1948); Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960).

[18]Turner v. City of New Bern, 187 N.C. 540, 122 S.E. 469 (1924).

[19]Welch v. Swasey, 214 U.S. 91 (1908); Kenyon Peck,. Inc. v. Kennedy, 210 Va. 60, 168 S.E.2d 117 (1969).

[20]Gorieb v. Fox, 274 U.S. 603 (1927) (setback lines not arbitrary but had some relation to health and safety).

[21]Thompson v. City of Carrollton, 211 S.W.2d 970 (Tex. Ct. App. 1948). The *Thompson* court stated that the ordinances were "designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers." *Id.* at 971.

[22]Corning v. Town of Ontario, 204 Misc. 38, 121 N.Y.S.2d 288 (Sup. Ct. 1953); Flower Hill Bldg. Corp. v. Village of Flower Hill, 199 Misc. 344, 100 N.Y.S.2d 903 (Sup. Ct. 1950).

[23]10 N.J. 165, 89 A.2d 693 (1952).

> does much to determine whether or not it is a desirable place in which to live.[24]

Other situations in which zoning has been upheld ostensibly because of interest in protecting health and safety are numerous and widespread throughout the jurisdictions.[25] Many other cases specifically recognize aesthetics as a valid secondary condition although not as a valid primary motive.[26] However, in *Preferred Tires, Inc. v. Village of Hempstead*,[27] the court, while noting the danger of overhead signs to pedestrians and other travelers, made clear in dicta that aesthetic considerations alone would be sufficient.

> This court is not restricted to aesthetic reasons in deciding to sustain the validity of the ordinance in question, but if it were so restricted, it would not hesitate to sustain the legislation upon that ground alone. The court cannot believe that . . . a municipal board in this day and age can be so restricted, as plaintiff contends, in thus promoting the happiness and general welfare of the community.[28]

Unhappily, the New York court is in a somewhat singular position. Most jurisdictions, even in recent decisions, beg the aesthetic issue and validate their zoning ordinances through the more traditional channels of health and safety.[29] In *Thille v. Board of Public Works*,[30] a California case, and *Appeal of Kerr*,[31] a Penn-

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[24] *Id.* at 173, 89 A.2d at 697.

[25] City of Atlanta v. Awtry & Lowndes Co., 205 Ga. 296, 53 S.E.2d 358 (1949) (funeral home in residential area); Giangrosso v. City of New Orleans, 159 La. 1016, 106 So. 549 (1925) (businesses forbidden in residential district); Turner v. City of New Bern, 187 N.C. 540, 122 S.E. 469 (1924) (lumber yard in residential district); Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960) (screening of junkyard required).

[26] Neef v. City of Springfield, 380 Ill. 275, 43 N.E.2d 947 (1942); Town of Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243 (1945); Town of Lexington v. Govenar, 295 Mass. 31, 3 N.E.2d 19 (1936); Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923). *See generally* Burk v. Municipal Court, 229 Cal. App. 2d 696, 40 Cal. Rptr. 425 (1964); 122 Main Street Corp. v. City of Brockton, 323 Mass. 646, 84 N.E.2d 13 (1949); General Outdoor Adv. Co. v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935).

[27] 19 N.Y.S.2d 374 (Sup. Ct. 1940). This case is a forerunner of the current New York position.

[28] *Id.* at 377.

[29] Central Adv. Co. v. City of Ann Arbor, 42 Mich. App. 59, 201 N.W.2d 365 (1972); Sun Oil Co. v. City of Madison Heights, 41 Mich. App. 47, 199 N.W.2d 525 (1972); Campbell v. Ughes, 7 Pa. Commw. 98, 298 A.2d 690 (1972); Kenyon Peck, Inc. v. Kennedy, 210 Va. 60, 168 S.E.2d 117 (1969); Weiss v. Guion, 17 F.2d 202 (6th Cir. 1926) (setback lines held to have a reasonable relation to health and safety).

[30] 82 Cal. App. 187, 255 P. 294 (1927).

[31] 294 Pa. 246, 144 A. 81 (1928).

sylvania case, the courts recognized the connection between aesthetics and the general welfare, but based their decisions on the public health and safety.[32] Both courts realized the potential strength of the general welfare term, but were reluctant to say that a setback ordinance was sustainable under that term alone. This rationale is unfortunate because the most probable reason for the enactment of the setback requirement was to guarantee the beauty of the neighborhood rather than to promote the safety of the community. Assurance of aesthetic niceties such as lawns and open space should be as important to the courts as to zoning boards and planning commissions and should thus be entitled to legal protection solely under a general welfare clause. However, upon a finding that health, safety or moral considerations could have justified the zoning ordinance, many courts will assume that they did and fail to discuss further the aesthetics issue.[33]

B. The General Welfare Term

1. Emerging Definitions

Acceptance of the general welfare term of the various zoning enabling acts as a valid basis for the exercise of the police power has been a gradual process in the state courts. There continues to be reluctance to expansively interpret the term because of the variety of situations that could arguably fall within the ambit of the general welfare, but some jurisdictions have recognized the need for expansion, within reasonable limits, of the aesthetic and cultural side of municipal development.[34]

The process has been slow, and some courts have only recently expanded their concepts of the general welfare. In *Criterion Service v. City of East Cleveland,*[35] the argument that the prohibition of billboards in retail store districts was founded on purely aesthetic reasons was met by an extension of the general welfare idea.

> The right of a city to classify its territory into use zones, under a complete zoning ordinance, must be liberally construed not only as it may affect the public health, morals, and safety, but also as such classifications are deemed necessary in promoting the public convenience, comfort, prosperity and general welfare and in giving consideration

[32]"While a zoning ordinance cannot be sustained on merely aesthetic grounds, that may be considered in connnection with questions of general welfare." *Id.* at 250, 144 A. at 83.

[33]Giangrosso v. City of New Orleans, 159 La. 1016, 106 So. 549 (1925); Civello v. New Orleans, 154 La. 271, 97 So. 440 (1923).

[34]Ware v. City of Wichita, 113 Kan. 153, 214 P. 99 (1923) (this legislation was said to be a liberalized application of the general welfare term.)

[35]55 Ohio Law Abs. 90, 88 N.E.2d 300 (Ohio Ct. App. 1949).

to these questions the council may be motivated in part at least by esthetic considerations.[36]

In the development of zoning for aesthetic purposes there have been two areas in which the courts have been more receptive to aesthetic considerations: preservation of the neighborhood and protection of property values. It may be that these concepts provide more concrete definition of general welfare and thus have enabled the courts to more readily interpret that term. Regardless of the reasons, many ordinances have been upheld by reference to the need to protect the character and value of land rather than by reliance on traditional health and safety requirements. This liberalization and definition of the general welfare term is an important step in zoning for aesthetic reasons.

2. *Preservation of Area Character*

In *Elbert v. North Hills*,[37] aesthetic considerations were approved in conjunction with health, safety, and the desire to maintain the quietude and rural character of a community as a proper motivation for local regulation. An Illinois court also recognized that a court may take into consideration the character of the neighborhood.[38] Preservation of the character of the community has been held the basis for the regulation of minimum lot areas,[39] even to the point of upholding a five-acre minimum in New Jersey.[40] Validity of an ordinance is still subject to attack on reasonableness grounds,[41] but the burden is upon the plaintiff to show that the action of the legislative body or commission entrusted with zoning decisions was arbitrary or unreasonable.

Recently, courts in many jurisdictions have approved ordinances predicated upon the protection of the character of a community. Florida courts assented to the protection of a single-family residential district along a lake and an ocean[42] and have also in-

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[36]*Id.* at 95, 88 N.E.2d at 303. *See also* City of Daytona Beach v. Abdo, 112 So. 2d 398 (Fla. Ct. App. 1959); McGuire v. Purcell, 7 Ill. App. 2d 407, 129 N.E.2d 598 (1955); United Adv. Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964).

[37]28 N.Y.S.2d 317 (1941). *See* Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, 252 N.Y.S. 178 (1931).

[38]Trust Co. of Chicago v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951). *See also* Kaplan v. City of Boston, 330 Mass. 381, 113 N.E.2d 856 (1953), wherein the primary purpose of zoning was said to be the preservation for the public good of residential neighborhoods against deleterious uses.

[39]Clary v. Borough of Eatontown, 41 N.J. Super. 47, 124 A.2d 54 (1956).

[40]Fischer v. Bedminster Twp., 11 N.J. 194, 93 A.2d 378 (1952).

[41]The test for reasonableness is outlined in note 4 *supra*.

[42]Watson v. Mayflower Property, Inc., 223 So. 2d 368 (Fla. Ct. App. 1969).

validated an ordinance because the appellant's land, given the characteristics of the surrounding area, was not suitable for single-family residences as zoned.[43] In Colorado, an ordinance which required large building lots in the center of a village, which had been incorporated with the express desire and purpose of maintaining a rural atmosphere, was held to be within statutory authority and not an unreasonable exercise of police power.[44] A New Jersey court, in recognizing the aesthetic importance of uniform community maintenance, stated that the physical characteristics of and the existing circumstances in the community must enter into the decision-making process when the validity of a zoning ordinance is challenged.[45]

It is clear that preservation of the character of a community has been accepted,[46] even though it is admittedly an exercise of aesthetic control over the physical appearance of specific areas. As a valid objective of the general welfare, character preservation has had a great influence in saving many residential areas from the unwanted infiltration of business and industry.

3. Preservation of Property Value

Companion to the preservation of area character has been the preservation of property value. It is widely recognized that the value of residential land will be adversely affected by the construction of factories, businesses, or other commercial establishments because of increased traffic, noise, and pollution. Further, the value of residential property may be affected by the destruction of parks, woods or other open spaces, and scenery. Urban zoning ordinances are often enacted with these considerations in mind, and the courts have shown a willingness to accept such regulation as within the scope of the general welfare.[47] A leading case in this area is *Saveland Park Holding Corp. v. Wieland,*[48] in which the Wisconsin Supreme Court sustained an ordinance controlling the architectural appeal of a building. The ordinance provided that a building permit could be issued only

[43]William Murray Builders, Inc. v. City of Jacksonville, 254 So. 2d 364 (Fla. Ct. App. 1971) (thirty-five acre plot zoned residential when surrounded by marshland, railroad yard, sewage disposal plant, gas station, and large apartment complex.)

[44]Nopro Co. v. Town of Cherry Hills Village, 504 P.2d 344 (Colo. 1972).

[45]J.D. Construction Corp. v. Township of Freehold, 119 N.J. Super. 140, 290 A.2d 452 (1972).

[46]Lindgren v. City of Chicago, 124 Ill. App. 2d 289, 260 N.E.2d 271 (1970).

[47]Conner v. City of University Park, 142 S.W.2d 706 (Tex. Ct. App. 1940).

[48]269 Wis. 262, 69 N.W.2d 217 (1955).

after the Fox Point Building Board had found the exterior architectural appeal of the proposed structure to be compatible with the existing and proposed buildings in the neighborhood so as not to cause a substantial depreciation in property values. The trial court held the ordinance unconstitutional on three grounds. In reversing the court below, the Supreme Court of Wisconsin decided that (1) the protection of property values is an objective which falls within the general welfare clause, (2) the general rule prohibiting the exercise of the zoning power for aesthetic reasons only is undergoing development, and it is extremely doubtful that the prior rule is still the law, and (3) the words "substantial" and "neighborhood" were not so vague as to render the ordinance void.

In its discussion of property values as a valid legislative objective for zoning, the court said:

> [T]he protection of property values is an objective which falls within the exercise of the police power. . . . Anything that tends to destroy property values of the inhabitants of the village necessarily adversely affects the prosperity, and therefore the general welfare, of the entire village. . .[49]

In 1964, the New Jersey Supreme Court astutely noted the close relationship between property values and aesthetic considerations by stating:

> There are areas in which aesthetics and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound. We refer not to some sensitive or exquisite preference but to concepts of congruity held so widely that they are inseparable from the enjoyment and hence the value of property.[50]

Further, the court criticized the practice of attaching zoning established for aesthetic reasons to the health or safety:

> Surely no one would say today that an industrial structure must be permitted in a residential district upon a showing that the operation to be conducted therein involves no significant congestion in the streets, or danger of fire or panic, or impediment of light and air, or overcrowding of land, or undue concentration of population.[51]

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[49] *Id.* at 270, 69 N.W.2d at 222.

[50] United Adv. Corp. v. Borough of Metuchen, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964).

[51] *Id. See also* Township of Livingston v. Marcher, 85 N.J. Super. 428, 205 A.2d 65 (1964), wherein the integral relationship between neighborhood aesthetics and property values was recognized.

The point was made that aesthetics should not be ignored and are as much a part of the general welfare as health, safety, or morals. The connection between aesthetic impact and economic effect is an integral part of the general welfare.

A sampling of cases reveals approval of ordinances to protect the economic value of existing uses,[52] to prevent untidy appearance of land and diminution of land value,[53] to promote tourism,[54] and to halt the deterioration of an area and the resulting depreciation of property value.[55]

Of course, any combination of preservation of character and protection of property values may be employed by a court. In *Reid v. Architectural Board of Review*,[56] the ordinance approved established an architectural board of review and instructed the members of the board to regulate the orientations of all new buildings according to proper architectural principles. The purpose of the regulation was to protect the value of real property and to assure a high character of community development. Although this type of regulation is susceptible to arbitrary action on the part of the board members, the necessity for architectural standards justified the delegation of authority to the board.

In cases involving property values, plaintiffs often argue that refusal to allow them to use the land at its highest and best use amounts to a taking of property without due process. However, courts have held that a mere reduction in the value of property affected will not be sufficient to invalidate the ordinance on due process grounds.[57] Plaintiffs often contend in the alternative that the property affected should be rezoned to allow their desired use. Generally such rezoning also will be refused when the sole purpose for the attempted rezoning is to put the property to its most remunerative use.[58] "[T]here is simply no constitutionally protected right . . . to gain the maximum profit from the use of

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[52]County of Brevard v. Woodham, 223 So. 2d 344, (Fla. Ct. App. 1969); City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972).

[53]Melton v. City of San Pablo, 252 Cal. App. 2d 794, 61 Cal. Rptr. 29 (1967).

[54]Desert Outdoor Adv. v. County of San Bernardino, 255 Cal. App. 2d 765, 63 Cal. Rptr. 543 (1967); County of Santa Barbara v. Purcell, Inc., 251 Cal. App. 2d 169, 59 Cal. Rptr. 345 (1967).

[55]City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969). *But see* Appeal of Manns, 3 Pa. Commw. 242, 281 A.2d 355 (1971).

[56]119 Ohio App. 67, 192 N.E.2d 74 (1963).

[57]Cosmopolitan Nat'l Bank v. City of Chicago, 1 Ill. App. 3d 478, 275 N.E.2d 310 (1971).

[58]Fields v. City of Little Rock, 475 S.W.2d 509 (Ark. 1972).

property."[59] It must be remembered, however, that an ordinance which would render a specific property valueless will probably be held improper on due process grounds.[60] Thus, a statute which will result in some loss in value is not necessarily invalid. However, substantial impairment of the value casts serious doubt upon the constitutionality of the ordinance as applied.

At this point, it is important to note briefly another role that property value may play in aesthetic zoning. It has been suggested that the area of aesthetic zoning is too subjective and that sight cannot be protected as efficiently from offense as the senses of hearing and smelling because of the ease with which sound and smell can be measured. Property value itself may be the best way to attach an objective measure to visual excellence. The value of aesthetics can be seen daily in the real property market. Lots with views often sell for substantially more than similar lots without views and are often assessed for the purpose of taxation at a higher rate. The prices of land located on permanent open spaces, golf courses, beaches, or parks are always higher than the prices of lots with less scenic surroundings. Buildings and lots with landscaping and trees are worth more to a purchaser because of the aesthetic pleasure they impart. Thus, aesthetic considerations do have a measurable value. Dollars can act as much as an objective measure of injury as decible levels or air samples.

The destruction of aesthetic amenities results in the lessening of the value of property[61] just as a malodorous factory or a noisy airport reduces land value. If the beauty of the land and thus its value can be protected via zoning for aesthetic purposes, then zoning enabling statutes should be interpreted so that such ends may be met.

III. Aesthetics Proper in Historic Preservation

The preservation and protection of historic sites as an area of aesthetic zoning is a hybrid of zoning to preserve the character and value of property and zoning for aesthetic purposes only. The regulations are often imposed collaterally to protect the property value and the character of the area as well as to promote tourism. Many historic zoning regulations are intended to direct the architectural design of future buildings and to preserve that of existing buildings. These legislative ordinances are generally upheld. Protection by the city of New Orleans of the Vieux Carre district

[59]Nopro Co. v. Town of Cherry Hills Village, 504 P.2d 344, 350 (Colo. 1972).

[60]Ziman v. Village of Glencoe, 1 Ill. App. 3d 912, 275 N.E.2d 168 (1971).

[61]People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); Frankland v. City of Lake Oswego, 493 P.2d 163 (Ore. Ct. App. 1972).

is a prime example of historic site preservation. Prohibition of changes in the exterior of a building in the historic district,[62] as well as the proscription of signs without the approval of the Vieux Carre Commission,[63] were held to be valid in light of the avowed purpose of saving the district for its aesthetic value and historic interest.

Massachusetts has enacted laws providing for the preservation of the architecture of Nantucket Island. Historically a famous whaling and fishing center, the area in recent years has been endangered by those vacationing in the resort. The use of the police power to protect the island was approved in *Opinion of the Justices to the Senate.*[64] The protection of the natural scenery and the historic buildings was the recognized focus of the regulation which included the requirement that a permit be issued before any building was altered. The Supreme Judicial Court of Massachusetts realized that "the proposed act can hardly be said in any ordinary sense to relate to the public safety, health, or morals."[65] But, in the interest of the appearance of the island, the ordinance was approved.

More recently, in *Rebman v. City of Springfield,*[66] it was held to be within the concept of the public welfare to effect the preservation of historical sites, so long as reasonable limitations were imposed. The limitations mentioned in *Rebman* are more fully outlined in *Hayes v. Smith*[67] where a brick addition to an historically protected clapboard church was allowed as generally compatible. The Rhode Island court reasoned that the legislature did not intend to require absolute duplication of existing style since such a requirement might jeopardize the validity of the historic zoning ordinance. Historic zoning, then, as all zoning, must meet a test of resonableness in light of the specific purposes which the zoning is intended to further.[68]

There are some problems peculiar to historic zoning. When a landowner is prevented from destroying an existing structure, he may abandon or allow the building to fall into such disrepair that it ultimately must be condemned. The prevention of deterioration of historic areas is often difficult, and the solution will vary in

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[62]City of New Orleans v. Impastato, 198 La. 206, 3 So. 2d 559 (1941).

[63]City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941). *See* City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953).

[64]333 Mass. 773, 128 N.E.2d 557 (1955). *See also* Opinion of the Justices to the Senate, 333 Mass. 783, 128 N.E.2d 563 (1955) (protection of the historic Beacon Hill District in Boston).

[65]333 Mass. at 778, 128 N.E.2d at 561.

[66]111 Ill. App. 2d 430, 250 N.E.2d 282 (1969).

[67]92 R.I. 173, 167 A.2d 546 (1961).

[68]For a typical statute see IND. CODE § 18-4-22-1 (Burns 1974).

any given case. A court order compelling repair may be effective when the owner has the necessary financial resources. Some areas have set up local agencies empowered to make repairs upon the designated land and to record the cost of such repair as a lien upon the property. The ideal solution is to secure a buyer for the land who is willing to accept the maintenance expenses of his purchase.

Historic zoning resembles zoning for only aesthetic purposes and is often recognized for what it is—an attempt to preserve what is beautiful and historic so others may enjoy it. Today's society has become aware of the need to preserve parts of its heritage for the betterment and education of society in the future. Some states, most notably New York, Oregon, and Florida, have recognized that this reasoning can be applied to areas not so historically important, but just as aethetically pleasing and therefore valuable.

IV. Aesthetics Proper as Sole Basis

In the history of zoning for aesthetic purposes, there are some early cases that are recognized as boldly ahead of their time. These cases established the basis for the modern trend, and the courts exhibited foresight in their understanding of the problems of urban deterioration and shabbiness.[69] However, the decision universally considered as setting the stage for acceptance of aesthetic considerations as wholly valid criteria in zoning is *Berman v. Parker*,[70] a 1954 United States Supreme Court decision. The District of Columbia had condemned Berman's property to make way for a privately controlled redevelopment project. The Court sustained the taking of land for what Berman contended was not a public use and countered his argument by stating that once the public interest had been established, the means of achieving that end were of little relevance.[71] Thus, the Court expanded the scope of condemnation proceedings by substituting the public purpose language contained in the police power for the public use language of eminent domain. In commenting on the significance of aesthetic considerations, Justice Douglas, writing the opinion of the Court, said:

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should

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[69]Civello v. City of New Orleans, 154 La. 271, 97 So. 440 (1923).

[70]348 U.S. 26 (1954).

[71]This is sometimes referred to as the beneficial use theory.

> be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[72]

In answer to questions of constitutionality, Justice Douglas further commented that "if those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."[73]

The use of eminent domain to impose aesthetic regulations has been widely accepted as a result of the *Berman* case. The difficulty arises when the use of zoning is contemplated to achieve the same result. The general rationale of *Berman* has been accepted by some state courts[74] and has been applied to zoning situations.[75] Thus, *Berman* has become a precedent in the use of both eminent domain and zoning. The power to condemn land for aesthetic purposes is extremely important in acquiring and preserving unimproved open spaces and smaller sites for the public benefit. The use of zoning to accomplish these ends will result in great financial savings to states and municipalities and is a welcome consequence of the *Berman* decision.

The New York courts are among the strongest supporters of aesthetic values. The New York Court of Appeals, in *People v. Stover*,[76] upheld a zoning ordinance prohibiting clotheslines in front and side yards abutting a street. The ordinance was based solely on aesthetic considerations. Recognizing that aesthetic considerations are accepted as a valid subject for legislative concern, the court held that any reasonable legislation instituted to promote the aesthetic nature of the community would be a valid exercise of the police power. Judge Fuld noted that the regulation imposed no arbitrary or capricious standard of beauty upon the community, but merely proscribed conduct which was offensive to the average person's visual sensibilities. It is interesting to note that the court could have decided the case on safety or property value grounds, but declined to do so.

The New York position has been reiterated in recent years[77] and, regardless of past decisions to the contrary, there is no doubt that at the present time aesthetic considerations alone are a proper basis for zoning ordinances in New York,[78] so long as the legisla-

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[72]348 U.S. at 33.

[73]*Id.*

[74]Davis v. City of Lubbock, 326 S.W.2d 699 (Tex. 1959).

[75]Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955).

[76]12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963).

[77]Cromwell v. Ferrier, 24 App. Div. 2d 998, 225 N.E.2d 749, 266 N.Y.S.2d 188 (1962).

[78]People v. Berlin, 62 Misc. 2d 272, 307 N.Y.S.2d 96 (Dist. Ct. 1970).

tion is reasonably designed to promote and preserve the appearance of a community.[79] It is possible that this position has developed as a result of the long history of urbanization in that state and the effect such development has had in reducing the natural beauty of the area. However, regardless of the reasons, New York leads in what will surely be the trend in zoning regulation.

Florida has also effectively recognized the value of aesthetic considerations in zoning. The beauty of the state coupled with the strong tourist industry present key factors in the courts' decisions to uphold aesthetic zoning. *E. B. Elliot Advertising Co. v. Dade County,*[80] referred to *Stover* with approval and stated that aesthetic considerations are valid in promoting the general welfare. In another decision,[81] the Florida Court of Appeals acknowledged that the police power should not be confined narrowly to the public health, safety, or morality, but may be expanded to regulate occupations or businesses detrimental to the general welfare. A federal district court recently noted that the Florida courts had approved the enhancement of aesthetic appeal as a proper exercise of the police power, and added its approval.[82] The urgent need to protect the quality of the environment was mentioned as a national goal, thus further accentuating the importance of aesthetic considerations.

Oregon has also joined in approving aesthetic considerations alone as a valid basis for the exercise of the police power. In *Oregon City v. Hartke,*[83] the ordinance in question totally excluded a junkyard from the specified area. In this respect, the regulation was much more strict than the regulation in *Stover,* as the use in *Stover* was not wholly prohibited. The Oregon court realized the importance of urban planning and its relation to the well-being of city dwellers by saying that it is "not irrational for those who must live in a community from day to day to plan their physical surroundings in such a way that unsightliness is minimized."[84]

V. Conclusion

Jurisdictions that accept aesthetic considerations as the sole justification for zoning ordinances are clearly in the minority today. The reluctance of the courts to infringe upon private

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[79]People v. Goodman, 31 N.Y.2d 262, 290 N.E.2d 139, 338 N.Y.S.2d 97 (1972).

[80]425 F.2d 1141 (5th Cir. 1970).

[81]Rotenberg v. City of Fort Pierce, 202 So. 2d 782 (Fla. Ct. App. 1967).

[82]Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971). *See also* Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960).

[83]240 Ore. 35, 400 P.2d 255 (1965).

[84]*Id.* at 50, 400 P.2d at 263.

citizens' property rights is in large part responsible for the slow acceptance of aesthetics as a valid excuse for regulation.

> The whole concept of zoning implies a restriction upon the owner's right to use a specific tract for a use profitable to him but detrimental to the value of other properties in the area, thus promoting the most appropriate use of land throughout the municipality, considered as a whole.[85]

It is a balancing of the public and private interests[86] that is difficult to apply and is of concern to judges and lawyers. However, this balancing process has and will continue to have central importance in aesthetic zoning issues.

There has been a continuing development of aesthetic principles by the courts and a gradual recognition of the importance of aesthetics in zoning. Clearly, many courts have been giving increased weight to aesthetic values. The reluctance of many courts to break away from traditional justifications for the use of the police power has been cited as a detriment to the development of a full recognition of aesthetics. The attorney should familiarize himself with the aesthetic zoning issues in the interest of a better environment.[87] The recent shift of public awareness to environmental problems should be reflected by the courts. The use of the police power to aesthetically improve our urban areas can be a valuable asset for the environmentalist, city planner, and resident alike.

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[85]Blades v. City of Raleigh, 280 N.C. 531, 546, 187 S.E.2d 35, 43 (1973).

[86]Chusud Realty Corp. v. Village of Kensington, 40 Misc. 2d 259, 243 N.Y.S.2d 149 (Sup. Ct. 1963).

[87]The lawyer seeking affirmation of aesthetic zoning has at least four arguments available: (1) that the majority of case holdings are in error; (2) that there exists a rational relationship between property value, other economic considerations, the character of the neighborhood, and the general welfare; (3) that the zoning is related to public health, safety, or morality, and (4) if appropriate, that there is need for historic preservation.