PROPRIETY OF USING THE POLICE POWER FOR AESTHETIC REGULATION:

A COMPREHENSIVE STATE-BY-STATE ANALYSIS

National Park Service &
National Center for Preservation Law

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PROPRIETY OF USING THE POLICE POWER FOR AESTHETIC REGULATION

A COMPREHENSIVE STATE-BY-STATE ANALYSIS

As of May 1990

By

Sarah L. Goss, Esq.

September 1992

National Park Service &
National Center for
Preservation Law
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INTRODUCTION

Historic preservation ordinances are often viewed as related to aesthetics and are often legally justified in part as an exercise of a state's police power. This report reviews state case law and the history of the use of aesthetics as a justification for the exercise of police power by government entities. Especially, this report seeks to determine for each state whether historic preservation ordinances may be based upon aesthetic considerations alone. This report does not address the other means by which land use is regulated or the other legal bases for state and local historic preservation laws and ordinances. The scope of this report is limited to an examination of state case law and leaves to other publications the consideration of Federal statutory and case law.

This report is intended to serve as an initial point of reference for attorneys and laypersons who are interested in aesthetics-related ordinances as a legitimate use of a state's police power. This report uses selected, key cases in the development of each state's case law. This report is not intended to substitute for legal research in litigation or other individual situations.

HISTORICAL PERSPECTIVE

States, in the name of the public good, may pass laws of varying sorts. Frequently these measures are designed to promote the "general health, safety, morals, and welfare" of the community. This type of statute or ordinance, whether enacted directly by the state government or by local governments where authorized by state enabling law, is referred to as an exercise of the state's "police power." In the early half of this century (and prior to that time), courts read very strictly the purposes that such legislation might serve; i.e., the definitions of health, safety, morals, and welfare were very narrowly drawn. If the enactment did not directly relate to the traditional purposes of health, safety, morals, and welfare, the judiciary would invalidate the law. For example, a sanitation ordinance would fall within the definition of health because it deals directly with the physical health of members of the community. However, promotion of emotional health and a general community feeling of belonging and general well being would not meet the narrow definition. Throughout this report, this stringent view of the police power is referred to as the "traditional" or "early" position of the courts.

With a growing recognition that the general welfare might encompass legislation which served purposes more generally related to health, safety and morals, the courts began to permit new justifications for police power actions. In the context of the aesthetics issue, the courts would sustain a law which considered such purposes in addition to the traditional justifications. This document refers to this development in the law as the "intermediate" or "auxiliary" position of judicial thought.

In the latter half of this century, the courts of many states began to permit justifications other than the traditional ones to sustain legislative measures. Finally, an ordinance or statute which sought to preserve or maintain aesthetic values—without simultaneously addressing health, safety or morals—was considered to be a valid exercise of the police power. This doctrinal attitude is referred to as the "modern," "permissive," or "pro-aesthetic" position.

ORGANIZATION OF THIS REPORT

This report endeavors to place the position of each state's case law—whether favorable or unfavorable to aesthetic justifications—in a historical context. Each state section summarizes the state's position as of May 1990 and then presents a thorough case history of how the courts
reached that point. The text is flagged with consistent headings that mark the stages of doctrinal development.

Immediately after the text for each state, the important cases are listed chronologically, followed by a list of the prior decisions (from whatever jurisdiction) each case cited as authority for its position. The "Case Listings and References" division at the end of each state section is provided as a matter of convenience for the students of precedent and legal history. The lists give scope and perspective to progression of the various state courts' position from traditional to pro-aesthetic which seems to be the national trend.

All of the cases reviewed in this report appear in Appendix A. This appendix lists key aesthetics-related cases illustrating the movement towards the modern opinion. Selected cases which were not crucially related to the aesthetics issue, but which bore upon other zoning or historic preservation matters, appear in Appendix B. A table listing the current (May 1990) state case law positions ("Aesthetics alone," "Auxiliary use of aesthetics," or "Uncertain") on the issue can be found on pages v-vii.

CITATION FORMS

Case citations (and quotations) throughout the text and in Appendix A are presented in accordance with the rules appearing in the A Uniform System of Citation, 14th Edition. The boldface portions alone constitute the correct citation form per the rules. If additional citation information was available, it is included (for convenience) in regular typeface. Citations of Appendix B are as close to the uniform system as possible.

Example:

Citation as it appears in text and Appendix A:


Citation as it would appear in a legal document:


Case citations which appear in the "Case Listings and References" division of each state section are abbreviated. If the referred to opinion is from the state under review in that section, both the official (state) and unofficial (West Publishing Co.) citations are provided. However, if the decision is from another jurisdiction, only the unofficial portion appears.

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1 Note that not all states follow the Uniform System of Citation rules and may, instead, have a unique form of citation.
OVERVIEW OF UNITED STATES SUPREME COURT OPINIONS

The United States Supreme Court has never addressed the use of aesthetics as a justification for an exercise of the police power in the historic preservation context. However, two separate opinions give judicial support to these matters. The decision in Berman v. Parker, 348 U.S. 26 (1954) is frequently cited by the state courts which sustain aesthetics as a police power consideration. In this case, the Supreme Court held that the legislative branches of government, when enacting redevelopment measures, could consider aesthetics and other issues. Some of Justice Douglas’ famous language from the majority opinion reads:

Public safety, public health, morality, peace and quiet, law and order--these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it...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 would be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled...If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Id., at 32-33. (citations omitted). Thus, the Court upheld the District’s redevelopment plan, the constitutionality of which had been attacked under the Fifth Amendment (a deprivation of property without due process of law or just compensation).

Some concern exists over the interpretation to be given the Berman decision. Does it permit aesthetic considerations alone or as an auxiliary element of legislation? The Supreme Court has not subsequently spoken on the issue but some understanding of the case is gleaned from state courts’ opinions on the subject of aesthetics. Overwhelmingly, the state courts which permit aesthetics alone cite Berman as the authority for that position.

The Supreme Court gave a cursory address to the use of aesthetics in the context of historic preservation in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). The Penn Central decision upheld the city’s historic preservation ordinance which "embod[y]ed a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city." Id., at 132. Justice Brennan wrote:

Because this Court has recognized in a number of settings that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city...appellants do not contest that New York City’s objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.

Id., at 129. (citations omitted). The Court resolved that the preservation designations did not violate constitutional principals.

The Penn Central opinion referred to other cases from the Court which supported the consideration of aesthetics in zoning decisions, including Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) and Welch v. Swasey, 214 U.S. 91 (1909), but Berman is the seminal decision on the issue.
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* Aesthetic reasons alone constitute sufficient justification for use of the police power.

** Aesthetic reasons in combination with other grounds (i.e. economic impact) are sufficient justification for use of the police power.

*** There are three possible scenarios for a state being classified as "uncertain:"

1) Aesthetics may be used as justification, but it is not certain whether aesthetics alone constitute sufficient grounds for use of the police power; or

2) All cases relating to the issue are so old that it is unclear if the State would uphold its expressed position; or

3) It is unclear if aesthetics can be used at all as a justification for use of the police power.
STATE-BY-STATE REVIEWS

ALABAMA

There is no case law addressing aesthetics from the state of Alabama. See Appendix B: Other Zoning-Related Cases.

ALASKA

The state of Alaska has not addressed the aesthetics issue in its case law. See Appendix B: Other Zoning-Related Cases.

ARIZONA

ABSTRACT

The Arizona state supreme court has never ruled on aesthetics regulations. Appellate courts, however, have split over the issue in the few decisions promulgated at that level. Other zoning decisions suggest that should the question arise, Arizona law would allow a ruling in favor of aesthetic-based regulations.

AUXILIARY CONSIDERATION OF AESTHETICS PERMITTED

The first case to address the use of police power to control aesthetic concerns was City of Scottsdale v. Arizona Sign Association, 115 Ariz. 233, 564 P.2d 922 (Ct. App. 1977). Decided upon other grounds, Scottsdale recognized that municipalities possessed the authority "to regulate matters of aesthetics and design through the zoning power." Id. 564 P.2d 922, 923. The precedents allowing such enactments were "particularly strong where, as here, the ordinance is expressly tied to the interests of the city in maintaining the economic and general well-being of the community." Id. at 923. Since the plaintiffs failed to demonstrate any harm, present or future, the court declined to rule on the sufficiency of the ordinance's standards.

Only one other case delves explicitly into the aesthetics issue: Corrigan v. City of Scottsdale, 149 Ariz. 553, 720 P.2d 528 (Ct. App. 1985), aff'd in part, vacated in part, 149 Ariz. 538, 720 P.2d 513, 55 U.S.L.W. 2051, 16 Envtl. L. Rep. (Envtl. L. Inst.) 20, 985, cert. denied, 479 U.S. 986, 107 S.Ct. 577, 93 L.Ed. 2d 580, (U.S. 1986). At the appellate level, Corrigan ruled that a public interest in aesthetics, alone, was insufficient to justify a harm to a private landowner. The court, however, failed to articulate either a clear policy decision based on precedent or an internally consistent test of the relationship to state interests.

1 The Supreme Court of Arizona also ruled on Corrigan, but the issues in the decision focused on the proper remedy due to the landowner since the court agreed with the court of appeals that the ordinance constituted a taking for which just compensation was due. Corrigan v. City of Scottsdale, 149 Ariz. 538, 720 P.2d 513 (1986).
Reviewing the trial court decision in Corrigan, the court of appeals noted that "the ordinance is reasonably related to public health, safety, morals, and general welfare," and listed a number of safety concerns which justified the enactment. Id. at 536. The opinion also recorded evidence produced at trial (which) revealed that the McDowell Mountains, which are Scottsdale’s only mountains, enhance property values in their natural state. Furthermore, development in the mountains could result in unsightly scarring. However, public interest in aesthetics, standing alone, is often too vague to offset substantial injury to a landowner in a rezoning case.

Id. (footnote omitted). In its footnote, the court cited Scottsdale as representing that "[a]esthetics are a proper consideration in determining the validity of a zoning ordinance, especially where aesthetics are auxiliary to more traditional public interests." Id. at 536. Scottsdale did not explicitly announce such a limitation however. The Corrigan court said that, even with the enumerated safety considerations, the trial court "did not find there would be a substantial threat to public safety without the ordinance. Obviously there often is and has been building in mountainous or hilly areas within the Valley of the Sun. Therefore the ordinance was not a valid exercise of police power." Id. at 536-37 (emphasis added). This sketchy logic contravenes the traditional ordinance test, which examines the reasonableness of the enactment’s relationship to public interests, by requiring a pre-existing problem. The case cites no authority for this change and no other opinions follow this version of the reasonableness test.

Moreover, the Corrigan court relied on, at best, persuasive authority—a law review note and case from Georgia—as justifications for applying a different test to the ordinance. The law review note asked whether a deplorable condition existed or was likely to occur under the existing zoning; the Corrigan bench found no evidence in support of a deplorable condition and therefore found an excuse to invalidate the zoning law. The Georgia case addressed the vagueness of a public interest in aesthetics; Corrigan never scrutinized this aspect of the zoning enactment. Though the case was appealed to the state supreme court, the aesthetics issue was untouched by the subsequent opinion. 2

DE FACTO USE OF AESTHETICS AS A BASIS FOR ZONING DECISIONS

Other decisions follow the usual tests to determine reasonableness but manage to sidestep the aesthetics issue, even if the de facto result is "pro-aesthetic." For example, in Arizona Public Service Co. v. Town of Paradise Valley, 125 Ariz. 447, 610 P.2d 449 (1980), the Supreme Court of Arizona upheld an ordinance requiring a utility to relocate its power lines underground. The municipal authority derived from a state statute which allowed cities to "regulate [the] location, height, bulk, number of stories and size of buildings and structures." Id. 610 P.2d 449, 451. The court noted further that

2 Overall, the Corrigan decision is not only incongruous with Scottsdale and other sister states’ law, but also ignores Arizona’s own zoning ordinance decisions. The central zoning validity case is City of Phoenix v. Beall, 22 Ariz. App. 141, 524 P.2d 1314 (Ct. App. 1974). The court upheld a presumption of validity for legislative enactments involving zoning, rebuttable by clearly showing the arbitrary and unreasonable nature of the ordinance and its unsubstantial relation to public health, safety, morals or general welfare. If the factors considered to ascertain reasonableness, the only limitation the court expressed was that an increase in land value resulting from a zoning change was not controlling on the issue of a denial’s propriety. The same appellate court further stated in City of Phoenix v. Collins, 22 Ariz. App. 145, 524 P.2d 1318 (Ct. App. 1974), that the court would examine the individual facts of each case to determine if the zoning ordinance, as applied, was reasonable and serving a "beneficial public purpose." Clearly, Corrigan’s test was a substantial deviation from the Arizona law.
[The height and location of utility poles is a common subject of planning and zoning statutes and ordinances. We find nothing in the Arizona statutes which exempts utility poles from the grant of authority to the towns to enact zoning laws. We believe this statute gives the Town the power to require the undergrounding of utility poles in the Town pursuant to statute.]

Id. at 452 (citation omitted).

While Arizona Public Service Co. found an express delegation of police power to municipalities, Bartolomeo v. Town of Paradise Valley, 129 Ariz. 409, 631 P.2d 564 (Ct. App. 1981) relied on the traditional reasonableness test articulated in Beall to uphold a zoning decision. The appellate court found evidence which supported the denial of a development permit, namely, the town's concerns regarding floodplains after completion of the proposed construction. Interestingly, however, the court also stated that the ordinance, which classified all land within the town as large-lot residential, was not unconstitutional; the enabling legislation from the state was interpreted to be "permissive," meaning that other possible zoning classifications were not required to be created by towns in toto.

On a final note, the courts have affected aesthetic-type regulations through sign ordinance cases: Levitz v. State, 126 Ariz. 203, 613 P.2d 1259 (1980), and Miller v. City of Tucson, 153 Ariz. 380, 736 P.2d 1192 (Ct. App. 1987). Levitz struck down a sign ordinance, but only because the enactment failed to meet the state statute's guidelines; the court did not attack the ability of the state or municipalities to regulate signage. In a similar situation, the Miller opinion dispensed with an alleged violation of the city's sign ordinance because the sign at issue technically did not fall within the law's prohibitions. Again, the court did not challenge the city's ability to regulate signs so much as it required procedural adherence to the ordinance's provisions.

These few cases from Arizona indicate the unresolved status of Arizona's position on aesthetics. With no definitive supreme court opinion on the topic, and conflicting appellate court decisions, a well-tailored and precisely-worded ordinance might succeed within the jurisdiction.

CASE LISTINGS AND REFERENCES

1974  
City of Phoenix v. Beall, 22 Ariz. App. 141, 524 P.2d 1314  
Citing:  
no aesthetics precedent

Citing:  
no aesthetics precedent

1977  
City of Scottsdale v. Arizona Sign Association, 115 Ariz. 233, 564 P.2d 922  
Citing:  
State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970)  
State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217  
(Wis. 1955)  
Reid v. Architectural Board of Review, 192 N.E.2d 74 (Ohio 1963)  
Old Farm Road, Inc. v. Town of New Castle, 259 N.E.2d 920 (N.Y. 1970)

Miller also questioned whether an A-frame style sign was so aesthetically displeasing that it could be prohibited on that basis alone. Probably the court missed the city's larger aim to rid the area of excess signage and visual clutter.
ARKANSAS

ABSTRACT

Arkansas clearly recognizes the government's ability to base statutes and ordinances on aesthetic considerations. While none of the state's decisions flatly prohibited such regulations, the supreme court hesitated to declare an articulate policy for many years. Their current pro-aesthetic position arguably applies to historic preservation ordinances. All of the reviewed decisions are from the highest state court.

AUXILIARY CONSIDERATION OF AESTHETICS

The earliest Arkansas case to directly address aesthetics is Bachman v. State, 235 Ark. 339, 359 S.W.2d 815 (1962). The Supreme Court of Arkansas held that a statute prohibiting

Two prior cases arguably would support aesthetics-based regulations: Berkau v. City of Little Rock, 174 Ark. 1145, 298 S.W. 514 (1927) recognized that cities may prevent "injury and annoyance" to its residents from "anything dangerous, offensive, or unhealthy." Id. 298 S.W. 514, 515 (emphasis added). Seiz v. City of Hot Springs, 194 Ark. 544, 108 S.W.2d 897 (1937) held that an ordinance providing that building permits could be refused if the structure was deemed to be "unsafe, unsanitary, obnoxious or detrimental to public welfare" was not invalid just because it reflected the exact language of the enabling statute. Id. 108 S.W.2d 897, 898-99 (emphasis added). Neither case addressed aesthetics since each was resolved on safety justifications.
automobile junkyards within a certain proximity to a highway, with no provision for screening such junkyards, was arbitrary and unreasonable since it bore no relation to the intended purpose of preventing unsightly views from the road. The justices considered that

a very sound argument could be made to show that an automobile graveyard, although located near a public highway, in no way affects the...general prosperity of the people. If that argument be accepted it must be concluded that only the esthetic [sic] senses of the traveling public would be offended or affected. There is respected authority that the police power is not broad enough to include only esthetic [sic] considerations...[which therefore would render this statute unconstitutional].

Id. 359 S.W.2d 815, 816. The court expressly declined to follow this reasoning because

the general trend of modern judicial thinking is to broadening [sic] the scope of the police power to include esthetic [sic] considerations, especially when connected with other considerations....In this modern age when our highway system is being expanded and improved, and when more attention is being given to their beautification for the attraction of tourists, we deem it wise not to close the door on the aforementioned tendency to broaden the scope of the state's police power.

Id. at 816-17 (emphasis added). The Bachman decision presented an important opportunity for the recognition of the validity of aesthetic-based regulations.

Even with the open, though non-committal, policy laid out by Bachman, the supreme court refused to decide the Board of Adjustment of Fayetteville v. Osage Oil & Transportation, Inc., 258 Ark. 91, 522 S.W.2d 836 (1975), appeal dismissed, cert. denied, 423 U.S. 941, 96 S.Ct. 350, 46 L.Ed. 2d 273 (U.S. 1975) case on the basis of aesthetics. The court held that the city possessed the necessary power to regulate signs, to make distinctions between on-site and off-site signs, and that the ordinance was presumed constitutional:

Such regulations have been upheld upon many grounds, including the promotion of traffic safety, the control of potentially hazardous structures, and the fundamental considerations of city planning and city beautification that underlie the zoning concept itself....Moreover, the particular distinction now before us, between on-site and off-site advertising signs, has almost invariably been held to be constitutional.

Id. 522 S.W.2d 836, 837 (citations omitted)(emphasis added). The high court, however, found no proof that the ordinance was unreasonable or arbitrary and on that ground sustained the enactment; the court below "rested its decision on esthetic [sic] considerations...That is not our basis for upholding the Fayetteville zoning restrictions." Id. at 839. By specifically recognizing the government's ability to promote "city beautification," but rejecting that reason in their holding, the supreme court did not advance the aesthetics doctrine beyond the open Bachman position.

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

The year after the Board of Adjustment decision, the court delivered an opinion which essentially accepted aesthetics as a valid objective for legislation. Yarbrough v. Arkansas State Highway Commission, 539 S.W.2d 419 (Ark. 1976) held that statutes under the State Highway Beautification Act did not create an unconstitutional taking nor abridge the equal protection clause:
The statutory scheme contemplated an exemption for those areas which were already heavily commercialized or industrialized and sought to prevent areas devoted mainly to agricultural activities or forestry land from becoming glutted by signs which would obstruct the view and detract from the beauty of the landscape...This classification to preserve pastoral scenery and eliminate disharmonious advertising has a substantial, fair and reasonable relation to the object of the legislation.

Id. at 423 (citation omitted). With this language, the court upheld the constitutionality of the statute, the basis of which was pointedly aesthetic. Additionally, in affirming that property ownership is always subject to reasonable regulation, the court cited authority which strongly intimated that aesthetic restrictions were acceptable. However, even as a progressive step in a pro-aesthetics trend, Yarbrough did not plainly state a definitive position.

The City of Fayetteville v. Mcllroy Bank & Trust Co., 278 Ark. 500, 647 S.W.2d 439 (1983) decision clearly announced that a comprehensive sign ordinance, enacted on the basis of aesthetics and providing an amortization period for non-conforming signs, was a valid exercise of a city's police power. The Arkansas high court said:

In view of the strong trend of the decisions in the various states during the past thirty years or more, it can hardly be doubted that an ordinance such as this one is valid....At one time the courts held pretty generally that zoning ordinances could not be sustained if they rested primarily or solely upon aesthetic considerations, but that point of view is disappearing. If the inhabitants of a city or town want to make the surroundings in which they live and work more beautiful or more attractive or more charming, there is nothing in the constitution forbidding the adoption of reasonable measures to attain that goal.

Id. 647 S.W.2d 439, 440 (citation omitted). Though the court finally declared aesthetic objectives to be valid, the decision seems to be expressly limited to the facts of this particular case. This limitation does not appear to affect the otherwise clear judicial position in favor of aesthetics which was reinforced by subsequent opinions.

AESTHETICS AND HISTORIC PRESERVATION

A fairly recent supreme court decision arguably sustains the use of aesthetic regulations in the promotion of historic preservation. Second Baptist Church v. Little Rock Historic District Commission, 293 Ark. 155, 732 S.W.2d 483 (1987) held that the Historic District Commission's refusal to grant a permit for a parking lot was a valid exercise of police power since the lot was at the edge of an historic district. On the basis of the preservation ordinance's language, the court believed that

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5 Note also that three justices dissented citing the Virginia case Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975) as evidence that not all jurisdictions accorded on aesthetic regulations as a proper use of the police power.

6 See, Donrey Communications Co. v. City of Fayetteville, 280 Ark. 760, 660 S.W.2d 900 (1983), cert. denied, 466 U.S. 959, 104 S.Ct. 2172, 80 L.Ed. 2d 555 (U.S. 1984), which upheld a restrictive billboard ordinance as pursuing a substantial government interest of promoting reasonable, orderly display of signs and preserving natural beauty, even as the ordinance affected "unsightly" commercial districts. Additionally, Donrey declared that, under the ordinance in question, amortization and removal of the signs did not constitute a taking in derogation of the Constitution.
an Historic District Commission may prohibit a particular use of property within a
district in order to develop an appropriate setting for historical buildings if that use is
obviously incongruous with the historic nature of the district. We believe that an
Historic District Commission is given authority to preserve the district.

Id. 293 Ark. 155, 161 (emphasis added). The unresolved issue in Second Baptist Church is
whether aesthetics are included as an element of an "appropriate setting." The proposed parking
lot clearly would create a visual impact on the historic district; is this what the court intended to
prevent? The opinion is unclear and no subsequent Arkansas case addresses these questions. At
the least, the state permits aesthetic-based zoning restrictions; the decisions might be construed to
extend that power in furtherance of preservation objectives.

CASE LISTINGS AND REFERENCES

1927 Berkau v. City of Little Rock, 174 Ark. 1145, 298 S.W. 514
Citing:
no aesthetics precedent

1937 Seiz v. City of Hot Springs, 194 Ark. 544, 108 S.W.2d 897
Citing:
Berkau, supra

1962 Bachman v. State, 235 Ark. 339, 359 S.W.2d 815
Citing:

1975 Board of Adjustment of Fayetteville v. Osage Oil & Transportation, Inc., 258 Ark.
91, 522 S.W.2d 836
Citing:
Seiz, supra
Berkau, supra
Cromwell v. Ferrier, 225 N.E.2d 749 (N.Y. 1967)
Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fia. 1960)

1976 Yarbrough v. Arkansas State Highway Commission, 539 S.W.2d 419
Citing:
Board of Adjustment, supra
(Mass. 1935)
Ghaster Properties, Inc. v. Preston, 200 N.E.2d 328 (Ohio 1964)
New York State Thruway v. Ashley Motor Court, Inc., 176 N.E.2d 566
(N.Y. 1961)
Village of Belle Terre v. Boraas, 416 U.S. 1 (1973)
Reed v. Reed, 444 U.S. 71 (1971)

1983 City of Fayetteville v. McIlroy Bank & Trust Co., 278 Ark. 500, 647 S.W.2d 439
Citing:
Lachapelle v. Town of Goffstown, 225 A.2d 624 (N.H. 1967)
The State of California originally recognized aesthetics issues only as auxiliary concerns of the general police power. As the modern trend toward accepting aesthetics-based enactments developed, California courts began to question this early view. Presently, aesthetics may properly justify an exercise of police power; the decisions strongly support such legislation in historically significant areas.

**Auxiliary Consideration of Aesthetics**

The Supreme Court of California initially permitted aesthetics to enter as an auxiliary consideration to zoning ordinances through its decision in *Varney & Green v. Williams*, 155 Cal. 318, 100 P. 867 (1909). Primarily, the court believed an ordinance had to be grounded in a traditional police power objective (health, safety, morals or welfare) because a pure aesthetics basis created constitutional violations:

Bearing in mind that the ordinance does not purport to have any relation to the protection of passers-by from injury by reason of unsafe structures, to the elimination of hazard of fire, or to the prevention of immoral displays, we find that the one ground upon which the town council may be thought to have acted is that the appearance of billboards is, or may be, offensive to the sight of persons of refined taste. That the promotion of aesthetic or artistic considerations is a proper objective of governmental care will probably not be disputed. But, so far as we are advised, it has never been held that these considerations alone will justify, as in [sic] exercise of police power, a radical restriction of the right of an owner of property to use his property in an ordinary and beneficial way. Such restriction is, if not a taking, pro tanto of the property, a damaging thereof.

*Id.* 100 P. 867, 868 (emphasis added). Thus the court struck down an ordinance that did not rely on morals or safety in prohibiting all off-site advertising signs. The *Varney & Green* decision allowed aesthetic issues to be addressed in zoning ordinances so long as a traditional relationship to health, safety, morals or welfare was met.

The same court handed down a decision in *Abbey Land & Improvement Co. v. San Mateo County*, 167 Cal. 434, 139 P. 1068 (1914) which narrowed further the permissible goals of police power enactments. Invalidating an ordinance which prohibited more than one crematory per township without board approval and a permit, the supreme court noted that such acts "could not
be upheld on the ground that they are not pleasant to the eye,...or that they make the vicinity less attractive for a dwelling place, or for business, and thereby lessen the value of adjoining lands." *Id.* 139 P. 1068, 1070. To constitute a proper exercise of police power, in view of *Varney & Green* and *Abbey Land*, municipalities could not seek to promote aesthetics nor protect land values without also justifying an enactment under traditionally accepted police power goals.

**THE TREND TOWARDS THE MODERN VIEW**

Though the precedent seemed to be clearly articulated, a 1930 opinion suggested that the *Varney & Green* position might be less stringent in its prohibition than originally perceived. *Brougher v. Board of Public Works of City and County of San Francisco*, 107 Cal. App. 15, 290 P. 140 (Dist. Ct. App. 1930) upheld an ordinance which restricted building heights to a certain level in districts without tall buildings as a reasonable restriction, even though an adjacent district had many tall buildings. First, the District Court of Appeal⁷ (intermediate level) recognized that the local government could properly regulate building heights:

> It seems well settled that a municipality may in proper cases regulate as to height of buildings both as to the municipality at large and to particular and limited districts; and it would seem to be nothing unreasonable or arbitrary or a variance with considerations looking to the securing of adequate supply of sunlight and to overcome obstruction against the diffusion of the same that a municipal regulation of maximum building height for a municipality within which is embraced territory diversified by many hills should be addressed to and bear some relation to the physical peculiarities of the local and specific areas...That such local physical condition may afford warrant for the operation of legislative discretion,...would seem manifest under the present status of law in regard to public welfare.

*Id.* 290 P. 140, 143 (emphasis added). The court’s language suggests that an ordinance should consider the quasi-aesthetic aspects (physical surroundings) of its area of impact.

Next, the appellate court rejected the plaintiff’s claim that the ordinance was grounded on aesthetics alone:

> In our opinion there is no merit in appellants' further assertion that the ordinance was enacted solely for aesthetic purposes. On the contrary, the record shows that it was passed for safety, public convenience, comfort, general welfare, prevention of and spread of fire, for the conservation of sunlight and air, the prevention of congestion of streets due to overcrowding, as well as for aesthetic purposes.

*Id.* at 144 (emphasis added). Arguably, many of the justifications that the court enumerated point out the ordinance’s emphasis on aesthetics. But the appellate court also connected the ordinance to traditional safety concerns, noting that "[s]uch legislation will be sustained if on any ground it appears to be within the scope of police power and not an infringement of constitutional or statutory limitations." *Id.* at 145 (emphasis added). Though still following the *Varney & Green* holding, the court appeared more receptive to the aesthetic concerns of municipal zoning ordinances.

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⁷ The intermediate appellate court of California was originally named the "District Court of Appeal;" later, the name was changed to "Court of Appeal." They represent the same level of appeal.
Thirty years after Brougher, the District Court of Appeal still recognized Varney & Green as the representation of California’s policy on aesthetics-based ordinances. In City of Santa Barbara v. Modern Neon Sign Co., 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (Dist. Ct. App. 1961) the court struck down an ordinance which prohibited moving signs, but permitted flashing signs, for the resulting constitutional violations. The decision relied on Varney & Green to hold that "[i]n its present state the law of this jurisdiction is that aesthetic considerations alone cannot sustain a statute or ordinance which impinges substantially upon private property rights." Id. 11 Cal. Rptr. 57, 62 (emphasis added). The court’s language superimposed a "substantial impingement" condition on the test of ordinances that did not appear in the cases precedent. Since the court also acknowledged the trend permitting aesthetic-based regulations, perhaps the decision contained expansive intentions by its authors. Consider the court’s closing distinction on the issue:

"It is to be borne in mind that the present problem is the right of the municipality to effect upon aesthetic grounds alone the destruction or impairment of existing property rights. What it may do with respect to signs to be built in the future is an entirely different question."

Id. (emphasis added). Because Santa Barbara otherwise followed the traditional view of Varney & Green, any substantial change on the aesthetics issue would come from other cases.

Another case from the 1960s, National Advertising Co. v. County of Monterey, 27 Cal. Rptr. 136 (1963), advanced the likelihood of California accepting aesthetics-based ordinances in later years. Recognizing that the police power "is elastic, and capable of expansion to meet existing conditions of modern life," the appellate court upheld an ordinance prohibiting the construction of off-site billboards in unclassified zones and its five year amortization period for the removal of such signs in classified zones. Id. at 137. The court admitted that the governing body may "have felt that billboards are considered unattractive by tourists generally, and that thus their unrestricted proliferation would adversely affect the substantial tourist industry of Monterey County." Id. at 138. The language of the opinion implies that a different reading than usual of the "based on aesthetics" idea would justify enactments relying on such considerations:

"We recognize that aesthetic [sic] considerations alone cannot justify a zoning regulation although departure from that view has been suggested. Here, however, the supervisors are not asserting their own view of what is attractive or artistic, but rather are concerned with the economic question of what will repel or attract customers of a substantial business of the county."

Id. (citations omitted)(emphasis added). The court neatly sidestepped the key aesthetics question by fashioning the zoning board’s considerations around the economic aspects of aesthetics-based regulations. Moreover, the court then distinguished Varney & Green from the National Advertising situation, though they previously cited the 1909 case as authority to strike down enactments built on an aesthetics-only base. Whether or not the court itself was confused, the National Advertising decision marked an increasingly liberal tendency in the California courts to shake the traditional view holding against aesthetics.

The decisions of this era also reflect the abandonment of the Abbey Land prohibition against zoning ordinances enacted to protect property values. Besides a reference to the concern in National Advertising, the Court of Appeal upheld inter alia an ordinance aimed at protecting land values by requiring permits for certain uses as a constitutionally valid enactment. Melton v. City of San Pablo, 252 Cal. App. 2d 794, 61 Cal. Rptr. 29 (Ct. App. 1967). In this case, the court affirmed that a city could enact regulations over the use of land for the traditional purposes and aesthetic considerations "when they bear in a substantial way on land utilization." Id. 61 Cal. Rptr. 29, 34. With this language, the court essentially, though not expressly, overruled the Abbey Land holding. But the court upheld the ordinance’s reasonableness with a formula derived directly from Varney & Green: safety and aesthetic goals together.

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With relatively sluggish progress in the direction of permitting aesthetics-based regulations, evidenced by the Santa Barbara, National Advertising, and Melton cases of the 1960s, the appellate decision in Bohannan v. City of San Diego, 30 Cal. App. 2d 416, 106 Cal. Rptr. 333 (Ct. App. 1973) is almost an anomaly. Here the court upheld the constitutionality of an ordinance requiring the use of architectural and sign styles "in accord" with a nearby historic district. Bohannan is apparently the first decision to suggest that the general welfare purpose would sustain an ordinance that, in all frankness, is based on aesthetics. The appellate court, however, connected the enactment to other general welfare concerns:

The police power extends to measures designed to promote the public convenience and the general prosperity. The trial court found the "purpose of the ordinance as shown by the evidence falls within the meaning of 'general welfare' of the public."...Preservation of the image of Old Town as it existed prior to 1871, as reflected in the historical buildings in the area, as visual story of the beginning of San Diego and as an educational exhibit of the birth place of California, contributes to the general welfare; gives the general public attendant educational and cultural advantages; and by its encouragement of tourism is of general economic value. The purpose of the ordinance clearly is within an exercise of the police power.

Id. 106 Cal. Rptr. 333, 336-37 (citations omitted). As the first case connecting aesthetics and historic preservation in California, the Bohannan decision gives significant justifications for requirements affecting buildings in the neighborhood of historic sites. The decision also represents a pre-Metromedia departure from the Varney & Green position, even though the courts were not yet willing to accept the idea across the board.9

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW: METROMEDIA

When the Supreme Court of California ruled on Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510, 14 Env't Rep. Cas. (BNA) 1865, 10 Envtl. L. Rep. (Envtl. L. Inst.) 20,862 (1980)10 the first time, the Varney & Green holding was overruled:

Constrained by this precedent, subsequent California Court of Appeal decisions have stated that aesthetic considerations cannot justify an ordinance prohibiting billboards. Only one decision, however, has actually invalidated a city ordinance on this ground City of Santa Barbara v. Modern Neon Sign Co.,...In all other cases the courts have found some additional ground for the ordinance, such as the elimination of driving hazards or promotion of tourist traffic. Relying on such additional grounds, the cases concluded that the ordinance did not become unconstitutional merely because aesthetic considerations may have played some part in motivating its enactment. Thus we could distinguish the present case from Varney & Green...on the ground that the present ordinance was not enacted exclusively for aesthetic purposes. We

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9 See also, People ex rel. Department of Public Works v. Golden Rule Church Association, 49 Cal. App. 3d 773, 122 Cal. Rptr. 596 (Ct. App. 1975) (aesthetic considerations were sufficient to justify the state's removal of non-conforming billboards and signs as nuisances).

10 The full, proper citation for Metromedia appears in "Cases Under Review," Appendix A.
believe, however, that the holding of Varney & Green v. Williams, that aesthetic purposes alone cannot justify assertion of the police power to ban billboards, is unworkable, discordant with modern thought as to the scope of the police power, and therefore compels forthright repudiation.

Id. 610 P.2d 407, 412-13 (citations omitted) (footnote omitted) (emphasis added). The court articulated several justifications for overruling Varney & Green beyond the express recognition of the modern trend on the aesthetics issue and held inter alia that the ordinance which required removal of billboards visible from roads, and its amortization period, was reasonably related to proper police power objectives.

The high court's decision in Metromedia was appealed to the United States Supreme Court which overturned the California ruling. [prob. juris, noted. 449 U.S. 897, 101 S.Ct. 265, 66 L.Ed. 2d 127 (U.S. 1980), rev'd. 453 U.S. 490, 101 S.Ct. 2882, 16 Env't Rep. Cas (BNA) 1057, 69 L.Ed. 2d 800, 11 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,600 (U.S. 1981)]. Through its plurality opinion, the Supreme Court found that the ordinance violated the first amendment of the constitution insofar as it banned noncommercial speech by prohibiting billboards. Four justices of the Court, however, recognized that the improved traffic safety and visual appearance of the city were "substantial" governmental objectives and that the ordinance was directly related to accomplishing those goals. Metromedia was then remanded to the Supreme Court of California for proceedings to determine if the constitutionality could be saved with special statutory construction by the court.

The decision on remand [on remand. 32 Cal. 3d 180, 649 P.2d 902, 185 Cal. Rptr. 260 (1982)] followed the United States Supreme Court in sustaining the First Amendment violation. Neither proceeding, at the United State Supreme court level and on remand, objected to the ordinance on the basis of the consideration given to aesthetics. Arguably, the initial overruling of Varney & Green was still valid; subsequent cases would maintain such a position.11

BEYOND METROMEDIA

Novi v. City of Pacifica, 169 Cal. App. 3d 678, 215 Cal. Rptr. 439 (Ct. App. 1985) was the first case after the United States Supreme Court Metromedia decision to address the aesthetics issue. The Novi court upheld the ordinance calling for "variety in design...to avoid monotony" as a constitutionally sufficient standard that did not require further definitional criteria. To the plaintiff's argument to the contrary, "and that such criteria are required for aesthetic land use regulations by Metromedia," the court observed that none of the Metromedia decisions made such a requirement; instead, "aesthetic regulation is permissible if it is reasonably related to the public safety and welfare." Id. 215 Cal. Rptr. 439, 441. The court of appeal in the Novi decision, however, pointedly did not assert that aesthetics alone would sustain an ordinance.

In a different division of the same district of the court of appeal, the judges openly interpreted the Metromedia line of cases to permit aesthetics-based zoning enactments. City of Salinas v. Ryan Outdoor Advertising, Inc., 189 Cal. App. 3d 416, 234 Cal. Rptr. 619 (Ct. App. 1987) upheld the constitutionality of a city ordinance regulating on-site signs. Sections I. and IV.

11 In the middle of the Metromedia battle, an Appellate Department of Superior Court (county appellate level) decision came out in favor of aesthetics-based ordinances. People v. Tolman, 110 Cal. App. 3d Supp. 6, 168 Cal. Rptr. 328 (App. Dep't Super. Ct. 1980) upheld an ordinance prohibiting certain commercial vehicles in residential areas as a constitutional exercise of police power since the regulation of aesthetics was adequately related to the general welfare. The court said, "It appears to us that the ordinance bears an adequate relation to the general welfare by being considered as a regulation of the aesthetic appearance of residential neighborhoods. Although aesthetic considerations were formerly somewhat suspect as a base for such an ordinance, Metromedia now sanctions such a consideration," Id. 168 Cal. Rptr. 328, 329.
of the opinion explain the substantive interpretation given to the Metromedia decisions. The appellate court found that Metromedia upheld restrictions on commercial signs, but did not discuss or criticize the California Supreme Court’s resolution of the other questions raised. "We therefore conclude that the reasoning of the court in Metromedia (Cal.) I and its statement of the law on other issues is still correct." Id. 234 Cal. Rptr. 619, 623 (emphasis added). The Salinas opinion therefore returned California to the pro-aesthetics position it had reached with the first state supreme court ruling in Metromedia.

The same year, two decisions came from other districts of the court of appeal which implicitly supported the Salinas holding. First, in City of San Francisco v. Eller Outdoor Advertising, 192 Cal. App. 3d 643, 237 Cal. Rptr. 815 (Ct. App. 1987), the court stated that an ordinance prohibiting all off-site signs in "cultural, historic, or scenic" areas was a legitimate exercise of the police power:

San Francisco’s indisputable interests in reducing traffic hazards and beautifying a vital area of the City clearly justify a content-neutral ban on off-site signs and billboards. Furthermore, because the prohibition is restricted to only certain sections of town deemed to be of special cultural, historic or scenic importance, the City’s interests clearly outweigh any incidental infringement on First Amendment rights.

Id. 237 Cal. Rptr. 815, 824-25. The court relied heavily on Metromedia at the first state supreme court level. Though the opinion’s language does not at first seem to reflect an acknowledgement of aesthetics-based ordinances, the challenged ordinance in San Francisco was enacted to serve very clear aesthetic purposes.

The second case that followed the Salinas lead was Ross v. City of Rolling Hills Estates, 192 Cal. App. 3d 370, 238 Cal. Rptr. 561 (Ct. App. 1987). Though the opinion made scant references to aesthetics, the ordinance sustained by the court protected views of the city’s hillsides; the court found it to be sufficiently clear to pass constitutionality tests. The support of such an ordinance, which regulated the placement of new construction when it interfered with a protected view, attests to the pro-aesthetic position that finally caught hold in California. The treatment by the courts of the challenges following Metromedia have established the use of aesthetics as a valid motivation for zoning ordinances. A conclusion that historic preservation ordinances grounded in aesthetics will be upheld by the California courts is not unreasonable.

CASE LISTINGS AND REFERENCES

1909 Varney & Green v. Williams, 155 Cal. 318, 100 P. 867
Citing: no aesthetics authority

1914 Abbey Land & Investment Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068
Citing: Monk v. Packard, 71 Me. 309 (1880)
Barnes v. Halhorn, 54 Me. 124 (1866)
New Orleans v. Wardens, 11 La. Ann. 244 (1856)
Clark v. Lawrence, 59 N.C. 83 (1866)
Lake View v. Rose Hill Cemetery, 70 Ill. 191 (1873)
Westcott v. Middleton, 11 A. 490 (N.J. Eq. 1887)
Varney & Green, supra
1930  
**Brougher v. Board of Public Works of City and County of San Francisco**, 107 Cal. App. 15, 290 P. 140

Citing:  
Atkinson v. Piper, 195 N.W. 544 (Wis. 1923)

1961  
**City of Santa Barbara v. Modern Neon Sign Co.**, 189 Cal. App. 2d 188, 11 Cal. Rptr. 57

Citing:  
Varney & Green, supra  
Abbey Land, supra  

1963  
**National Advertising Co. v. County of Monterey**, 27 Cal. Rptr. 136

Citing:  
Consolidated Rock Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638 (1962)  
Varney & Green, supra  
Kelbro, Inc. v. Myrick, 30 A.2d 527 (Vt. 1943)  
Rockingham Hotel Co. v. North Hampton, 146 A.2d 253 (N.H. 1958)  
Criterion Service, Inc. v. City of East Cleveland, 88 N.E.2d 300 (Ohio Ct. App. 1949)  
Murphy v. Town of Westport, 40 A.2d 177 (Conn. 1944)

1967  
**Melton v. City of San Pablo**, 252 Cal. App. 2d 794, 61 Cal. Rptr. 29

Citing:  
County of Santa Barbara v. Purcell, (later overruled)  

1973  
**Bohannan v. City of San Diego**, 30 Cal. App. 2d 416, 106 Cal. Rptr. 333

Citing:  
Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 55 P.2d 177 (1936)  
Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925)  
Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1945)  
Nebbia v. People of State of New York, 291 U.S. 502 (1933)  
Consolidated Rock, supra  
Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949)  
Desert Outdr. Adv., Inc. v. Co. of San Bernadino, 63 Cal. Rptr. 543 (1967)  
Santa Barbara/Purcell, supra  
Metromedia/Pasadena, supra
1975 People ex rel. Department of Public Works v. Golden Rule Church Ass'n, 49 Cal. App. 3d 773, 122 Cal Rptr. 596
Citing: Varney & Green, supra
Santa Barbara/Modern Neon, supra

1980 Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510
Citing: Metromedia/Pasadena, supra
Berman, supra
People v. Stover, 191 N.E.2d 272 (N.Y. 1963)
Oregon City v. Hartke, 400 P.2d 255 (Or. 1965)

People v. Tolman, 110 Cal. App. 3d Supp. 6, 168 Cal Rptr. 328
Citing: Metromedia/San Diego, supra

Citing: Metromedia/San Diego, supra
Melton, supra

Citing: Metromedia/San Diego, supra

Citing: Metromedia/San Diego, supra
Bohannan, supra
Suffolk Outdoor Adv., supra

Ross v. City of Rolling Hills Estates, 192 Cal. App. 3d 370, 238 Cal. Rptr. 561
Citing: no aesthetics authority
ABSTRACT

Colorado apparently never made flat prohibitions against the consideration of aesthetics in the exercise of police power; initially, aesthetic concerns were proper auxiliary purposes when municipalities enacted ordinances. Later, the Supreme Court of Colorado permitted ordinances to be motivated solely on the basis of aesthetics, since the court considered it to be an aspect of general welfare.

AUXILIARY CONSIDERATION OF AESTHETICS

The supreme court's decision of 1910 in Curran Bill Posting & Distributing Co. v. City of Denver, 47 Colo. 221, 107 P. 261 (1910) relied on authority from several other jurisdictions to strike down a sign ordinance that prohibited billboards within ten feet of all buildings. According to the court, the ordinance had no basis in any of the traditional police power purposes of health, safety, morals, or public welfare and therefore was not a necessary regulation. The decision, however, stopped short of ruling that aesthetics constituted a wholly improper consideration by the city; instead, the court noted cases holding that aesthetics might function as secondary motivations for the exercise of police power and thereby provided an early foundation for the pro-aesthetic position in Colorado.

THE TREND TOWARDS THE MODERN VIEW

In 1978, the court regarded aesthetics as an element of the general welfare in its decision on Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835, 8 Envtl. L. Rep. (Envtl. L. Inst.) 20,391, appeal dismissed, 439 U.S. 809, 99 S.Ct. 66, 58 L.Ed. 2d 101 (U.S. 1978). Holding inter alia that an ordinance prohibiting signs which extended three feet or more over public property was a valid exercise of the police power, Veterans recognized multiple proper motivations for the regulation:

In addition to the promotion of public safety, the city's sign code was also adopted to promote aesthetic values in the interest of the general welfare. Efforts by cities and towns to enact reasonable regulations designed to preserve and improve their physical environment have long been upheld by courts as being within the legitimate scope of a municipality's police power. Zoning to preserve the city's natural amenities and desirable characteristics is even an asserted purpose of the city's zoning ordinance of which the sign code is a part. A pleasant and orderly environment is especially important to a resort and vacation oriented community such as Steamboat Springs.

Id. 575 P.2d 835, 840 (citations omitted)(emphasis added). The court also found that the ordinance was reasonably related to reaching the goals asserted.12 Notably, the Veterans court did not connect aesthetics with the safety justification, but rather affirmed that aesthetics constituted an element of the general welfare which would sustain exercises of the police power.

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12 The supreme court also upheld the classification made by the city on the permissible distance a sign could protrude over public property. That determination was "one properly within the reasonable exercise of the municipality's police power. Aesthetic considerations also justify this regulation." Id. at 843.
ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

The following year, the City of Leadville v. Rood, 198 Colo. 328, 600 P.2d 62 (1979) case expanded the role of aesthetics in municipal ordinances. Recognizing the city’s ability to enact setback regulations to enhance the aesthetic value of the area, the supreme court’s opinion set the outer bounds of aesthetically motivated ordinances.

[The city of] Leadville created an exception to the general rule [of setback distances] by allowing new buildings to be created in line with existing buildings. This exception was well founded in reason and was a valid exercise of the police power. It ensured that the town would achieve the maximum aesthetic benefit without arbitrarily burdening any particular property owners.

Id. 600 P.2d 62, 64 (emphasis added). This language arguably establishes great latitude for municipalities in pursuing aesthetic goals, so long as the regulations otherwise conform to the usual constitutional requirements.

In the same expansive vein as Leadville, the supreme court decision in Landmark Land Co., v. City of Denver, 728 P.2d 1281, 17 Envtl. L. Rept. (Envtl. L. Inst.) 20,640 (Colo. 1986), appeal dismissed sub nom., Harsh Investment Corp. v. City of Denver, 483 U.S. 1001, 107 S.Ct. 3222, 97 L.Ed. 2d 729 (U.S. 1987) upheld an amendment to an ordinance protecting the mountain view. The amendment, according to the court, was rationally related to the legitimate public purpose of protecting aesthetics. Moreover, the court stated,

[once it is settled that protection of aesthetics is a legitimate function...the city is free to choose the method of implementing that goal, within the constitutional parameter that the enactment is not arbitrary or capricious...The fact that the same goal might have been accomplished through other means does not alter this conclusion nor invalidate the restrictions.

Id. 728 P.2d 1281, 1286-87. This language frees municipalities from the constraint of pursuing aesthetic regulations in any particular manner, so long as they follow the usual procedure set out in their own regulations. This case, and the others since Veterans, clearly established a permissive pro-aesthetics position on the exercise of police power in Colorado; it is likely that historic preservation ordinances which address aesthetics will survive judicial scrutiny.

CASE LISTINGS AND REFERENCES

1910 Curran Bill Posting & Distributing Co. v. City of Denver, 47 Colo. 221, 107 P. 261 Citing:

State v. Whitlock, 63 S.E.123 (N.C. 1908)
Varney & Greene v. Williams, 100 P. 867 (Cal. 1909)

13 The court also held that the exceptions made by the ordinance for existing buildings within the mountain view represented "a legislative determination that the view is now acceptable, but is not to be further derogated." Landmark Land., at 1285, citing, Board of County Commissioners v. Echternacht, 194 Colo. 311, 572 P.2d 143 (1977).
1978  **Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs**, 195 Colo. 44, 575 P.2d 835

Citing:
- Oregon City v. Hartke, 400 P.2d 255 (Ore. 1965)
- Donnelly Adv. Corp. of Maryland v. City of Baltimore, 370 A.2d 1127 (Md. 1977)
- Packer Corp. v. Utah, 285 U.S. 105 (1932)
- Oscar P. Gustafson Co. v. City of Minneapolis, 42 N.W.2d 809 (Minn. 1950)
- State v. Wightman, 61 A. 56 (1905)

1979  **City of Leadville v. Rood**, 198 Colo. 328, 600 P.2d 62

Citing:
- Flynn v. Treadwell, 207 P.2d 967 (Colo. 1949)

1986  **Landmark Land Co. v. City of Denver**, 728 P.2d 1281

Citing:
- Berman, supra
- Mosgrove v. Town of Federal Heights, 543 P.2d 715 (Colo. 1975)
- Polygon Corp. v. City of Seattle, 578 P.2d 1309 (Wash. 1978)
- Piper v. Meredith, 266 A.2d 103 (N.H. 1970)
- Brougher v. Bd. of Public Works, 290 P. 140 (Cal. 1930)

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**CONNECTICUT**

**ABSTRACT**

The state of Connecticut’s early case law recognized aesthetics as a proper auxiliary consideration of zoning ordinances. The highest court of the state, the Supreme Court of Errors of Connecticut, repeatedly has declined to determine whether or not aesthetics alone will sustain an exercise of the police power. One case, however, hints that the promotion of aesthetic interests and the preservation of historic properties are proper motivations of land use regulations.

**AUXILIARY CONSIDERATION OF AESTHETICS PERMITTED**

Connecticut’s first case to touch upon the issue was **Town of Windsor v. Whitney**, 98 Conn. 357, 111 A. 354 (1920). Answering only one question--whether the statute at issue which established standard street widths and setback lines created a taking of property--the court used
affirmative language to the effect that, at the least, aesthetics were a necessary consideration under the traditional police power concerns of morals and welfare.

Such a plan [as the one before the court] is wise provision for the future. It betters the health and safety of the community; it betters the transportation facilities; and it adds to the appearance and wholesomeness of the place, and as a consequence it reacts upon the morals and spiritual power of the people who live under such surroundings....Our large communities all have their examples of the unregulated layout of streets and building lines and buildings; of instances of land development so as to yield the last penny to its promoters regardless of the public welfare; of community eyesores; of streets made over, whole sections changed because at the beginning no reasonable provision was made for the safety, health, or welfare of the community.

Id. 111 A. 354, 355 (emphasis added). The lengthy but well-worded opinion contains other insights on the need for zoning legislation.

With regard to the aesthetics issue, the court did not articulate a conclusion. The court noted the prior rule which "announced undoubted[ly] that restrictions could not be impossible [sic] upon a private property solely for aesthetic considerations" but recognized that "it has been said by high authority that aesthetic considerations may be regarded in connection with recognized police power considerations." Id. at 357. Citing the United States Supreme Court opinion in Welch v. Swasey, the court acknowledged that the matter was not "conclusively settled." Id. Likewise, the Windsor opinion left Connecticut without a settled position on the issue.

THE TREND TOWARDS THE MODERN VIEW

A little over a decade later, the supreme court advocated a set position on aesthetics-motivated regulations in State v. Kievman, 116 Conn. 458, 165 A. 601 (1933). Upholding an ordinance which required the licensing of automobile junkyards and considered the surrounding neighborhood to determine whether or not to issue the license, the Kievman court clearly stated that aesthetics may be joined with the traditional police power goals: "the fact that considerations of an aesthetic nature also enter into the reasons for the regulation will not render it invalid." Id. at 601, 604. Because "[t]he situation presented does not require us to decide" the issue, the court declined to rule on whether aesthetic considerations alone were sufficient to justify zoning ordinances.

Similarly, in Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944), the Supreme Court of Errors recognized the ability of municipalities to give auxiliary consideration to aesthetics, but sidestepped an opportunity to support aesthetics-based regulations. The ordinance before the court distinguished between on- and off-site advertising signs. The high court opened its analysis with a history of prior aesthetics rules and stated that

[Indeed, as is pointed out in some of these decisions, such aesthetic [sic] considerations as are involved in the regulation or prohibition of signboards cannot be divorced from material and economic factors; the presence of signboards near property may definitely affect its value and the comfort of those who may be living upon it...Whether or not aesthetic [sic] considerations in themselves would support the exercise of the police power, there can be no question that, if a regulation finds a reasonable justification in serving a generally recognized ground for the exercise of that power, the fact that aesthetic [sic] considerations play a part in its adoption does not affect its validity.]
Additionally, the court provided a potential springboard for expansion of the policy by declaring that "[t]he police power is not to be confined narrowly within the field of public health, safety or morality....The purposes of zoning as they are generally recognized go far beyond the protection of public health, safety or morality;...it [the police power] cannot remain static but must change with the changing needs of the times." Id. at 180 (emphasis added). Still, the court decided Murphy on evidentiary grounds and did not resolve the aesthetics-only question beyond the holdings of Windsor and Kievman.

Eventually, in 1951, the supreme court stated a clear position on the aesthetics-alone issue. Gionfriddo v. Town of Windsor, 137 Conn. 701, 81 A.2d 266 (1951) held against an ordinance which banned the placement of new or used cars for sale on lots in any zone that was based, in the court's view, primarily on aesthetics.

The ordinance in question prohibited the display for sale of even one new car on the lot. It is not apparent how such an act could affect property values or the health, safety, morals or even the aesthetic [sic] sensibilities of the people of Windsor. If the last statement is questioned, the answer is that in Connecticut aesthetic [sic] considerations alone are insufficient to support the invocation of the police power.

Id. 81 A.2d 266, 268. Though the ordinance presented serious constitutional problems relating to the conduct of lawful businesses, the court relied upon Murphy as authority to assert a position against purely aesthetic justifications for zoning; it is not clear that Murphy actually articulated a strong enough position to substantiate the Gionfriddo language.

Contrary to Gionfriddo, De Maria v. Enfield Planning and Zoning Commission, 159 Conn. 534, 271 A.2d 105 (1970) represented a more permissive attitude on the court's part towards aesthetic-based enactments. The case was decided on procedural grounds but reviewed the propriety of the commission's aesthetic motivations for denying a permit to construct garden apartments. The court did not discount the possibility of such decisions relying on aesthetic justifications, stating that "sufficiently defined aesthetic standards may properly influence the decision of a zoning commission." Id. 271 A.2d 105, 108. But the court included the caveat that a decision under these circumstances must be supported by adequate evidence because "vague and undefined aesthetic considerations alone are insufficient to support the invocation of the police power;" the commission in De Maria fit into this situation according to the court. Id. Even so, the language in this case affirmatively suggests that the court might sustain more specific and certain aesthetic-motivated zoning decisions.

AESTHETICS AND HISTORIC PRESERVATION

One case addressed aesthetics and historic preservation together: Figarskv v. Historic District Commission of the City of Norwich, 171 Conn. 198, 368 A.2d 163, 6 Envtl. L. Rep. (Envtl. L. Inst.) 20,654 (1976). The court found that the historic preservation commission's denial of a demolition permit to the plaintiff did not cause the historic preservation ordinance to work unconstitutionally towards him. Looking to Connecticut's enabling legislation and the decisions in other jurisdictions, the court noted that "it has been held that the preservation of a historical area or landmark as it was in the past falls within the meaning of general welfare and, consequently, the police power....[This] we cannot deny." Id. 368 A.2d 163, 170. The plaintiff challenged the ordinance's standards under the Gionfriddo and De Maria "'vague aesthetic legislation'" arguments;

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14In fact, the court affirmed that a "regulation of billboards which is part and parcel of such a [comprehensive] plan may be found to stand upon a somewhat different ground than one [ordinance] which deals with them [billboards] alone." Id. at 181.
the court rejected the vagueness allegation since the ordinance incorporated by reference the state statute's (sufficient) standards. Nor did

"aesthetic considerations alone" provide the basis for the ordinance. Furthermore, as long ago as Windsor v. Whitney we commented that the question of the relationship between aesthetics and the police power was not a settled question. In State v. Kievman, we stated that a land use regulation was not invalid simply because it was based in part on aesthetic considerations. And in Murphy, Inc. v. Westport we indicated that aesthetic considerations may have a definite relation to the public welfare. Although we need not directly decide the issue in the present case, we note that other jurisdictions have recognized that "aesthetic considerations alone may warrant an exercise of the police power."

Id. at 170-71 (citations omitted). The court pointedly opened the possibility of a pro-aesthetics decision which, apparently, has not yet happened. While the trend of other jurisdictions would aid a shift in Connecticut's position on the issue, the case law within the state is less than certain support for such a case.16

CASE LISTINGS AND REFERENCES

1920 Town of Windsor v. Whitney, 95 Conn. 357, 111 A. 354
Citing:
Welch v. Swasey, 214 U.S. 91 (1909)
W. Cusack Co. v. City of Chicago, 242 U.S. 526 (1917)

1933 State v. Kievman, 116 Conn. 458, 165 A. 601
Citing:
Windsor, supra
Welch, supra

1944 Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177
Citing:
Kievman, supra
St. Louis Poster Adv. Co. v. City of St. Louis, 249 U.S. 269 (1919)
Chicago Park District v. Canfield, 19 N.E.2d 376 (Ill. 1943)
Perlmutter v. Greeng, 182 N.E. 6 (N.Y. 1932)
Noble State Bank v. Haskell, 219 U.S. 104 (1910)
Matter of Wulfson v. Burden, 150 N.E. 120 (N.Y. 1925)
State ex rel. Carter v. Harper, 196 N.W. 541 (Wis. 1923)
State v. Hillman, 110 Conn. 92, 147 A. 294 (1929)

16 Curry v. Planning and Zoning Commission of the Town of Guilford, 34 Conn. Supp. 52, 376 A.2d 79 (C.P. 1977) is the closest affirmation of aesthetically motivated ordinances found. In sustaining the "open space" amendment to the town's comprehensive zoning plan, the court cited a law review article--Hagman, "Open Space Planning and Property Taxation--Some Suggestions," 1964 Wis. L. Rev. 628—to the effect that "[o]pen areas should be preserved for a variety of purposes, economic and otherwise--some only vaguely articulated thus far....to preserve nature and natural amenities; to relieve urban congestion and create more cohesive suburban communities;...[and] to preserve sites of historic or scientific importance." Id. 376 A.2d 79, 82.
Vill. of Euclid v. Ambler Realty, 272 U.S. 365 (1926)
Ware v. City of Wichita, 214 P. 99 (Kan. 1923)
Windsor, supra
Welch, supra
Cusack Co., supra
Appeal of Liggett, 139 A. 619 (Pa. 1927)

1951
Gionfriddo v. Town of Windsor, 137 Conn. 701, 81 A.2d 266
Citing:
Murphy, supra

1970
De Maria v. Enfield Planning and Zoning Comm’n, 159 Conn. 534, 271 A.2d 105
Citing:
Gionfriddo, supra
Murphy, supra

1976
Figarsky v. Historic District Comm’n of City of Norwich, 171 Conn. 198, 368 A.2d 163
Citing:
Opinion of the Justices, 128 N.E.2d 557 (Mass. 1955)
Maher v. New Orleans, 516 F.2d 1051 (5th Cir. 1974)
Annapolis v. Anne Arundel County, 316 A.2d 807 (Md. 1974)
Lutheran Church in America v. City of New York, 316 N.E.2d 305 (N.Y. 1974)
Windsor, supra
Murphy, supra
People v. Stover, 191 N.E.2d 272 (N.Y. 1963)

1977
Curry v. Planning and Zoning Comm’n of the Town of Guilford, 34 Conn. Supp. 52, 376 A.2d 79
Citing:
Berman, supra

DELAWARE

ABSTRACT

The Delaware Supreme Court has not expressly declared whether or not the police power may be used to enact aesthetic-based regulations. The intermediate court, the Court of Chancery, has maintained that aesthetics may not serve as the basis for zoning ordinances. Only one Superior Court (trial level) decision upheld an "extended meaning of police power" which, under the facts of the case, included the regulation of aesthetic concerns in a community.
EARLY DECISIONS ON AESTHETIC CONCERNS

Apparently the Delaware courts have never precluded entirely the consideration of aesthetic issues in the exercise of police power—no decisions announcing such a policy exist. The earliest case bearing upon the question, Bayard v. Bancroft, 62 A. 6 (Del. Ch. 1905), glossed over aesthetics since the plaintiff failed to establish that he alone suffered harm and therefore had standing to sue. The Court of Chancery (intermediate level) implied that if the landowner had alleged property depreciation successfully, the aesthetic harms he claimed would have been sustained. Since he did not assert the property value loss, the owner could not enjoin a use on neighboring land on the basis of aesthetic concerns relating to the unsightliness of such use. The Bayard case suggests that aesthetic damages, in conjunction with other issues, are sustainable.

AUXILIARY CONSIDERATION OF AESTHETICS

The policy underlying Bayard was fully explored in the zoning case of Mayor of Wilmington v. Turk, 129 A. 512 (Del. Ch. 1925). The court refused to allow aesthetic considerations alone to qualify as a valid promotion of the general welfare given the facts in issue. But, in review of cases from other jurisdictions, the court recognized that aesthetics goals might be served so long as the ordinance was justified on other grounds:

It is worthy to note, however, that the opinions in those cases [which mention aesthetics in connection with police power] adhere to the established rule which rejects aesthetic considerations from the category of admitted things which the police power may serve. The utmost extent of their hint of a divergence from the settled rule is in the observation that "if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in, as auxiliary"—an observation which, it is apparent, constitutes no divergence from the settled rule, and can amount to nothing more than saying that if the police power is otherwise properly exercised, the element of taste and beauty in connection with the subject matter cannot serve to rob it of its vigor.

Id. at 519. The court held fast to the law of Delaware—"the rule that aesthetic considerations alone are an insufficient warrant for an exercise of the police power against a citizen who appeals to constitutional safeguards which assure to him the enjoyment of his property in all its legitimate uses."

Likewise, some sixteen years later, the Papaioanu v. Commissioners of Rehoboth, 20 A.2d 447 (Del. Ch. 1941) decision sustained the Mayor of Wilmington policy and declared aesthetic-based ordinances unconstitutional:

an ordinance which is clearly based entirely on aesthetic considerations relates to mere luxuries or indulgences, which are in no sense a necessity, and is, therefore, ordinarily void, both under the State and Federal Constitutions. Where, however, other considerations, such as the prevention of fire and matters relating to the public health, are, also, necessarily involved the situation is quite different.

Id. at 449. (citations omitted). The court, however, upheld the ordinance regulating building setbacks because no facts were presented which showed the ordinance to be arbitrary and unreasonable under the particular circumstances of the case.
THE TREND TOWARDS THE MODERN VIEW

By 1964, the modern trend towards accepting aesthetic regulation found expression in a Superior Court (trial level) opinion. The sign-owner in *In re Franklin Builders, Inc.*, 58 Del. 173, 207 A.2d 12 (Super. Ct. 1964) challenged the constitutionality of a county ordinance which restricted the circumstances under which advertising signs for new homes could be maintained. Relying on the state statute which granted zoning power to governmental entities, the judge wrote:

*I can find no substance or merit in the constitutional questions raised by the litigants in these cases. Whatever might have been the comprehension of the extent and scope of the "police power" as it was understood when...[Mayor of Wilmington] was decided, the particular language to be found in the constitutional authorization...and the statutory implementation thereof, extended the meaning of "police power," as was recognized by subsequent decisions of the Supreme Court of this State, which decisions, in a sense, approved the extension of the meaning of the concept of "police power."*

*Id.* 207 A.2d 12, 26 (citations omitted). The court, however, did not cite the Delaware cases to which the passage referred; instead, the opinion lists United States Supreme Court and other state Supreme Court decisions for authority. Nevertheless, *Franklin Builders* managed to articulate a policy which was receptive to aesthetics-based regulations.

The Delaware Supreme Court affirmed the *Franklin Builders* decision in a rather circumspect opinion. *Mayor of New Castle v. Rollins Outdoor Advertising, Inc.*, 475 A.2d 355 (Del. 1984) upheld a zoning ordinance which provided for gradual elimination of non-conforming uses (signs) under an amortization program. The court sustained the city’s authority to zone (using reasonable means as provided by state legislation) and further interpreted the statute to permit prohibitory ordinances, even though only regulation and restriction received mention in the legislative act. *Id.* at 358. Because of the facts in *Mayor of New Castle* pertaining to off-site billboards, the court implicitly recognized the ability of municipalities to regulate on the basis of aesthetic interests of the community. Arguably this would permit aesthetics regulations in furtherance of historic preservation goals.

CASE LISTINGS AND REFERENCES

1905  
*Bayard v. Bancroft*, 62 A. 6
Citing:
*LeClerq v. Trustees of Gallipolis*, 7 Ohio 218 (1838)
*Warren v. Mayor of Lyons City*, 22 Iowa 351 (1867)
*Commissioners of Franklin County v. Lathrop*, 9 Kan. 453 (1872)

1925  
*Mavor of Wilmington v. Turk*, 129 A. 512
Citing:
*Stubbs v. Scott*, 95 A. 1060 (Md. 1915)
*Spann v. Dallas*, 235 S.W. 513 (Tex. 1921)
*State v. Mckelvey*, 256 S.W. 474 (Mo. 1922)
*People v. City of Chicago*, 108 N.E.2d 16 (Ill. 1953)
*Passaic v. Patterson Posting & Sign Co.*, 62 A. 267 (N.J. 1905)
*Haller Sign Works v. Physical Culture School*, 94 A. 920 (Ill. 1911)
*Byrne v. Maryland Realty Co.*, 98 A. 547 (Md. 1916)
*Quintini v. Board of Aldermen*, 1 So. 625 (Miss. 1887)
Like many other states, Florida’s early cases did not recognize the validity of exercises of police power in furtherance of solely aesthetic concerns. But, the change in position by the Florida courts to the pro-aesthetic policy came relatively early in comparison to other states. Currently, the courts sustain ordinances which regulate aesthetic matters through the police power.

THE AUXILIARY CONSIDERATION OF AESTHETICS

One of the first cases to address aesthetics was *Anderson v. Shackelford*, 74 Fla. 26, 76 So. 343 (1917). The Supreme Court of Florida struck down an ordinance which prohibited the use of walls as advertising billboards since the prohibition was “beyond the power of the municipality to prescribe.” *Id.* 76 So. 343, 345. Though the court declared that it would not uphold an ordinance based solely on aesthetics, the possibility that aesthetic considerations might be served
once the ordinance met the traditional objectives of public health, safety, morals and general welfare was not precluded in the court's opinion.

The supreme court picked up the aesthetics issue from this open-ended point and affirmatively decreed in City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941) that ordinances may legitimately regulate aesthetics in furtherance of the general welfare. Examining the character of the city, the court determined that aesthetics fell under the "public welfare" purpose for which such zoning restrictions could be imposed:

It is difficult to see how the success of Miami Beach could continue if its aesthetic appeal were ignored because the beauty of the community is a distinct lure to the winter traveler....It seems that if one observes the forest instead of the trees, the advantages of the zoning ordinance under attack [which precluded commercial uses beyond a certain line on the beach] are immediately apparent and that the enforcement of the ordinance encompassing the whole plan will redound (sic) to the benefit of all without oppression or injustice to the plaintiff or anyone in like position.

Id. at 367. The decision, as permissive as it at first appears, did not actually articulate a clear policy of law on the aesthetics issue. It implies, strongly, that aesthetic-based ordinances would be sustained. In fact, that is what happened.16

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW: SUPREME COURT

The same supreme court justice who wrote the Miami Beach opinion, Justice Thomas, further refined Florida's aesthetics policy in three opinions. The first and most important decision was Merritt v. Peters, 65 So. 2d 861 (Fla. 1953). There the supreme court held that a county ordinance restricting the size of commercial signs was a valid exercise of police power on behalf of the general welfare and, therefore, was constitutional. Citing the Miami Beach case, Justice Thomas reiterated that

[w]e held in that case that attractiveness of a community like Miami Beach was of prime concern to the whole people and therefore affected the welfare of all. We think the principle applies to the territory across the bay where the appellant's property is situated. All in the area are regulated alike in the use of their property in constructing signs; all will profit if all obey; all will suffer if none is restricted. We must hold that although safety, morals and health of the general public in the territory do not demand the restriction, the general welfare does and that the chancellor [below] ruled quite correctly when he dismissed the bill of complaint seeking to restrain enforcement.

Id. at 862. Clearly and concisely, the Merritt decision permitted aesthetic regulations as an act for the general welfare under the police power.

The second opinion from the supreme court, written by Thomas, reinforced the Merritt holding and set forth an aspect of property rights as affected by an aesthetics-based ordinance. International Co. v. City of Miami Beach, 90 So. 2d 906 (Fla. 1956) maintained that the complainant/hotel business was not entitled to erect a sign, in derogation of a prohibitory sign

16 Oddly enough, the supreme court did not reaffirm the Miami Beach opinion for several years. Only a year after Miami Beach, the court justified a regulatory billboard ordinance on the basis of the safety concerns it met in Hav-a-Tampa Cigar Co. v. Johnson, 5 So. 2d 433 (Fla. 1942). Arguably the enactment served aesthetics as well and could have been sustained on that ground.

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ordinance, for the purpose of attracting non-patrons into its coffee shop and lounge, which were classified as "accessory uses" under another city ordinance. In the brief opinion, the court stated:

We have upheld zoning generally in the Miami Beach area where the principal consideration was aesthetics on the showing that because of the very nature of the place restrictions that had no relevancy to health, safety and morals, could be imposed because the general welfare of the community depended upon preserving its beauty.  

Id. (citation omitted). Aesthetic purposes were valid, said the court, "so long as the restraints imposed did not constitute deprivation of property without due process of law." Id. at 907.

The court, however, prohibited discriminatory ordinances which served aesthetic interests in the third key case written by Chief Justice Thomas, Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960). Though admitting that aesthetics may be a valid basis for regulation, the court held that an ordinance allowing larger on-site (point of sale) wall signs than off-site (non-point of sale) wall signs was invalid, unreasonable, and discriminatory. In the situation presented by Sunad, the court could not find within the ordinance a definite "pattern calculated to protect and preserve the city's beauty." Id. at 615.

Bearing in mind that aesthetics is the criterion by which the merits of the ordinance should be judged, we find insurmountable difficulty...in...a decision that a wall sign 300 square feet in size at non-point of sale would not offend while a sign of the same size on one of petitioner's [non-point of sale] billboards would [offend], or that an unrestricted wall sign, at point of sale would be inoffensive but one of petitioner's signs would shock refined senses, or for that matter, that a roof, ground, or other sign could be only 180 square feet while a wall sign could be at least 300 square feet and, if at point of sale, unlimited.  

Id. at 614-15 (emphasis added). The Florida high court also explicitly receded from portions of the Anderson holding which conflicted with Miami Beach, Merritt, and International Co., thereby reinforcing the pro-aesthetics policy towards Florida ordinances.  

ADOPTION OF THE MODERN PRO-AESTHETIC VIEW: APPELLATE COURTS

The decision of the District Court of Appeal of Florida in Rotenberq v. City of Fort Pierce, 202 So. 2d 782 (Fla. Dist. Ct. App. 1967) represents the intermediate courts' conformity with and broadening of the doctrine supporting aesthetics-based ordinances espoused by the supreme court. In upholding a junkyard screening requirement imposed by a local enactment, the court expanded the coverage of aesthetic considerations beyond signage.

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17 The court receded partially from this decision in City of Lake Wales v. Lamar Advertising Association of Lakeland, 414 So. 2d 1030 (Fla. 1982), infra.

18 The Supreme Court of Florida consistently upheld this policy against discriminatory and unreasonable ordinances in two similar cases: Abdo v. City of Daytona Beach, 147 So. 2d 598 (Fla. Dist. Ct. App. 1963), rev'd, 112 So. 2d 398 (Fla. Dist. Ct. App. 1959), cert. dismissed, 118 So. 2d 540 (Fla. 1960) and Eskind v. City of Vero Beach, 150 So. 2d 209 (Fla. 1963). At the intermediate level, Eskind upheld a sign ordinance which prohibited the outdoor advertisement of hotel and motel rates, but did not prohibit advertising other available amenities or prices for commodities offered by other businesses. In contrast, the appellate court in another district struck down an identical ordinance in Abdo. The supreme court decision in Eskind resolved both cases in line with Sunad--that ordinances which regulate outdoor advertising "must be non-discriminatory and...must have a solid foundation in some reasonable relationship to the general welfare." Eskind, 150 So. 2d 209, 211 (citation omitted). The court could not rationalize a distinction based on aesthetics between rate signs for hotels/motels and other businesses, or between hotel/motel rate signs and other signs listing their various services.
Similarly, City of Coral Gables v. Wood, 305 So. 2d 261 (Fla. Dist. Ct. App. 1974) followed the aesthetics language of Sunad and upheld an ordinance prohibiting the outdoor storage of camper trailers in residential areas:

the Coral Gables ordinance is aimed at preventing unsightly appearances and diminution of property values which obtain when camper-type vehicles are parked or stored out of doors in a residential area of the community. The reasonableness of the prohibitory enactment is evidenced by the fact that the storage of such vehicles is permitted within a garage or other structure. The defendant was not deprived of a right to own the...vehicle or to store it on his premises; he was only restricted from indulging in a use that would impinge upon the rights of other property owners.

Id. at 264. The court found that the enactment was a valid exercise of police power and, as applied, was constitutional.

AESTHETICS AND HISTORIC PRESERVATION

One of the more important and expansive decisions from the appellate level is Moviematic Industries Corp. v. Board of County Commissioners of Metropolitan Dade County, 349 So. 2d 667 (Fla. Dist. Ct. App. 1977). This case added to the doctrine set out in previous cases in three principle ways. First, the court recognized that zoning ordinances pertaining to governmental services may qualify as fulfilling traditional purposes of public health, safety, and welfare. Second, the court stated that

zoning regulations which tend to preserve the residential or historical character of a neighborhood and/to [sic] enhance the aesthetic appeal of a community are considered valid exercises of the public power as relating to the general welfare of the community.

Id. at 669 (citations omitted)(emphasis added). This passage unequivocally permits aesthetic and historic preservation concerns to be met conjunctively in zoning ordinances. The third expansive aspect of Moviematic recognized that the "preservation of the ecological balance of a particular area is a valid exercise of the police power" and is "a legitimate objective of zoning ordinances and resolutions" Id. Through Moviematic, the appellate court developed the aesthetics policy to the favor of preservation efforts.

FURTHER DEVELOPMENTS

Other enlargements in aesthetics regulations came from the Florida supreme court in City of Lake Wales v. Lamar Advertising Association of Lakeland, 414 So. 2d 1030 (Fla. 1982). While the policy articulated in Sunad, supra, did not allow distinctions between on-site (point of sale) and off-site (non-point of sale) advertising signs, Lake Wales receded from the prior holding and permitted such distinction solely on the basis of aesthetic considerations:

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19 Arguably under the court's logic, where the government provides historic preservation services, zoning ordinances enacted pursuant to that governmental function would also serve traditional purposes.

20 The court included the historical aspect language even though the topic was not presented as an issue in the case. The particular facts of the case dealt with the maintenance of a major aquifer of the county's water supply. However, the court's language is not limited within the opinion to the facts at hand and therefore may be read as a statement of the court's general policy favoring such ordinances.
We find this Court’s refusal in Sunad to recognize an aesthetic difference between on-site and off-site signs to be contrary to the majority and better-reasoned view.... We agree that “zoning solely for aesthetic purposes is an idea whose time has come; it is not outside the scope of police power.” Cities have the authority to take steps to minimize sight pollution and, if in doing so they find it reasonably necessary to make a distinction between on-site and off-site signs, there is no constitutional impediment preventing that distinction.

Lake Wales, at 1032 (citation omitted). 21 Though articulating a clear policy on different sign classifications, the supreme court has not ruled on sign ordinances which prohibit all off-site advertising signs in the name of aesthetics; currently the appellate courts diametrically conflict on this issue. 22 Otherwise, Florida maintains a highly receptive position towards ordinances based on aesthetic considerations.

CASE LISTINGS AND REFERENCES

1917 Anderson v. Shackelford, 74 Fla. 36, 76 So. 343
Citing:
Varney & Green v. Williams, 100 P. 867 (Cal. 1909)
Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1870)
Bill-Posting Sign co. v. Atlantic City, 58 A. 342 (N.J. 1904)
City of Chicago v. Gunning System, 73 N.E. 1035 (Ill. 1905)
Bostock v. Sams, 52 A. 665 (Md. 1902)
Laugel v. City of Bushnell, 63 N.E. 1086 (Ill. 1902)
Crawford v. City of Topeka, 33 P. 476 (Kan. 1893)

1941 City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364
Citing:
State v. City of Jacksonville, 133 So. 114 (Fla. 1931)
Blitch v. City of Ocala, 195 So. 406 (Fla. 1940)
State ex rel. Carter v. Harper, 196 N.W. 415 (Wis. 1923)

1942 Hav-a-Tampa Cigar Co. v. Johnson, 5 So. 2d 433
Citing:
no aesthetics precedent

1953 Merritt v. Peters, 65 So. 2d 861
Citing:
Miami Beach, supra

21 See also, City of Sunrise v. D.C.A. Homes, Inc., 421 So. 2d 1084 (Fla. Dist. Ct. App. 1982) (municipality can separately classify off-site and on-site advertising signs solely on the basis of aesthetics).

22 See, City of Naples v. Polk, 346 So. 2d 1077 (Fla. Dist. Ct. App. 1977) (the Second District Court held an ordinance totally prohibiting off-site signs unconstitutional and unenforceable), as compared to Lamar-Orlando Outdoor Advertising v. City of Ormond Beach, 415 So. 2d 1312 (Fla. Dist. Ct. App. 1982) (the Fifth District Court upheld the constitutionality of an ordinance prohibiting all off-site advertising by billboards as a legitimate exercise of the police power) and Lamar Advertising Associates of East Florida v. City of Daytona Beach, 450 So. 2d 1145 (Fla. Dist. Ct. App. 1984) (the Fifth District Court upheld the constitutionality of ordinances "regulating or prohibiting" off-site advertising billboards so long as no First Amendment or commercial speech violations were thereby incurred).
1956  **International Co. v. City of Miami Beach**, 90 So. 2d 906  
Citing:  
  Miami Beach, supra

1960  **Sunad, Inc. v. City of Sarasota**, 122 So. 2d 611  
Citing:  
  Merritt, supra  
  International Co., supra  
  Dade County v. City of Gould, 99 So. 2d 236 (Fla. 1957)

1963  **Abdo v. City of Daytona Beach**, 147 So. 2d 598  
Citing:  
  Sunad, supra

**Eskind v. City of Vero Beach**, 150 So. 2d 209  
Citing:  
  Dade County, supra  
  Sunad, supra

1967  **Rotenberg v. City of Fort Pierce**, 202 So. 2d 789  
Citing:  
  City of Shreveport v. Brock, 89 So. 2d 156 (La. 1956)  
  Murphy, Inc. v. Town of Westport, 40 A.2d 177 (Conn. 1941)  
  People v. Sevel, 261 P.2d 359 (Cal. 1953)  
  Vt. Salvage Corp. v. Village of St. Johnsbury, 34 A.2d 188 (Vt. 1943)  
  Sunad, supra  
  Miami Beach, supra

1974  **City of Coral Gables v. Wood**, 305 So. 2d 261  
Citing:  
  Sunad, supra  
  Rotenberg, supra  
  Town of Livingston v. Marchev, 205 A.2d 65 (N.J. Super. 1964)

1977  **Moviematic Industries Corp. v. Board of County Commissioners of Metropolitan Dade County**, 349 So. 2d 667  
Citing:  
  Miami Beach, supra  
  Merritt, supra  
  Sunad, supra  
  Coral Gables, supra  
  Nattin Realty, Inc. v. Ludewig, 324 N.Y.S.2d 668 (Sup. Ct. 1971)
The Supreme Court of Georgia has permitted consideration of aesthetics when the police power is exercised for zoning. Though initially unclear as to the role aesthetics played as a justification of ordinances, the supreme court eventually recognized and followed the trend in favor of aesthetic-based legislation. Georgia currently permits aesthetic bases to sustain historic preservation regulations.

The 1931 supreme court decision in Howden v. Mayor of Savannah, 172 Ga. 833, 159 S.E. 401 (1931) upheld a zoning ordinance prohibiting businesses in residential areas as proper under the city’s authority given by the state constitution. This was one of the first opinions to endorse zoning enactments. The court suggested many justifications for zoning ordinances: the proposed business sat adjacent to a park which furnish[ed] a playground for children and a place of recreation for grown people. Playgrounds and places of recreation are essential to the welfare and health of a community. The erection of business structures around this park...would impair their usefulness as playgrounds and pleasure resorts. The erection of filling stations brings new perils to person and property. They endanger, to some extent, limb and life. Business structures on the streets which form the boundaries of this lovely park would tend to destroy its loveliness and beauty; and do not the beauty of parks conduce to the general welfare of the city?

Id. 159 S.E. 401, 407 (emphasis added). Though weighing aesthetic concerns as an issue of general welfare, the court did not specify relationships between, or importance of, the elements it listed as supporting zoning enactments. The language in the opinion suggests that all of the justifications were considered together: "In the circumstances, we cannot say that the zoning of the property...is so arbitrary and unreasonable as to render the zoning ordinance invalid." Id.
Because the Howden opinion is an early success for zoning regulations, the opinion probably did not intend that any one of the justifications could stand alone.\(^23\)

**THE TREND TOWARDS THE MODERN VIEW**

The following year, in *City of Smyrna v. Parks*, 240 Ga. 699, 242 S.E.2d 73 (1978), the Supreme Court justices sustained an ordinance banning chain-link fences from front yards, although other types of fencing were permitted. Reviewing the language of the state's enabling legislation for zoning, the court found that the legislative intent for

> the municipalities...to be empowered with the authority to protect the property interests of citizens in their residential neighborhoods is apparent from references to the "character of the district,"... "promoting desirable living conditions,"... "protecting property against blight and depreciation," "conserving the value of buildings," and "encouraging the most appropriate use of land and other buildings and structures."

*Id.* 242 S.E.2d 73, 77 (emphasis original). Though acknowledging a public safety justification for the ordinance in issue, the court stated that a city exercised its police power validly, regardless of whether the action was motivated solely by aesthetics:

> Even if the ground of safety is deemed a tenuous one, however, the ordinance would not be an unwarranted exercise of police power based on aesthetics alone, provided there is a reasonable relationship between the regulation and the legitimate public purposes of regulations as enunciated by the legislature.

*Id.* Thus, the Georgia high court refused to declare the city council decision unconstitutional unless the measure was "clearly arbitrary and unreasonable." *Id.* at 78.\(^24\)

The opinion in *Thomas v. City of Marietta*, 245 Ga. 485, 265 S.E.2d 775 (1980), cert. denied, 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed. 2d 45 (U.S. 1980) is a curiosity in the history of Georgia's case law on aesthetic-based regulations. *Thomas* deviated from the holding in *Smyrna* and maintained that aesthetics were "incidental effect[s]" of zoning regulations and "being merely a question of subjective taste, would not alone be enough to support...legislation...under the police power." *Id.* 265 S.E.2d 775, 777.\(^25\) The court cited *Smyrna* and the United States Supreme Court opinion in *Berman v. Parker* as authority for the conclusions in *Thomas*, but the court's assertion seems to contradict the very cases upon which it relied. Since no other cases in Georgia have followed *Thomas*, the decision probably carries little weight in state's position on the aesthetics issue.

\(^23\) This assertion is substantiated by the decision in *McKnight v. Mitchell*, 144 Ga. App. 109, 240 S.E.2d 313 (Ct. App. 1977), where the Court of Appeals of Georgia (intermediate level) delineated the bases of zoning decisions. The judges held that a junkyard permit was properly granted since a denial grounded on the "unesthetic appearance" of junkyards was impermissible. Other improper grounds, the court maintained, were the depreciation of surrounding property and speculative plans for future development.

\(^24\) Another decision, *Rockdale County v. Mitchell's Used Auto Parts, Inc.*, 243 Ga. 465, 254 S.E.2d 847 (1979), followed *Smyrna*'s lead in upholding regulations that arguably served "beautification purposes." *Id.* 254 S.E.2d 847, 848. *Rockdale* sustained a fencing and buffer space requirement for junkyards, noting that the regulation of such businesses was a "traditional police power function." *Id.*

\(^25\) However, the court justified the restrictions placed upon temporary signs by the ordinance on safety and welfare grounds.
ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

H & H Operations, Inc. v. City of Peachtree City, 248 Ga. 500, 283 S.E.2d 867, 17 Env't Rep. Cas. (BNA) 1420 (1981), cert. denied, 456 U.S. 961, 102 S.Ct. 2037, 17 Env't Rep. Cas. (BNA) 1536, 72 L.Ed. 2d 484 (U.S. 1982) solidly returned the supreme court to the pro-aesthetics position. Though holding that the regulations banning the display of prices on signs restricted commercial speech without a countervailing substantial governmental interest, the court explicitly recognized "that municipalities may enact and enforce reasonable sign ordinances under the general public welfare aspect of its police power, specifically aesthetics. Implicit in this holding is the subsidiary holding that such ordinances do not constitute a prohibited ‘taking’ of property." Id. 283 S.E.2d 867, 868-69 (citation omitted). Essentially the H & H decision made aesthetic considerations an element of general welfare that justifies the enactment of regulations.26

Subsequent supreme court decisions followed the Smyrna and H & H holdings. Gouge v. City of Snellville, 249 Ga. 91, 287 S.E.2d 538 (1982) upheld an ordinance requiring all television satellite dishes to be located only in rear yards. The city's "justification of the ordinance [based] on the advancement of the city's aesthetic interests" was "reasonable and proper" in the court's view. Id. 287 S.E.2d 538, 541. In Warren v. City of Marietta, 249 Ga. 205, 288 S.E.2d 562 (1982), the court declared that zoning ordinances based on aesthetics, like any other zoning ordinance, were "presumptively valid." Also, Department of Transportation v. Shiflett, 251 Ga. 873, 310 S.E.2d 509 (1984) sustained the constitutionality of a state statute which prohibited off-site advertising signs within a certain distance of highways. "That billboards detract from natural beauty is a subjective determination with regard to which we observe no underlying improper purpose." Id. 310 S.E.2d 509, 512. The court identified "two substantial governmental interests, safety...and preservation of natural beauty," underlying the statute. Id. (emphasis added). This language represents the beginning of an expansionist trend that would recognize aesthetic justifications for historic preservation regulations.

AESTHETICS AND HISTORIC PRESERVATION

In 1985, with almost a decade of pro-aesthetic decisions, the Georgia supreme court held that since aesthetic issues constituted a valid government interest, an ordinance which prohibited general advertising signs within view of and within a certain distance of historic sites passed constitutional challenge. Corey Outdoor Advertising, Inc. v. Board of Zoning Adjustments of City of Atlanta, 254 Ga. 221, 327 S.E.2d 178 (1985), appeal dismissed, 474 U.S. 802, 106 S.Ct. 33, 88 L.Ed. 2d 27 (U.S. 1985). The court first examined the intent behind the ordinance:

The clear purpose of the ordinance is to provide a zone of visual integrity around certain designated structures which the City of Atlanta has deemed to have historical significance, preventing general advertising signs from marring historical sites by distracting from the view, overshadowing the site, or lessening the impact of the site. The prohibition against any part of such signs' being visible from the site prevents the ordinance from being arbitrarily applied when natural topography, trees, buildings or structures screen out such signs from view on or within the boundaries of such historic site.

26 Noting the trend in other jurisdictions permitting aesthetic-based ordinances, and after restating the Smyrna decision in favor of aesthetic grounds, the court addressed the Thomas holding in one curious sentence: "But see Thomas where we upheld a portable sign ordinance on safety and welfare grounds." H & H, at 888. This treatment by the court might suggest that the Thomas decision was meant to allow the justification of ordinances on safety/welfare or aesthetic grounds; since Thomas stated the contrary, the supreme court merely may have taken the opportunity presented by H & H to rectify the aberration that Thomas created.
Id. 327 S.E.2d 178, 180-81 (emphasis added). The court affirmed that "restricting or minimizing visual blight surrounding a historic site" was a "valid public purpose...because the entire site is visually important,...not just the front." Id. at 181. The Corev decision moved Georgia beyond junkyards and regular sign ordinances to a position giving full regard to aesthetics as a justification for historic preservation enactments.

CASE LISTINGS AND REFERENCES

1931 Howden v. Mayor of Savannah, 172 Ga. 833, 159 S.E. 401


1978 City of Smyrna v. Parks, 240 Ga. 699, 242 S.E.2d 73


1980 Thomas v. City of Marietta, 245 Ga. 485, 265 S.E.2d 775
1981  
Citing:  
- Smyrna, supra  
- Berman, supra  

1982  
**Gouge v. City of Snellville**, 249 Ga. 91, 287 S.E.2d 538  
Citing:  
- H & H, supra  
- DeKalb County v. Flynn, 243 Ga. 679, 256 S.E.2d 362 (1979)  
- Smyrna, supra

**Warren v. City of Marietta**, 249 Ga. 205, 288 S.E.2d 562  
Citing:  
- Metromedia, supra  
- H & H, supra  
- Gouge, supra  
- Smyrna, supra  
- Guhl, supra  

1984  
**Department of Transp. v. Shiflett**, 251 Ga. 873, 310 S.E.2d 509  
Citing:  
- Metromedia, supra  

1985  
**Corey Outdoor Adv., Inc. v. Bd. of Zoning Adjustments**, 254 Ga. 221, 327 S.E.2d 178  
Citing:  
- Gouge, supra

**HAWAII**

**ABSTRACT**

The state of Hawaii has very little case law on the issue of whether aesthetic motivations may justify an exercise of the police power. The one available case appears to permit unrestrained use of aesthetic justifications as long as the statute or ordinance comports with normal legislative requirements.
In State v. Diamond Motors, Inc., 50 Haw. 33, 429 P.2d 825 (1967), the Supreme Court of Hawaii upheld the validity of restrictions imposed by a sign ordinance in an industrial area. Though the state did not assert that aesthetics alone would sustain a legislative enactment, the court advanced "a more modern and forthright position:"

We accept beauty as a proper community objective, attainable through the use of the police power. We are mindful of the reasoning of most courts that have upheld the validity of ordinances regulating outdoor advertising and of the need felt by them to find some basis in economics, health, safety, or even morality. We do not feel so constrained.

Id. 429 P.2d 825, 827 (citation omitted). The court determined that a state constitutional provision, which devolved the "power to conserve and develop [Hawaii's] natural beauty, objects and places of historic or cultural interest, sightliness and physical good order," justified the regulations imposed on the industrial property at issue in the case:

The natural beauty of the Hawaiian Islands is not confined to mountain areas and beaches. The term "sightliness and physical good order" does not refer only to junkyards, slaughter houses, sanitation, cleanliness, or incongruous business activities in residential areas....We hold that the application of the ordinance...constituted a regulation for the public welfare under the City's police power in a legitimate field for legitimate aesthetic reasons and that it does not constitute a taking of private property.

Id. at 828. With the Diamond Motors decision, the supreme court placed Hawaii in the pro-aesthetic position; the open language of the opinion and the state constitutional language express a willingness to uphold ordinances relating to historic preservation that are grounded in aesthetics.

CASE LISTINGS AND REFERENCES

1967

State v. Diamond Motors, Inc., 50 Haw. 33, 429 P.2d 825
Citing:

Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917)
Merritt v. Peters, 65 So. 2d 861 (Fla. 1953)
Cromwell v. Ferrier, 225 N.E.2d 749 (N.Y. 1967)
Oregon City v. Hartke, 400 P.2d 255 (Ore. 1965)
Puna Sugar Co. v. Territory, 13 Haw. 272, (1901)

IDAHO

ABSTRACT

Idaho appears to have addressed the issue of whether aesthetic considerations may justify zoning regulations only once. The courts support the pro-aesthetic position, yet the precise extent to which they will uphold the doctrine is unclear. The aesthetics justification has not been applied to an historic preservation ordinance, but Idaho may entertain such an application.
THE TREND TOWARDS THE MODERN VIEW

The one case which dealt with the aesthetics issue was Dawson Enterprises, Inc. v. Blaine County, 98 Idaho 506, 587 P.2d 1257 (1977). There the Supreme Court of Idaho held that the denial of rezoning an area from residential and agricultural to commercial was reasonable and constitutional. The ordinance at issue sought "to avoid strip-development along [a]...stretch of highway and to maintain the open and rural character of the valley," id. 587 P.2d 1257, 1264, an objective in which "aesthetic considerations play a predominant role." Id. at 1268.

The court noted that the controversy surrounding the "hotly contested" issue of aesthetic-based zoning ordinances and recognized that "[i]n other jurisdictions, the trend in recent years has been to uphold the validity of zoning restrictions based solely or predominantly on aesthetic considerations." Id. At this point, the supreme court's analysis follows a curious path which, though not subrogating the pro-aesthetic position adopted under Dawson, renders the decision less than definitive on the issue. First, the opinion stated that no controversy would exist "when the aesthetic objectives form only part of the considerations" in zoning enactments. Id. This is not necessarily true. Second, the court asserted that the "[c]ourts of other jurisdictions] are unanimous" in following Berman v. Parker which expanded the concept of public welfare to include aesthetic considerations. Id. at 1269. Again, this statement is not completely accurate. Notwithstanding these conclusions drawn by the Idaho court, Dawson held that "to the extent that [the ordinance] embodies the purpose of maintaining the rural character of the County and the Wood River Valley, [it] is a valid exercise of the power of the state to regulate the use of land for the general welfare." Id.

How the court determined that the regulations in the case "embodied" the aesthetic purpose of the ordinance is not readily discernable. The opinion's analysis on this point is limited to a lengthy quotation from another jurisdiction's decision without explanation of the Idaho court's conclusion. Moreover, the Dawson court did not affirmatively assert its alignment with a particular level of the aesthetics doctrine. Does the fact that the court found "no controversy" with the auxiliary use of aesthetics and "unanimity" of all courts with the Berman decision mean that the Idaho court favors one or both of these positions? The question is not resolved in Dawson or other subsequent cases. Thus, whether or not Idaho would sustain an historic preservation ordinance which was grounded in aesthetics is likewise uncertain.

CASE LISTINGS AND REFERENCES

Citing: 
Hukle v. City of Kansas City, 512 P.2d 457 (Kan. 1973)
Thurman v. City of Mission, 520 P.2d 1277 (Kan. 1974)
Nopro Co. v. Town of Cherry Hills Village, 504 P.2d 344 (Colo. 1973)
City of Tempe v. Rasor, 536 P.2d 239 (Ariz. 1975)
Houston v. Bd. of City Comm'rs, 543 P.2d 1010 (Kan. 1975)
ILLINOIS

ABSTRACT

Like most other states, Illinois' early court decisions did not recognize an aesthetics justification for exercises of police power by state or local governments. While the state supreme court gradually has allowed aesthetics to become a consideration in zoning decisions, the intermediate appellate courts have adopted the "modern" pure aesthetic justification since 1980. Supreme court decisions which ratify the appellate holdings or resolutely expound a pro-aesthetic doctrine appear not to exist. Implicitly then, Illinois recognizes the ability of regulatory ordinances to be based solely on aesthetics.

EARLY DECISIONS ON AESTHETIC CONCERNS

Beginning with sign ordinances, Illinois' history on the issue allowed regulations pertaining to aesthetics so long as they connected with the appropriate governmental interests of health, safety, morals and general welfare. In City of Chicago v. Gunning System, 214 Ill. 628, 73 N.E. 1035 (1905), the Supreme Court of Illinois recognized that municipalities possessed authority to control signage to the extent the ordinances met the traditional state interests, yet voided an enactment which prohibited signs on boulevards or residential areas as an unreasonable exercise of police power. "The purpose of [the ordinance]," said the opinion, "seems to be mainly sentimental, and to prevent sights which may be offensive to the aesthetic sensibilities of certain individuals residing in or passing through the vicinity of the billboards [in question]." Id. 73 N.E. 1035, 1041. This was an insufficient justification for such an "unreasonable and oppressive" ordinance. Id. at 1040.

The court more fully explained its exact position in Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920 (1911). Here the court also held that aesthetics may not serve as a legitimate basis for ordinances and that such regulations must be enacted only when necessary to promote traditional state interests. The court negated an argument

that the police power ought to be extended, both by restriction and compulsion, to the promotion of purely aesthetic purposes, upon the ground that the general welfare of the public requires it. While the general welfare is recognized as one of the principal considerations which will justify an exercise of the police power of the state, still it must be borne in mind that the general welfare of the state is promoted by according to each individual the largest degree of personal liberty that is consistent with the best interest of the public.

Id. 94 N.E. 920, 924. The ordinance in question did not relate to health or safety considerations in the court's mind and was therefore unconstitutional. With exception for auxiliary consideration of aesthetics, the court would not permit ordinances to exercise the police power so as to regulate or be based on aesthetics.27

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27 See also, Forbes v. Hubbard, 348 Ill. 168, 180 N.E. 767 (1932) holding, inter alia, that a city ordinance which classified an area as residential, when it sat across the street from another village's business zone, was an unreasonable and invalid invasion of property rights. The court maintained that aesthetics provide an insufficient basis for an exercise of police power in such a case.
AUXILIARY CONSIDERATION OF AESTHETICS

The Haller court’s language left open the possibility of using police power to promote aesthetics when other grounds justified an ordinance. Neef v. City of Springfield, 380 Ill. 275, 43 N.E.2d 947 (1942) resolved the issue in favor of such limited aesthetic controls. The court, maintaining that aesthetic purposes had no relation to health, safety, or morals, asserted that

*it is no objection...to a zoning ordinance that it tends to promote an aesthetic purpose, if its reasonableness may be sustained on other grounds. The question here then is whether or not, disregarding the evidence relating to the beauty of the neighborhood and the streets and other aesthetic purposes, the ordinance should be sustained on the grounds of public health, safety, morals or general welfare.*

*Id.* 43 N.E.2d 947, 950. Because the proposed rezoning of the parcel in issue potentially would lower the property values in the immediate vicinity, thereby lowering tax revenues, the court decreed that “[t]he prevention of such a loss by the city is one of the specific purposes for which the zoning power is granted, and is directly related to the public welfare. On this ground alone, we think the ordinance should be sustained.” *Id.*

Almost a decade later, the court continued to allow the ancillary aesthetic motivation behind zoning ordinances. The Trust Co. of Chicago v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951) case, however, articulated other elements which bore upon the determination of an enactment’s reasonableness under traditional interests:

*Among the particular facts and circumstances to be taken into consideration in determining whether a purported exercise of the police power is so unreasonable and confiscatory as to constitute an unlawful invasion of private rights are the character of the neighborhood, the zoning classification and use of nearby property, the extent to which property values are diminished by the particular zoning restrictions involved, and the gain to the public compared to the hardship imposed upon the individual property owner.*

*Id.* 96 N.E.2d 499, 504 (emphasis added)(citation omitted). Even though the list appears not to limit consideration to factors mentioned and arguably affords more legitimacy to aesthetic considerations alone, the opinion, citing Forbes, reaffirmed that purely aesthetic purposes were insufficient justifications.

THE TREND TOWARDS THE MODERN VIEW

Likewise, the decision in La Salle National Bank of Chicago v. County of Cook, 12 Ill. 2d 40, 145 N.E.2d 65 (1957) (La Salle/Cook) enlarged the Trust Co. list of factors. The court outlined expansive criteria for justifying a zoning ordinance without any one factor controlling a decision and without limiting the test to the elements mentioned. LaSalle/Cook, 145 N.E.2d 65, 69. Notably, the court did not include a consideration of the neighborhood’s character, nor did it directly address aesthetics. The language, however, suggested a shift in the court’s view towards acceptance of aesthetic-based regulations.

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28 See also, Chicago Park District v. Canfield, 382 Ill. 218, 47 N.E.2d 61 (1943) (following Neef, held that aesthetics may be promoted secondarily with justification of the ordinance on other grounds; the court found the classifications in issue to be invalid, unlawful, and unreasonable).
This trend is manifest in subsequent decisions of the intermediate courts which allowed increasing weight to be given to aesthetics. In Paulus v. Smith, 70 Ill. App. 2d 97, 217 N.E.2d 527 (App. Ct. 1966), the appellate court upheld a sign ordinance which prohibited signs within a certain distance of a road as within the police power of the city. The court did not rely on aesthetics language, yet justified the regulation of billboards as an exercise of police power which was more like the regulation of streets than of private property. The court also found that such billboard regulations were "intended for the protection of the public traveling upon highways, and to promote safe driving and eliminate traffic hazards." Id. 217 N.E.2d 527, 533. Beyond this, the court does not elaborate upon its safety justification, nor does it cite authority for the assertion.

Similarly, Village of Glenview v. Van Dyke, 240 N.E.2d 354 (Ill. App. Ct. 1968) upheld the constitutionality and validity of an ordinance prohibiting camper parking in residential areas. The court did not outrightly address aesthetics but used language which strongly implied that an ordinance so motivated was acceptable without a firm tie to the traditional justifications:

"The establishment of a neighborhood of homes in such a way as to avoid congestion in the streets, to secure safety from fire and other dangers, to prevent overcrowding of land, to obtain adequate light, air and sunshine, which when such neighborhood is established would tend to improve and beautify the Village and would harmonize with the natural characteristics of the locality, could be materially facilitated by the regulation here in question."

Id. 240 N.E.2d 354, 357 (emphasis added). Such holdings recognized that a move towards the support of aesthetics-based ordinances was imminent.

AESTHETICS AND HISTORIC PRESERVATION

For a state which had not fully declared a position on the issue, an unusual decision came out of the intermediate court in 1969. Rebman v. City of Springfield, 111 Ill. App. 2d 430, 250 N.E.2d 282 (App. Ct. 1969) ruled primarily on the use of police power to protect historic areas. See also, M & N Enterprises, Inc. v. City of Springfield, 111 Ill. App. 2d 444, 250 N.E. 2d 289 (App. Ct. 1969). In justifying the historic district zoning, however, the court found an avenue of legislative intent to promote aesthetics that no case has fully explored. The court referred to a passage of an Illinois statute which

contains a declaration of policy by the Legislature as a preamble to the act relating to the preservation of historical and other special areas. From the language there found it is clear that the subsequent grant of authority to municipalities to preserve areas, places, buildings, structures, works of art and other objects having special historical community or aesthetic interest was based upon a legislative determination--first, of desirability; second, of public welfare; and third, a total delegation of authority to do that which the state itself could do....We consider this grant of authority as auxiliary to the general zoning power granted to the city.

Id. 250 N.E.2d 282, 287 (emphasis added). This connection of the general welfare to aesthetics (and historic preservation) should have cleared a path for aesthetics-based regulation; the courts, both appellate and supreme, continued to waver between ancillary consideration of aesthetics and wholesale acceptance of the modern permissive view.
FURTHER DEVELOPMENTS

One important supreme court decision, La Salle National Bank v. City of Evanston, 57 Ill.2d 415, 312 N.E.2d 625 (1974), determined that a decision to rezone in view of certain aesthetic qualities was not arbitrary or unreasonable but met general welfare concerns. The court noted that "there was substantial evidence that the building contemplated by the Corporation would be significantly dissimilar to any structure in the immediate vicinity and would alter the area's character." Citing Trust Co., the opinion remarked that

prior decisions of this court, while recognizing aesthetic elements, have not deemed them to be controlling in zoning cases. However, there would appear to be significant authority that aesthetic factors may, in some instances, be utilized as the sole basis to validate a zoning classification or be acknowledged as a viable factor in zoning determinations. We are of the opinion that in the present case aesthetic qualities are a properly cognizable feature and that the evidence presented is supportive of defendant's position that the [classification] is not arbitrary or unreasonable and is in accord with the general public welfare.

Id. 312 N.E.2d 625, 634 (emphasis added)(citations omitted). The Illinois high court, notwithstanding its favorable language, did not explore the connections between aesthetics and general welfare at all. Though other cases would cite to La Salle/Evanston as precedent for allowing consideration of aesthetics in the reasonableness test, the case left the aesthetics issue in a confused state of disresolve.29

Perhaps with intent to focus the judicial trend, the appellate court in Ward v. County of Cook, 68 Ill. App. 3d 563, 25 Ill. Dec. 38, 386 N.E.2d 309 (App. Ct. 1979) wrote an aesthetics passage that, in reality, only partially explained the thin La Salle/Evanston opinion. As the court held that the evidentiary burden to show the ordinance arbitrary and unreasonable went unmet, it "accepted at the present time that the aesthetic enjoyment of one's home is closely related to the legal problems of zoning." Id. 386 N.E.2d 309, 316. On this point the court explained that

[i]n the case before us there is testimony by the planning and zoning expert called by defendant that, in his opinion, the proposed planned development would do harm to the ability of residents in the surrounding area to obtain enjoyment from the use of their homes....In our opinion, it cannot be denied that, although not decisive, aesthetic reasons as thus expressed tend to support the judgment reached [in favor of the county ordinance].

Id. (emphasis added). But the court also found a general welfare "crutch" on which to rely:

See Grobman v. City of Des Plaines, 59 Ill. 2d 588, 322 N.E.2d 443 (1975) (aesthetics may be considered to determine if an ordinance is unreasonable, citing La Salle/Evanston; plaintiff failed to produce evidence that the ordinance was arbitrary and unreasonable or unrelated to health, safety and welfare). The appellate decision in Metromedia, Inc. v. City of Des Plaines, 26 Ill. App. 3d 942, 326 N.E.2d 59 (App. Ct. 1975) ruled that aesthetic considerations alone do not justify a use of police power regarding a prohibitory sign ordinance; the ordinance prohibiting off-site advertising signs was declared arbitrary, capricious, and unconstitutional. Just one year later, another division of the appellate courts determined that municipalities may consider aesthetics "in proper instances" in zoning ordinances. Continental Homes of Chicago v. County of Lake, 37 Ill. App. 3d 727, 346 N.E.2d 226 (App. Ct. 1976). Though the aesthetics issue was barely present in County of Lake v. First National Bank of Lake Forest, 79 Ill. 2d 221, 37 Ill. Dec. 589, 402 N.E.2d 591 (1980), the supreme court took the opportunity to articulate a position—that aesthetics considerations may be made but are not controlling in zoning cases. The appellate courts did not adhere strictly to this opinion as the rest of this section will demonstrate.
The companion issue is whether the reduction of value of the site upon which plaintiffs [developers] hold an option would promote the health, safety, morals or general welfare of the public. We conclude that there would be a gain to the surrounding homeowners from rejection of the proposed use. This gain lies in protection of the surrounding area against depreciation or economic loss and also in a protection of the right to aesthetic enjoyment of their property.

Id. (emphasis added). The language is particularly weighted in favor of aesthetic-based regulations; but again, other courts were slow to take effective advantage of the possibilities created by Ward.

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

A series of three appellate decisions in 1980 finally recognized the validity of aesthetic motivations in zoning cases. The essence of these particular cases is most clearly conveyed in City of Champaign v. Kroger Co., 88 Ill. App. 3d 498, 43 Ill. Dec. 661, 410 N.E.2d 661 (1980). Among other issues, Champaign held that an ordinance based upon aesthetics was reasonably related to the general health, safety and welfare and therefore sustained the lower court which issued an injunction against the company from continued violations of the sign ordinance. To determine reasonableness, the court looked to the intent of the enactment which was "primarily aesthetic." Id. at 661, 666. Noting the national trend supporting aesthetic-based regulation, the court observed that Illinois case law followed this path as well, then launched into a detailed review of the state cases, from Gunning to Ward. Though cautioning that "an aesthetic basis for a zoning ordinance does not necessarily render it valid," Id. at 669, the court concluded that Illinois now follows the better view that aesthetics is an element of the public health, safety, and welfare. La Salle/Evanston (1974) and Grobman effectively--albeit not expressly--overruled the line of cases beginning with Gunning that illustrates the old "forbidden purpose" rule on the role of aesthetics in zoning. The welfare of a community includes its appearance: Municipalities may enact zoning laws regulating, among other things, the dimensions of commercial signs.

Id. at 670. The Champaign ruling thus allowed aesthetic regulations alone to justify ordinances by making such motives a valid general welfare concern.

The most recent effect on the aesthetics issue came as a mild limitation in City of Chicago v. Gordon, 146 Ill. App. 3d 898, 100 Ill. Dec. 464, 497 N.E.2d 442 (App. Ct. 1986). The test articulated by the appellate court said that if an ordinance is justified by aesthetics, the tribunal must look carefully to see if the enactment is merely a rationalization for improper goals. Because the ordinance at issue proscribed real estate "for sale" signs, the court believed that an ulterior motive for the regulation existed. Though it was "uncontroverted that the promotion of aesthetic and safety concerns constitutes a substantial governmental goal," the court stated that "even the show of a substantial interest may be insufficient to justify an infringement of First Amendment rights." Id. at 442, 446. Basically, the court set the bounds of constitutionality for

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30 See also, Amalgamated Trust v. County of Cook, 82 Ill. App. 3d 370, 37 Ill. Dec. 717, 402 N.E.2d 719 (App. Ct. 1980) where the court held that the ordinance as applied was not unreasonable in prohibiting the proposed use and that "aesthetic factors" have a "significant bearing on zoning" and the rights of adjoining landowners. Also, Rent-a-sign v. City of Rockford, 85 Ill. App. 3d 453, 40 Ill. Dec. 740, 406 N.E.2d 943 (App. Ct. 1980) recognized that state and municipal governments may consider aesthetic and environmental values and therefore that a restrictive ordinance on mobile signs was constitutional. Amalgamated and Rent-a-sign followed Ward on the point of aesthetics.
aesthetic regulations, but otherwise did not interfere with the governmental ability to justify ordinances on aesthetic grounds. Viewed in the light of these most recent decisions, the Illinois courts’ position on aesthetics may be presumed to sustain historic preservation ordinances based on aesthetics given the earlier opinion in Rebman.

CASE LISTINGS AND REFERENCES

1905  
City of Chicago v. Gunning System, 214 Ill. 628, 73 N.E. 1035
Citing:  
no aesthetics authority

1911  
Haller Signs Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920
Citing:  
Crawford v. City of Topeka, 33 P. 476 (Kan. 1893)  
People v. Green, 83 N.Y.S. 460 (App. Div. 1903)  
Bill-Posting Co. v. City of Atlantic City, 58 A. 342 (N.J. 1904)  
City of Passaic v. Patterson Bill-Posting Co., 62 A. 267 (N.J. 1905)  
Bryan v. City of Chester, 61 A. 894 (Pa. 1905)  
Welch v. Swasey, 214 U.S. 91 (1909)  
State v. Whitlock, 63 S.E. 123 (N.C. 1908)  
Varney & Green v. Williams, 100 P. 867 (Cal. 1909)  
People v. Murphy, 88 N.E. 17 (N.Y. 1909)  
Curran Co. v. City of Denver, 107 P. 261 (Colo. 1910)  
Gunning, supra

1932  
Forbes v. Hubbard, 348 Ill. 168, 180 N.E. 767
Citing:  
People v. Kane, 288 Ill. 235, 123 N.E. 265 (1919)  
Town of Cortland v. Larsen, 273 Ill. 602, 113 N.E. 51 (1916)  
Haskell v. Howard, 269 Ill. 559, 109 N.E. 992 (1915)  
Haller, supra  
Dowsev v. Vill. of Kensington, 177 N.E. 427 (N.Y. 1931)  
Welch, supra

1942  
Neef v. City of Springfield, 380 Ill. 275, 43 N.E.2d 947
Citing:  
Haller, supra  
Koos v. Saunders, 182 N.E. 415 (Ill. 1932)  
Forbes, supra  
City of Aurora v. Burns, 149 N.E. 784 (Ill. 1925)  
Village of Western Springs v. Bernhagen, 156 N.E. 753 (Ill. 1927)  
People v. Village of Oak Park, 107 N.E. 636 (Ill. 1914)  
City of Carbondale v. Reith, 147 N.E. 442 (Ill. 1925)

1943  
Chicago Park Dist. v. Canfield, 382 Ill. 218, 47 N.E.2d 61
Citing:  
Neef, supra
1951  
**Trust Co. of Chicago v. City of Chicago**, 408 Ill. 91, 96 N.E.2d 499

Citing:
- Galt v. County of Cook, 91 N.E.2d 395 (Ill. 1950)
- Forbes, supra
- Neef, supra

1957  
**La Salle Nat'l Bank v. County of Cook**, 12 Ill. 2d 40, 145 N.E.2d 65

Citing:
- Krom v. City of Elmhurst, 8 Ill.2d 104, 133 N.E.2d 1 (1956)
- Forbes, supra
- Langguth v. Village of Mt. Prospect, 5 Ill.2d 49, 124 N.E.2d 879 (1955)
- Midland Elec. Coal Corp. v. County of Knox, 1 Ill.2d 200, 115 N.E.2d 275 (1953)
- Offner Elec., Inc. v. Gerhardt, 398 Ill. 265, 76 N.E.2d 27 (1947)
- People ex rel. Kirby v. City of Rockford, 363 Ill. 531, 2 N.E.2d 842 (1936)
- Ehrlich v. Village of Wilmette, 361 Ill. 213, 197 N.E. 567 (1935)
- Chicago Title and Trust Co. v. Village of Franklin Park, 4 Ill.2d 304, 122 N.E.2d 804 (1954)
- Evanston Best & Co. v. Goodman, 369 Ill. 207, 16 N.E.2d 131 (1938)
- Hannifin Corp. v. City of Berwyn, 1 Ill.2d 28, 115 N.E.2d 315 (1953)
- Petropoulos v. City of Chicago, 5 Ill.2d 270, 125 N.E.2d 522 (1955)

1966  
**Paulus v. Smith**, 70 Ill. App. 2d 97, 217 N.E.2d 527

Citing:
- Ghaster Properties, Inc. v. Preston, 200 N.E.2d 328 (Ohio 1964)
- City of Chicago v. Vokes, 193 N.E.2d 40 (Ill. 1963)

1968  
**Village of Glenview v. Van Dyke**, 240 N.E.2d 354

Citing:
- Exchange Nat'l Bank v. County of Cook, 25 Ill.2d 434, 185 N.E.2d 250 (1962)
- Rams-Head Co. v. City of Des Plaines 9 Ill.2d 326, 137 N.E.2d 259 (1956)
- Reitman v. Village of River Forest, 9 Ill.2d 448, 137 N.E.2d 801 (1956)
- Honeck v. County of Cook, 12 Ill.2d 257, 146 N.E.2d 35 (1957)
- Krom, supra
- Stemwedel v. Village of Kenilworth, 14 Ill.2d 470, 153 N.E.2d 79 (1958)
- Jacobson v. City of Evanston, 10 Ill.2d 61, 139 N.E.2d 205 (1956)
- Gregory v. City of Wheaton, 23 Ill.2d 402, 178 N.E.2d 358 (1961)
- Skryasak v. Village of Mt. Prospect, 13 Ill.2d 329, 148 N.E.2d 721 (1958)

1969  
**Rebman v. City of Springfield**, 111 Ill. App. 2d 430, 250 N.E.2d 282

Citing:
- City of Santa Fe v. Gamble-Skogmo, 389 P.2d 13 (N.M. 1964)
- Opinion of the Justices, 128 N.E.2d 563 (Mass. 1955)
- City of New Orleans v. Pergament, 5 So. 2d 129 (La. 1941)
- Vieux Carre Property Owners & Assoc., Inc. v. City of New Orleans, 167 So.2d 367 (La. 1964)
M & N Enterprises, Inc. v. City of Springfield, 111 Ill. App.2d 444, 250 N.E.2d 289
Citing:
Rebman, supra
LaSalle/Cook, supra

1974
La Salle Nat'l Bank v. City of Evanston, 57 Ill. 2d 415, 312 N.E.2d 625
Citing:
Trust Co., supra
Chicago Park District, supra
State Bank and Trust Co. v. Village of Wilmette, 358 Ill. 311, 193 N.E. 131 (1934)
Forbes, supra
People v. Stover, 191 N.E.2d 272 (N.Y. 1963)
State ex rel. Stovanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970)

1975
Grobman v. City of Des Plaines, 59 Ill.2d 588, 322 N.E.2d 443
Citing:
LaSalle/Evanston, supra

Metromedia, Inc. v. City of Des Plaines, 26 Ill. App. 3d 942, 326 N.E.2d 59
Citing:
LaSalle/Evanston, supra
Haller, supra

1976
Continental Homes of Chicago v. County of Lake, 37 Ill. App. 3d 727, 346 N.E.2d 226
Citing:
LaSalle/Evanston, supra

1979
Ward v. County of Cook, 68 Ill. App. 3d 563, 386 N.E.2d 309
Citing:
La Salle/Evanston, supra
Grobman, supra
Continental Homes, supra

1980
County of Lake v. First National Bank of Lake Forest, 79 Ill.2d 221, 402 N.E.2d 591
Citing:
LaSalle/Evanston, supra

Amalgamated Trust v. County of Cook, 82 Ill. App. 3d 370, 402 N.E.2d 719
Citing:
Ward, supra

Rent-a-sign v. City of Rockford, 85 Ill. App. 3d 453, 406 N.E.2d 943
Citing:
Berman v. Parker, 348 U.S. 26
Ward, supra
ABSTRACT

Indiana’s position on the issue of whether aesthetics may justify an exercise of the police power is gleaned from aged decisions and is, at best, uncertain. Whether or not today’s courts would follow the modern pro-aesthetic trend is equally unknown—and apparently untested.

AUXILIARY CONSIDERATION OF AESTHETICS

The earliest decision on the aesthetics question from the Supreme Court of Indiana was General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930). Though holding that the regulatory statute required compensation to owners of billboards for removal from park and boulevard areas, the high court’s language recognized the government’s ability to create and enforce zoning regulations: "Municipal corporations, under the police power...may reasonably control and regulate the construction and maintenance of advertising billboards...provided such regulations have some reasonable tendency to protect the public safety, health, morals, or general welfare and do not unnecessarily invade private property rights."

Id. 172 N.E. 309, 311 (citations omitted). Moreover, the court expressly permitted auxiliary use of aesthetics in zoning ordinances, but precluded use of aesthetics alone:

Under a liberalized construction of the general welfare purposes of state and Federal Constitutions there is a trend in the modern decisions (which we approve) to foster, under the police power, an aesthetic and cultural side of municipal development—to prevent a thing that offends the sense of sight in the same manner as a thing that offends the senses of hearing and smelling. But this trend must be kept within reasonable limitations. [U]nder the law as it exists to-day [sic] aesthetic or artistic considerations alone are not considered sufficient to warrant the exercise of police power....But aesthetic considerations enter in to a great extent, as an auxiliary consideration, where the regulation has a real or reasonable relation to the safety, health, morals, or general welfare; and, where a regulation of billboards does not apply to an entire city, but merely applies to billboards in close proximity to public parks and boulevards, it may properly have a relation to the public health, comfort, and welfare which it would otherwise not possess.
Id. at 312-313 (citations omitted)(footnote omitted)(emphasis added). The court recognized the modern trend of accepting aesthetics as a legitimate motivating factor in zoning decisions--and arguably opened itself to future changes.\footnote{32}

THE TREND TOWARDS THE MODERN VIEW

While no other court opinions have advanced Indiana beyond an auxiliary use of aesthetics, one case does suggest that the state might favorably receive such a movement: Regester v. Lincoln Oil Refining Co., 183 N.E. 693 (Ind Ct. App. 1933). Though it was decided in the Appellate Court of Indiana only three years after General Outdoor/Indianapolis, the Regester opinion extended a modicum of power to the court to aid the preservation of park land (in this case the center green strip of a boulevard).

We believe that, where the destruction, conversion, or taking of public property that has been created and beautified for the benefit of the public at large is concerned, the court[s] should lend their aid to the citizens and taxpayers of a community, so far as may be expedient in each particular instance, to prevent such destruction....[W]e do believe that they [the courts] should exercise their discretion in such matters to the end that public parks, boulevards, miniature parks, etc., should not be destroyed or mutilated or converted for the primary purpose of assisting a private enterprise in the furtherance of its business, especially in cases where the abutting property owner has means of access to and from his property with out such measures.

Id. at 696 (emphasis added). This language suggests--if the current courts still subscribe to this philosophy--that there is room for the de facto preservation of aesthetic qualities in an area. Combined with the "aesthetic and cultural" passage of the General Outdoor/Indianapolis decision, this arguably extends to the preservation of historic districts. No cases, unfortunately, have tested this possibility.

CASE LISTINGS AND REFERENCES

1930 General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 309

Citing:

Cream City Bill Posting Co. v. Milwaukee, 147 N.W. 25 (Wis. 1914)
Thomas Cusack Co. v. Chicago, 242 U.S. 526 (1917)
Rochester v. West, 58 N.E. 673 (N.Y. 1900)
St. Louis Gunning Adv. Co. v. City of St. Louis, 137 S.W. 929 (Mo. 1911)
State v. Staples, 73 S.E. 112 (N.C. 1911)
Ex parte Savage, 141 S.W. 244 (Tex. 1911)
Horton v. Old Colony B. P. Co., 90 A. 822 (R.I. 1914)
State ex rel. v. Hauser, 17 Ohio App. 4 (Ct. App. 1922)
Oppenheim Apparel Corp. v. Cruise, 194 N.Y.S. 183 (1922)
Ware v. Wichita, 214 P. 99 (Kan. 1923)

\footnote{31} The court rationalized its conclusion by saying, "An enjoyment of fresh air and sunshine, and also the grass, flowers and trees, is most important in securing the social, physical, and moral well being of the people, and parks, as a means of providing these bounties of nature for all the people, have come to be considered as essentially necessary." Id. at 313. The court also looked to the character of the surrounding community to determine the unsightliness of a billboard in question, but ultimately was willing to defer to a legislative determination as to what regulations would be imposed in certain areas.

\footnote{32} "Restrictions which years ago would have been deemed intolerable and in violation of the property owners' constitutional rights are now desirable and necessary, and zoning ordinances fair in their requirements are usually sustained." Id. at 313.

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ABSTRACT

The Supreme Court of Iowa follows the modern trend that recognizes aesthetic-based regulations as valid exercises of the police power. Though the court at first only permitted aesthetics to play an auxiliary role, the current position allows full reliance on aesthetic justifications in ordinances. Perhaps this judicial position can be extended to encompass the use of aesthetics in furtherance of historic preservation objectives.

AUXILIARY CONSIDERATION OF AESTHETICS

No decision from the Iowa high court rejected the consideration of aesthetics entirely. An early supreme court opinion on the state’s zoning law, Anderson v. Jester, 207 Iowa 142, 221 N.W. 354 (1928), declared that incidental aesthetic considerations in a zoning determination were insufficient to invalidate the ordinance. Anderson confirmed that a district may be zoned residential under the police power and exclude industrial uses, even though the area may be adapted to industry. With this decision, Iowa could give secondary consideration to aesthetics when passing legislation that otherwise served the traditional goals of public health, safety and welfare.

The Anderson position was affirmed in Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956). The court held that an ordinance requiring uncompensated billboard removal, or a permit from the council to maintain the sign, was an unconstitutional deprivation of property without due process. But, Stoner McCray contemplated reasonable restrictions on billboards as a proper power of the city and the court noted "a trend to foster under police power the aesthetic and cultural side of municipal development—to prevent a thing that offends the sense of sight in the same manner as a thing that offends the senses of hearing and
smelling." *Id.* 78 N.W.2d 843, 847 (citations omitted). Nevertheless, the justices found authority elsewhere which held that "a city may not prohibit billboards merely because such billboards are unsightly" and therefore stuck with the Anderson theory that aesthetics "can be said to enter into the matter as an auxiliary consideration where the zoning regulation has a real or reasonable relation to the safety, health, morals, or general welfare of the community." *Id.* at 847-48 (citations omitted).

Just five years later, the court softened the Anderson holding in *Plaza Recreational Center v. Sioux City*, 253 Iowa 246, 111 N.W.2d 758 (1961). Here the traditional test of reasonableness—whether the means employed in the exercise of police power had a substantial relation to public health, safety, comfort and welfare—including the preservation of property values, was sanctioned by the high court. *Plaza* held that the ordinance was not arbitrary, capricious or discriminatory where the business district at issue was formed from an exclusive residential district and designed to serve the residential area without detracting from the character of the neighborhood. However, the court did not clearly define its use of the word "character" in the decision. Were aesthetics regulations included in an exercise of police power which could address a neighborhood's "character?"

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

Though not answering the specific question left open by *Plaza*, *Iowa Department of Transportation v. Nebraska-Iowa Supply Co.*, 272 N.W.2d 6 (Iowa 1979) moved Iowa into the pro-aesthetics position which permitted ordinances to be based on aesthetic considerations alone. The court held, *inter alia*, that the state's removal of the billboards at issue (for non-compliance with the permit process) was a valid exercise of the police power which did not require compensation to the sign-owners. Relying on the lower court's acceptance of the statutes which "promoted[d] the general public welfare as they promote[d] aesthetic values," the supreme court declared that a "clear basis" existed "in the record for the conclusion that the provisions of [the statute] constitute a valid exercise of the police power." *Id.* at 13. The court said:

*Other courts have reached a similar conclusion regarding the regulation of roadside advertising devices....The fact that the billboards must be removed due to violation of the valid police power regulations established in [the statute] is likewise inoffensive to the "taking" clause of the Fifth Amendment....Given the wide and varied scope of the police power, we cannot say that the regulations here are unreasonable or arbitrary.*

*Id.* at 13-14 (citations omitted). The court cited numerous authorities for their pro-aesthetics position; no other Iowa cases appear to have addressed the issue settled in favor of aesthetics by the *Iowa D.O.T.* decision. No cases directly address aesthetics in the historic preservation context.

CASE LISTINGS AND REFERENCES

1928 *Anderson v. Jester*, 207 Iowa 142, 221 N.W. 354
Citing: *Ex parte Hadacheck*, 239 U.S. 394 (1915)

1956 *Stoner McCray System v. City of Des Moines*, 247 Iowa 1313, 78 N.W.2d 843
Citing: *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917)
*Ware v. Wichita*, 214 P. 99 (Kan. 1923)
*State ex rel. Carter v. Harper*, 196 N.W. 451 (Wis. 1923)
ABSTRACT

Although Kansas seems never to have expressly precluded the consideration of aesthetic matters in zoning enactments, the state’s position on the issue only permits auxiliary consideration of aesthetics to justify governmental regulations on land use. Arguably, the inclusion of aesthetic considerations in historic preservation ordinances would be sustained by the Kansas courts.
AUXILIARY CONSIDERATION OF AESTHETICS

The first case from the Supreme Court of Kansas to address the aesthetics issue was Ware v. City of Wichita, 113 Kan. 153, 214 P. 99 (1923). Though ruling on the validity of a basic zoning enabling statute, the court used important language to permit aesthetic justifications which were related to the traditional police power motives of health, safety, morals and welfare:

With the march of the times...the scope of the legitimate exercise of the police power is not so narrowly restricted by judicial interpretation as it used to be. There is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations. Such legislation is merely a liberalized application of the general welfare purposes of state and federal Constitutions.

Id. 214 P. 99, 101 (emphasis added)(citations omitted). The readiness of the court to sustain aesthetically motivated regulations was tempered by the condition that "a reasonable zoning ordinance [should have] some pertinent relation to the health, safety, morals, and general welfare of the community." Id. at 102. Thus, the court adopted a position which effectually permitted only auxiliary consideration of aesthetics in zoning enactments.

Just over fifty years later, the supreme court reaffirmed this position in Houston v. Board of City Commissioners of City of Wichita, 218 Kan. 323, 543 P.2d 1010 (1975). Here the court upheld the board’s decision to rezone the plaintiff’s property from light commercial to multi-family residential use which was based on the surrounding extant land uses in the zoned area. The court did not believe the change was based on aesthetics:

The zoning here, of course, is not "aesthetic" in the sense that it purports to control the appearance of plaintiffs’ property. The objective sought is the exclusion of commercial uses from a residential area. Any "aesthetic" effect is purely incidental and entirely permissible. We hold that preserving the residential character of the neighborhood was a legitimate purpose of the zoning ordinance.

Id. 543 P.2d 1010, 1016 (emphasis added)(citation omitted). At best, the court’s language reflects a confusion over the purpose and the effect of the zoning decision. Arguably, there was no difference between the two concepts in this case; nevertheless, the court found otherwise and, in sum, maintained its approval of auxiliary aesthetic considerations.

Unfortunately, the subsequent case which discusses the aesthetics issue does little to conclusively resolve the Kansas position either in favor of the auxiliary approach or the pro-aesthetic position. Robert L. Rieke Building Co. v. City of Overland Park, 232 Kan. 634, 657 P.2d 1121 (1983) sustained a city ordinance--which required a special use permit for commercial use of searchlights--as a reasonable exercise of police power that bore a real and substantial relation to legitimate police power objectives. Noting that "[t]hroughout America today, it is generally agreed that billboards and other forms of advertising may be regulated by a state or municipality under the police power," the supreme court recognized "[g]enerally...three legitimate governmental purposes: promotion of traffic safety, aesthetic considerations, and the preservation of property values." Id. 657 P.2d 1121, 1127-28 (emphasis added).

33 Crawford v. City of Topeka, 51 Kan. 148, 33 P. 476 (1893), struck down an ordinance which imposed set-back regulations on fences, billboards or other advertising structures as beyond the police power of the city. The ordinance did not claim to promote the traditional police power purposes of health, safety, morals or welfare of the public. The supreme court, however, neither raised nor addressed the aesthetics issue directly.
The Rieke opinion, however, does not clearly articulate whether the three recognized purposes are dependent on or independent from each other. The court stated that "[a]lthough courts have not been in complete accord in the past, the current trend of the decisions is to permit regulation for aesthetic reasons." *Id.* at 1128. Yet, immediately after this passage, the court observed that safety considerations could sustain the city’s regulation. Without further discussion, the court concluded that a reasonable governmental decision established the reasonableness of the zoning ordinance. Basically, this left the aesthetics issue unchanged from the auxiliary approach which the court acknowledged in *Ware.* Fortunately, *Rieke* does not foreclose the possibility that an aesthetic-based ordinance may be a valid exercise of the police power.

CASE LISTINGS AND REFERENCES

1893  
**Crawford v. City of Topeka,** 51 Kan. 148, 33 P. 476  
Citing:  
no aesthetics precedent

1923  
**Ware v. City of Wichita,** 113 Kan. 153, 214 P. 99  
Citing:  
Paola v. Wentz, 79 Kan. 148, 98 P. 775 (1908)  
Remington v. Walthall, 82 Kan. 234, 108 P. 112 (1910)  
Smith v. Hosford, 106 Kan. 363, 187 P. 685 (1920)  
Opinion of the Justices, 127 N.E. 528 (Mass. 1915)  
State ex rel. Twin City Building v. Houghton, 174 N.W. 885, 176 N.W. 159 (Minn. 1920)  
State v. Wilson, 101 Kan. 789, 168 P. 679 (Kan. 1917)

1975  
**Houston v. Board of City Commissioners,** 218 Kan. 323, 543 P.2d 1010  
Citing:  
*Ware,* supra  

1983  
Citing:  
*Hilton v. City of Toledo,* 405 N.E.2d 1047 (Ohio 1980)  
*Art Neon Co. v. City of Denver,* 488 F.2d 118 (10th Cir. 1973)

*34* With regard to historic preservation ordinances, the court’s position should uphold such an enactment when aesthetics serve a secondary role in the legislation. The preservation of an historical area or neighborhood could be justified as a legitimate governmental goal, given the language of the *Houston* decision.
ABSTRACT

The high court of Kentucky has long recognized government’s ability to justify zoning regulations on the basis of aesthetic considerations. The doctrine, however, has yet to be applied to ordinances which regulate historic preservation districts.

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

The first case from the Court of Appeals of Kentucky which directly addressed the aesthetics issue was Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964). In upholding the constitutionality of the state’s Junk Yard Act (which prohibited the issuance of a permit for a junkyard within a certain distance of a highway unless hidden from view), the court used very explicit language in adopting the modern pro-aesthetic position:

Though it has been held that such [aesthetic] considerations are not sufficient to warrant the invocation of the police power, in our opinion the public welfare is not so limited. In Turner v. Peters, we recognized there could be a legitimate public interest in businesses which "offend the esthetics of the community."

Id. at 711 (citation omitted). The court reviewed the People v. Stover decision of New York, which permitted aesthetics alone to support an exercise of police power, and proceeded to align itself with the Stover court. Noting the expansive qualities of the police power, the Jasper court said:

The police power is as broad and comprehensive as the demands of society make necessary. It must keep pace with the changing concepts of public welfare. Certainly the legislature could take cognizance of the developing importance and extensive improvements of Kentucky’s highway system, of the actual commercial as well as aesthetic value of our scenic beauty, and of the patently offensive character of vehicle graveyards in close proximity to such highways. We may take judicial notice of these things.

Id. (citations omitted). Thus, the supreme court adopted the modern approach which permits aesthetic-based zoning regulations. Given the court’s interpretation of the law and police power, Kentucky may be ready to accept an historic preservation ordinance which is grounded in aesthetics alone.

35 Prior to 1976, the highest state court was named the Court of Appeals; it is now the Supreme Court of Kentucky.

36 Though Jasper conclusively accepted the pro-aesthetics position, the court’s decision in Moore v. Ward, 377 S.W.2d 881 (Ky. 1964) casts a slight shadow of doubt over the prior opinion. The Moore court remained consistently in favor of the aesthetics justification, but also sustained the Billboard Act of 1960 on grounds of public safety and desire to cooperate with the federal government. Since the court explicitly cited Jasper, it may be presumed that the holding therein was still valid and unaffected by other coincidental justifications.
CASE LISTINGS AND REFERENCES

1964

Jasper v. Commonwealth. 375 S.W.2d 709
Citing:
  Turner v. Peters, 327 S.W.2d 958 (Ky. Ct. App. 1959)
  State ex rel. Civello v. City of New Orleans, 97 So. 440 (La. 1923)
  Walnut & Quince Streets Corp. v. Mills, 154 A. 29 (Pa. 1931)
  People v. Stover, 191 N.E.2d 272 (N.Y. 1963)

Moore v. Ward, 377 S.W.2d 881
Citing:
  Jasper, supra

LOUISIANA

ABSTRACT

The case law of Louisiana creates a confusing mix of positions on the issue of aesthetics-motivated exercises of the police power. With regard to aesthetics as a purpose for general zoning ordinances, the courts seem to relegate aesthetics to an auxiliary role. However, aesthetics, as pertaining to historic preservation ordinances, is treated more deferentially by the Louisiana courts.

AUXILIARY CONSIDERATION OF AESTHETICS

Very early judicial rulings suggested that aesthetics alone might sustain the exercise of police power. In State ex rel. Civello v. City of New Orleans, 154 La. 271, 97 So. 440 (1923), the Supreme Court of Louisiana sanctioned zoning ordinances in general as constitutional regulations.37 The court entered a lengthy discussion of the aesthetics issue, which was resolved expressly in favor of an auxiliary use of aesthetics:

The Supreme Court of the United States maintains, and the state courts that have dealt with this subject also maintain, that aesthetic considerations alone do not justify an exercise of the police power to limit a person’s right to use his property as he sees fit. It is said, though, that if the primary considerations for the enactment of an ordinance limiting the individual’s right to use his own property is a substantial consideration of public health, safety, comfort, or general welfare, considerations of taste and beauty may also enter in and not be out of place.

Id. 97 So. 440, 444 (citations omitted)(emphasis added).

37 "In so far, therefore, as those [previous] decisions maintain that a municipal ordinance proscribing business establishments generally in a designated residence street or district is essentially only a matter of aestheticism, and cannot be sustained upon considerations of public health, safety, comfort, or the general welfare, the two decisions [Calvo v. City of New Orleans, 136 La. 480, 67 So. 338 (1915) and State ex rel. Blaise v. City of New Orleans, 142 La. 73, 76 So. 244 (1917)] are now overruled." Id. 97 So. 440, 443.
Continuing its analysis of the issue, the court explored the relationship of aesthetics to
general welfare and, in dicta, suggested that aesthetics alone might justify zoning ordinances:

If by the term "aesthetic considerations" is meant a regard merely for outward
appearances, for good taste in the matter of the beauty of the neighborhood itself, we
do not observe any substantial reason for saying that such a consideration is not a
matter of general welfare. The beauty of a fashionable residence neighborhood in a
city is for the comfort and happiness of the residents, and...[maintains property
values]. It is therefore as much a matter of general welfare as is any other condition
that fosters comfort or happiness....An eyesore in a neighborhood of residences might
be as much a public nuisance [sic], and as ruinous to property values in the
neighborhood generally, as a disagreeable noise, or odor, or a menace to safety or
health. The difference is not in principle, but only in degree. In fact, we believe that
the billboard case[s]...might have rested as logically upon the so-called aesthetic
considerations as upon the supposed other considerations of general welfare.

Id. at 444-45 (emphasis added).

THE TREND TOWARDS THE MODERN VIEW

The Civello decision initiated the auxiliary use of the aesthetics justification within
Louisiana. Unfortunately, none of the available subsequent cases have expanded this ruling to
follow the modern "aesthetics alone" doctrine. For example, in State Department of Highways v.
National Advertising Co., 356 So. 2d 557 (La. Ct. App. 1978), the intermediate (appellate) court
opted not to assert that an aesthetic motivation alone would sustain the highway beautification
statute: "We find the restrictions imposed by the statute to be 'rationally related to a legitimate
state interest.' The fact that aesthetic values are promoted in conjunction with the furtherance of
safety of travel on the public ways does not indicate an abuse of the police power." Id. at 567
(emphasis added)(citation omitted). The court adhered to the Civello position permitting auxiliary
use, though the National Advertising decision cites Berman v. Parker and numerous other cases
which have been used to justify purely aesthetic-based regulations. Thus, with regard to general
zoning provisions, it is not clear that Louisiana has moved beyond the intermediate, auxiliary use of
aesthetics position.

AESTHETICS AND HISTORIC PRESERVATION

The case history of the aesthetics issue with regard to historic preservation, however,
follows a different path than the general zoning cases. Two cases from 1941 upheld ordinances
promulgated under an amendment to the Louisiana constitution which created the historic Vieux
Carre district in New Orleans. Oddly enough, City of New Orleans v. Impastato, 198 La. 206, 3
So. 2d 559 (1941) and City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941) did
not challenge or resolve the constitutionality of the amendment's provisions. Impastato basically
defined the parameters of the Vieux Carre Commission's powers38 very broadly--arguably
including an ability to make aesthetically based regulations. This suggestion is bolstered by the
language of Pergament, explaining the purpose of the sign restriction at issue:

38 "[A] reading of the constitutional provision reveals a plain intention on the part of the people to delegate to the City of New
Orleans, acting through a Commission to be known as the Vieux Carre Commission, full and complete authority with respect
to the preservation of the architecture and the historic value of the buildings situated in the Vieux Carre section....This, we think,
is sufficient to include all reasonable regulations made by the City respecting changes to be made to the outside of any building
situated in the Vieux Carre section." Id. 3 So. 2d 559, 561.
The purpose of the ordinance is not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the tout ensemble, so to speak, by defending this relic against iconoclasm or vandalism. Preventing or prohibiting eyesores in such a locality is within the police power and within the scope of this municipal ordinance.

Id. 5 So. 2d 129, 131 (emphasis added).

Ironically, the case which sustained the constitutionality of the Vieux Carre amendment, City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953), contains language which cowers from the bolder position stated in Pergament. The landowner's challenge in Levy charged that the constitutional amendment was invalid because of its aesthetic motivations. The supreme court responded:

Perhaps esthetic [sic] considerations alone would not warrant an imposition of the several restrictions contained in the Vieux Carre Commission Ordinance. But, as pointed out in the Pergament case, this legislation is in the interest of and beneficial to the inhabitants of New Orleans generally, [preservation]...being not only for its sentimental value but also for its commercial value, and hence it constitutes a valid exercise of the police power. Incidentally, both the constitutional amendment and the ordinance recite that the preservation is for the public welfare.

Id. 64 So. 2d 798, 802-803 (emphasis added). The court chose not to allow aesthetics to invalidate the amendment since Pergament had previously proclaimed its purpose to serve much more than aesthetics. However, the suggestive language of Levy (emphasized above) hints that the court was not wholeheartedly abandoning the possibility of purely aesthetic-based regulations; "perhaps" a carefully worded ordinance, relying on an aesthetics justification and claiming the advancement of "public welfare," will be sustained by the Louisiana courts for historic preservation, if not general zoning, ordinances.

CASE LISTINGS AND REFERENCES

1923  
State ex rel. Civello v. City of New Orleans, 154 La. 271, 97 So. 440  
Citing:  
Welsh v. Swasey, 214 U.S. 91 (1909)  
Aver v. Comm'n on Height of Buildings, 136 N.E. 338 (Mass. 1922)  
Opinion of the Justices, 127 N.E. 525 (Mass. 1955)  
Cochran v. Preston, 70 A. 113 (Md. 1908)  
Cusack v. City of Chicago, 242 U.S. 526 (1917)  
Hubbard v. Taunton, 5 N.E. 157 (Mass. 1886)

1941  
City of New Orleans v. Impastato, 198 La. 206, 3 So. 2d 559  
Citing:  
no authority

City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129  
Citing:  
no authority
**ABSTRACT**

The Supreme Judicial Court of Maine has maintained a consistent position with regard to aesthetic regulations under the police power: aesthetic considerations may enter zoning decisions only as auxiliary factors. Only one case suggests that any substantial deviation from this view might occur.

**AUXILIARY CONSIDERATION OF AESTHETICS**

In the earliest opinion from the high court that addressed the aesthetics issue, *York Harbor Village v. Libby*, 126 Me. 537, 140 A. 382 (1928), the court held that the zoning ordinance, which prohibited camp grounds in certain areas, did not violate due process or equal protection clauses of the Constitution. The justices stated that aesthetics might be secondary considerations in zoning determinations. Arguably the decision left open the question of whether aesthetics alone would support ordinances:

> It is suggested, but, we think, not proved, that offensiveness to some supersensitive eyes is the only respect in which camping grounds affect the public welfare. If this were true and proved, we are not prepared to say that we should hold the restrictions to be reasonable and valid—even if one of the reactions were a depreciation in value of surrounding property. But the fact that "considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them."

*Id.* at 386 (emphasis added) (citation omitted). The aesthetics issue was tangential to the heart of the *York Harbor* case; at the very least, however, the decision permitted auxiliary consideration of aesthetics.
**REJECTION OF THE MODERN, PRO-AESTHETIC VIEW**

Many years later, the high court reiterated the York Harbor position and expressly precluded ordinances that were justified on the sole basis of aesthetics in *Wright v. Michaud*, 160 Me. 164, 200 A.2d 543 (1964).

With the development of the law of zoning and the inclusion in enabling acts of provisions for comprehensive planning for municipal development there has been a tendency to broaden the scope of the meaning of the term "general welfare" in determining the purposes for which zoning ordinances may be enacted.

*Id.* 200 A.2d 543, 547-48. Notwithstanding the language of *Berman v. Parker* which allows aesthetic considerations, the court concluded:

In considering the provisions of a comprehensive zoning ordinance the legislative body may take into consideration the nature and character of the community and of its proposed zone districts, the nature and trend of the growth of the community and that of surrounding municipalities, the areas of undeveloped property and such other factors that necessarily enter into a reasonable and well-balanced zoning ordinance. We do not feel that aesthetic considerations alone will warrant zoning restrictions against individual mobilehomes [*sic*].

However, we are satisfied that with the development of zoning in this state, a municipality...may properly consider, among other factors, the impact of the use of that type of structure upon the development of the community.

*Id.* at 548 (emphasis added). Even under the York Harbor position, the court upheld a zoning ordinance, which prohibited mobile homes unless a special permit was issued, as a constitutional exercise of the police power under the state statute.

After almost a decade, the high court maintained its conservative position in *Ace Tire Co. v. Municipal Officers of City of Waterville*, 302 A.2d 90 (Me. 1973), even though the opinion recognized that aesthetics were gaining more importance in zoning decisions:

The Legislature can take cognizance, and this Court judicial notice, of the need for a comprehensive plan structured with a view to promoting safety in the development of our highway system...and simultaneously salvaging the aesthetic value of our scenic beauty. We take judicial notice of the modern trend legislatively to protect the environment. Legislation under the police power will not be declared constitutionally invalid for the mere reason that factual considerations of an aesthetic nature have entered into its passage. Whether the police power of the state is broad enough to permit legislation based solely on aesthetic considerations, we need not decide in the instant case.

*Id.* at 97 (emphasis added)(citations omitted). *Ace Tire* invalidated a junkyard zoning statute to the extent it imposed discriminatory and unconstitutional fees for permits; otherwise, the court upheld the statute on safety grounds because the legislature, the court maintained, did not rely on aesthetic considerations in passing the law.

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39 Arguably, *Wright* can be construed to apply only to its literal word—that aesthetic restrictions will not be upheld against individual mobile homes—which would free municipalities to generate aesthetic-based regulations to apply to other structures or zones.
Would the _Ace Tire_ opinion uphold an enactment if the legislature _did_ rely on aesthetics? The answer is unclear. A year later the court wrote a more permissive decision which arguably favored the consideration of aesthetics factors to achieve aesthetic objectives. _Barnard v. Zoning Board of Appeals of Town of Yarmouth_, 313 A.2d 741 (Me. 1974) sustained a minimum lot size ordinance, saying

> We consider it well-established that, from the community standpoint, there are numerous practical and logical interests legitimately served by restrictive zoning, particularly when the individual restrictions...are promulgated as part of a comprehensive municipal planning and zoning scheme founded on lawful objectives. Communities cannot be condemned for seeking such ends as preservation of open space and local "beauty," avoidance of heavy traffic congestion and overcrowded housing, maintenance of property values, or even the stabilization of the burdens of spending for municipal services.

_id._ at 745 (emphasis added). This language strongly suggests that the court would validate aesthetic-based regulations. Subsequent decisions, however, do not fully accord with the _Barnard_ language.

**FURTHER DEVELOPMENTS**

The last case to rely heavily on the _York Harbor_ position was _Gabriel v. Town of Old Orchard Beach_, 390 A.2d 1065 (Me. 1978). In upholding the town ordinance, which restricted nude dancing in order to "preserve the quality of the urban environment," the court receded from _Barnard_'s permissive approach and insisted that aesthetics be considered with another traditional governmental interest.40 Other decisions, however, suggest that Maine is moving forward with the pro-aesthetic trend. _Warren v. Municipal Officers of the Town of Gorham_, 431 A.2d 624 (Me. 1981) apparently reaffirmed the holding of _Wright_ as to aesthetics alone, but used language throughout the opinion that implied movement in the opposite direction. Citing the lower court's opinion, the supreme court

> found four reasons in the record supporting the zoning ordinance: 1) aesthetic considerations; 2) deterioration in the value of neighboring properties; 3) adverse impact on the Town’s tax base; and 4) rapid deterioration of mobile homes. Such reasons do properly relate to the public health, safety, morals or general welfare.

_id._ at 628 (emphasis added). The zoning ordinance sustained by the court distinguished between single-unit and multiple-unit modular homes.

> This distinction strikes to the central purpose of all residential zoning; to control and shape the development of the community as a whole by the development of zones or neighborhoods that reflect individualization of properties, avoidance of detrimentally inconsistent property values within zones and a desirable harmony of appearance by whatever aesthetic values are chosen.

_id._ at 629 (emphasis added).

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40 Though the facts initially appear unrelated to preservation issues, the quality of setting or environment principle could be a very important justification for restrictive historic preservation ordinances. In _Gabriel_, the court held that the town's attempt to preserve the quality of the environment outweighed any minimally protected first amendment interest that the ordinance would infringe. Analogously, a municipal effort to preserve an historic setting might outweigh an historic property owner's right to derive maximum financial benefit out of his property.
In a footnote following the preceding quotation, the court wrote the opinion's most important passage, opening new possibilities for aesthetic-based regulations:

\[\text{In Wright} \] we noted that aesthetic considerations alone will not warrant zoning restrictions against individual mobile homes. We went on to say, however, that a mobile home, however elaborately built or landscaped, [original emphasis] is often detrimental to surrounding property. We do not read Wright as prohibiting zoning restrictions based upon a combination of aesthetic considerations and resulting decreases in abutting property values.

\[\text{id.} \] (emphasis added). This language articulates the most permissive and clearly stated policy on aesthetics found in any Maine decision. Apparently no cases have tested the combination of aesthetics and property depreciation as a basis for ordinances. With a slow acceptance of greater use of aesthetics, as articulated in new cases following the decisions of Ace Tire and Barnard, the Warren opinion might sustain the use of aesthetics alone.

CASE LISTINGS AND REFERENCES

1928  
\textbf{York Harbor Village v. Libby}, 126 Me. 537, 140 A. 382  
Citing:  
\textbf{Welch v. Swasey}, 214 U.S. 91 (1909)

1964  
\textbf{Wright v. Michaud}, 160 Me. 164, 200 A.2d 543  
Citing:  
\textbf{York Harbor, supra}  
\textbf{Toulouse v. Bd. of Zoning Adjustment}, 87 A.2d 670 (Me. 1952)  
\textbf{Fisher v. Bedminster}, 93 A.2d 378 (N.J 1952)  
\textbf{Lionshead Lake, Inc. v. Wayne}, 89 A.2d 693 (N.J. 1952)  
\textbf{Opinion of the Justices}, 128 N.E.2d 563 (Mass. 1955)

1973  
\textbf{Ace Tire Co. v. Municipal Officers of the City of Waterville}, 302 A.2d 90  
Citing:  
\textbf{Jasper v. Commw.}, 375 S.W.2d 709 (Ky. 1964)  
\textbf{York Harbor, supra}  
\textbf{Vermont Salvage Corp. v. Village of St. Johnsbury}, 34 A.2d 188 (Vt. 1943)  
\textbf{Levine v. Bd. of Adjustment}, 7 A.2d 222 (Conn. 1939)  
\textbf{Bachman v. State}, 359 S.W.2d 815 (Ark. 1962)  
\textbf{City of Akron v. Chapman}, 116 N.E.2d 697 (Ohio 1953)

\footnote{See, \textit{Begin v. Town of Sabattus}, 409 A.2d 1269 (Me. 1979) which recognized that a legislative purpose of "aesthetics and the 'character' of the neighborhoods" could permit a distinction between conventional and mobile homes. The court did not disallow such a purpose in its decision.}
MARYLAND

ABSTRACT

Though flirting with the concept of aesthetics as a valid basis for the exercise of the police power, Maryland has not recognized the ability of the legislature to base laws upon aesthetic grounds. All of the cases on the topic seem to have reached the highest court; the Maryland Court of Appeals. The case law is sporadic on the issue. Maryland recognizes the significance of historic preservation efforts. To the extent that historic preservation is the purpose of an enactment, the court appears willing to permit aesthetics justifications. Other, regular zoning ordinances, however, may not be supported by aesthetic grounds alone.

EARLY DECISIONS ON AESTHETIC CONCERNS

Remarkably, the earliest case pertaining to the subject, Garrett v. James, 65 Md. 260, 3 A. 597 (1886), came from the Court of Appeals over a century ago. The challenged ordinance regulated the location of porches and porticos in the Mount Vernon Place monument district of Baltimore. Notwithstanding some statutory questions raised by the case, the court applied an innovative concept in ruling on the issue of the ordinance’s propriety:

*We see no difficulty in the standing together of a special ordinance adapted to a particular locality, such as Mount Vernon place, and a general one, applicable to the streets and alleys of the city at large. The need of such discrimination is apparent. The necessities of thoroughfares,...adjacent to markets or wharves devoted to*
business, and "thronged" with pedestrians, are not similar to those of places or squares set apart for ornament and relief from the crowds and activities of commerce. [With regard to the latter, the paramount concern is in furtherance of the purpose to render them attractive—to give more freedom to the exercise of private taste for adornment in their vicinity. In a city noted for its monuments, municipal legislation peculiar to their neighborhood would seem indispensable; and we regard the ordinance allowing steps, porticoes, or any other ornamental structures to extend nine feet into Mount Vernon place a valid and reasonable exercise of statutory power.

Id. 3 A. 597, 600 (emphasis added). The court's language reflects some Victorian notions, but anticipates the modern trend in zoning that Maryland has yet to completely follow.

AUXILIARY CONSIDERATION OF AESTHETICS

Twenty years later, the court justified an ordinance restricting the permissible height of new buildings on fire and safety considerations. But before reaching its conclusion, the Cochran v. Preston, 108 Md. 220, 70 A. 113 (1908) decision noted the possibility of using aesthetics as an auxiliary motivation in ordinances. The court acknowledged that many scholars, and several cases from other jurisdictions, had refused to allow aesthetic justifications for exercises of the police power:

Such is undoubtedly the weight of authority, though it may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power, even for such [aesthetic] purposes.

Id. 70 A. 113, 114. Subsequent decisions would never quite give full effect to the open language of the Garrett and Cochran opinions.

For another sixty-five years, the aesthetics issue remained unresolved and essentially unchallenged. In 1973, Mayor and City Council of Baltimore v. Mano Swartz, Inc., 268 Md. 79, 299 A.2d 828, 3 Envtl. L. Rep. (Envtl. L. Inst.) 20,232 (1973) addressed the question and held that an ordinance prohibiting certain advertising signs on or around buildings served no purposes other than aesthetics. This constituted an invalid use of the police power. "While aesthetic goals may legitimately serve as an additional legislative purpose, if health, morals or safety or other ends generally associated with the concept of public welfare are being served, they cannot be the only purpose of regulation." Id. 299 A.2d 828, 832 (citations omitted). The court noted that if the restrictions had been connected with traffic safety, they might have sustained the enactment. Justifying the ordinance on solely aesthetic grounds created a difficulty for the court:

The principal difficulty is that other forms of pollution, stench and noise and the like, can be measured by more nearly objective standards. If beauty, however, lies in the eyes of the beholder, so does the tawdry, the gaudy and the vulgar—and courts have traditionally taken a gingerly approach to legislation which circumscribes property rights by applying what amounts to subjective standards, which may well be those of an idiosyncratic group.

Id. at 833 (citations omitted). Without definitive objective standards, the Court of Appeals would permit no more than auxiliary consideration of aesthetics in legislative enactments.
AESTHETICS AND HISTORIC PRESERVATION

The most important language from the Mano Swartz opinion upholds the importance of historic preservation. Though almost appearing contradictory to its earlier disavowal of purely aesthetic-based zoning decisions, the court would permit the preservation of a beautiful area by ordinance, but not the creation of one. Said the court,

"We do not wish to be understood as saying that aesthetic considerations cannot play a proper role in the zoning process, because they do. It has long been recognized that the police power may rightly be exercised to preserve an area which is generally regarded by the public to be pleasing to the eye or historically or architecturally significant."

Id. at 835 (emphasis added). The conclusion that Mano Swartz permits is that historic preservation (obviously, of existing buildings) is justifiable on aesthetic grounds.

The oddity of the Maryland decisions is that, though historic preservation purposes permit aesthetic-based ordinances, regular zoning goals do not.42 Whether attempting to rectify this situation or not, the Court of Appeals of Maryland validated an ordinance requiring the removal of off-site advertising signs in Donnelly Advertising Corp. of Maryland v. City of Baltimore, 279 Md. 660, 370 A.2d 1127, 7 Envtl. L. Rept. (Envtl. L. Inst.) 20,397 (1977). The opinion declared that the "removal of blight" was a legislative purpose worthy of a presumption of validity. Without defining "blight," the court saw that in this case, to the extent they perpetuated "blight," the signs affected the historically significant downtown area. Since historic preservation was recognized as a valid exercise of the police power, the sign ordinance was also valid. The logic of the court’s opinion works, but the Donnelly opinion becomes a roundabout method of permitting general aesthetic-based ordinances. Since there seem to be no more recent challenges to the issue, the Mano Swartz/Donnelly approach to aesthetics and historic preservation remains intact today.

CASE LISTINGS AND REFERENCES

1886 Garrett v. James, 65 Md. 260, 3 A. 597
Citing: no authority

1908 Cochran v. Preston, 108 Md. 220, 70 A. 113
Citing:
Welsh v. Swasey, 79 N.E. 745 (Mass. 1909)
Garrett, supra

1973 Mayor of Baltimore v. Mano Swartz, Inc., 268 Md. 79, 299 A.2d 828
Citing:
Feldstein v. Kammauf, 209 Md. 479, 121 A.2d 716 (1956)
Goldman v. Crowther, 147 Md. 282, 128 A. 50 (1925)
County Comm’rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967)

42 See, Montgomery County v. Citizens Building and Loan Association, Inc., 20 Md. App. 484, 316 A.2d 322 (Ct. Spec. App. 1974), which held that an ordinance prohibiting roof signs was an unconstitutional exercise of police power because the sole purpose was aesthetic without any non-aesthetic relation to the general welfare.
Grant v. City of Baltimore, 212 Md. 301, 129 A.2d 363 (1957)
Jack Lewis, Inc. v. City of Baltimore, 164 Md. 146, 164 A. 220 (1933)
(Mass. 1935)
Dowsey v. Village of Kensington, 177 N.E. 427 (N.Y. 1931)
Stevens v. City of Salisbury, 240 Md. 556, 214 A.2d 775 (1965)
General Outdoor Adv. v. City of Indianapolis, 172 N.E. 309 (Ind. 1930)
Opinion of the Justices, 128 N.E.2d 557 (Mass. 1955)
State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217
(Wis. 1955)
Cromwell v. Ferrier, 225 N.E.2d 749 (N.Y. 1967)
People v. Rubenfeld, 172 N.E. 485 (N.Y. 1930)
Quintini v. City of Bay St. Louis, 1 So. 625 (Miss. 1887)
Sunad, Inc. v. Sarasota, 122 So. 2d 611 (Fla. 1960)
State ex rel. Civello v. New Orleans, 97 So. 440 (La. 1923)
Naegle Outdoor Adv. Co. v. Village of Minnetonka, 162 N.W.2d 206
(Minn. 1968)
Oregon City v. Hartke, 400 P.2d 255 (Or. 1965)
State ex rel. Carter v. Harper, 196 N.W. 451 (Wis. 1923)
Ullrich v. State, 186 Md. 353, 46 A.2d 637 (1940)
Garrett, supra

1974

Montgomery County v. Citizens Building and Loan Ass’n, Inc., 20 Md. App. 484,
316A.2d 322
Citing:
Mano Swartz, supra

1977

Donnelly Adv. Corp. v. City of Baltimore, 279 Md. 660, 370 A.2d 1127
Citing:
City of Baltimore v. Charles Center Parking, 259 Md. 595, 271 A.2d 144
(1970)
Mano Swartz, supra
Cochran, supra
Garrett, supra
Master Royalties v. City of Baltimore, 235 Md. 74, 200 A.2d 652 (1964)

MASSACHUSETTS

ABSTRACT

Like many other states, the commonwealth of Massachusetts passed through the various
stages of acceptance of aesthetics as a valid basis for zoning ordinances before sanctioning the
aesthetics alone position. Though there is no one case on point, the law from the state indicates
that aesthetics and historic preservation are warmly received governmental purposes. If raised, an
aesthetics-based historic preservation regulation would probably be sustained.
AUXILIARY CONSIDERATION OF AESTHETICS

A very early case from the Supreme Judicial Court of Massachusetts (the highest court) upheld aesthetic considerations as a proper part of the state's eminent domain power in the creation of public parks. Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77 (1899). Defending the government's power to create parks and "preserve the architectural symmetry" around them, the court stated that

if the legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the lawmaking power might not determine that this was a matter of such public interest as to call for an expenditure of public money, and to justify the taking of private property.

Id. 55 N.E. 77, 78. The regulation in Williams restricted the height of buildings surrounding Boston's Copley Square and provided compensation to those landowners who were harmed by the ordinance. The consideration of aesthetics did not receive identical treatment, however, when made under an exercise of the police power. Though not prohibiting aesthetics as factor in legislative determinations, the Massachusetts court required legislation to meet one of the traditional purposes first.

One of the first cases to clearly define this position eventually went to the United States Supreme Court. Welsh v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), aff'd, 214 U.S. 91 (1909) sustained an ordinance limiting the height of buildings in different areas of a city. Showing great deference to the Supreme Judicial Court's opinion that the ordinance served safety, and not aesthetic concerns, the United States Supreme Court upheld the opinion below, but noted that if "considerations of an aesthetic nature also entered into the reasons for [the ordinance's] passage, [it] would not invalidate them." Id. 214 U.S. 91, 108. While Welsh determined aesthetics to be a proper auxiliary consideration, later decisions would refine Massachusetts' official position.

THE TREND TOWARDS THE MODERN VIEW

The next case to address the aesthetics issues in the Supreme Judicial Court of Massachusetts was General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799 (1935). First the court noted several significant aspects of the state's police power pertaining to its use in zoning regulations: that the power is vast and promotes health, safety, morals and general welfare (traditional goals); that regulations must be reasonable and designed to reach a permissible end. Id. 193 N.E. 799, 813. True to the traditional view of the police power, the General Outdoor decision permitted regulation of outdoor advertising signs since it promoted traffic safety and prevented travelers from the "annoyance of advertising." Id. at 814.

When the court reached the aesthetics issue in General Outdoor, its language reflected a more permissive attitude than was actually effectuated by the decision itself. Preservation goals were cited as a substantial motivation in the legislation:

In so far as the granting or denial of permits for the location of billboards in the cases at bar has been governed by considerations of taste and fitness, the purpose has been to preserve places of natural scenic beauty and historical interest from incongruous intrusion. It is in substance exclusion of billboards and advertising devices by zoning. It is an attempt to segregate them to a certain extent in places where from the scenic or historic point of view the dominant use of land is indifferent or is the transaction
of business, and to shut them out from regions where nature has afforded landscape of unusual attractiveness and where historic and other factors have created patriotic places hallowed by literacy and humanitarian associations.

Id. at 816 (emphasis added). While the implication of this passage is to permit aesthetic considerations in preservation ordinances, the court restricted its holding to the appropriateness of rules accomplishing the preservation goals. Further, the preservation efforts had to combine with the promotion of safety.

The General Outdoor court made an interesting distinction between the specific rules before it and other regulations. If the ordinance operated prospectively as to new construction, aesthetics entered as a factor of the ordinance.

The phrase "aesthetic considerations" in our opinion has commonly been applied to regulations as to the character, form and appearance of constructions to be erected. The rules and regulations here in question have different aims.... They are designed to promote safety... and enjoyment of resort to public parks and reservations, ... to protect property from depreciation, and to make the commonwealth attractive to visitors... as well as to her own citizens.

Id. at 815. Thus, since the regulations in question applied to extant structures, "aesthetics" were not a motivating factor of the law. This distinction is tenuous but represents a springboard for change in the Massachusetts position. The language of General Outdoor truly suggested that advancement in the judicial view on aesthetics was imminent; the courts, however, moved slowly.

AESTHETICS AND HISTORIC PRESERVATION

Perhaps two of the most famous preservation cases from Massachusetts Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955) and Opinion of the Justices, 333 Mass. 783, 128 N.E.2d 563 (1955), provided dramatic developments in the aesthetics and historic preservation areas. Acknowledging that the older position had only permitted an auxiliary consideration of aesthetics, the court pointed out that "[t]here is reason to think that more weight might now be given to aesthetic considerations than was given to them a half a century ago." Id. 333 Mass. 773, 779. Additionally, the opinions noted that "[t]here has been substantial recognition by the courts of the public interest in the preservation of historic buildings, places, and districts." Id. at 780. Without placing limitations on their observations, the court left open the opportunity for valid legislative expansion into these areas.

43 Later in the opinion the court took judicial notice of the fact that scenic beauty had an economic value to the state. Id. at 823.

44 In 122 Main Street Corp. v. City of Brockton, 323 Mass. 646, 84 N.E.2d 13 (1949), the court, instead of moving forward with its aesthetics doctrine, entrenched Massachusetts in the "auxiliary-use-only" position. Here, the high court struck down an ordinance provision establishing height requirements in the central business district, but sustained the portion which created that specific district. The opinion might be narrowly read, however, given the court's statement that "[i]t is not within the scope of the act to enact zoning regulations for the purpose of assisting a municipality to retain or assume a general appearance deemed to be ideal." Id. 84 N.E.2d 13, 16 (emphasis added).
ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

Finally, in 1975, the Supreme Judicial Court flatly stated that the use of aesthetics alone would justify an exercise of the police power. John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 339 N.E.2d 709, 8 Env't Rep. Cas. (BNA) 1671, 6 Envtl. L. Rep. (Envtl. L. Inst.) 20,123 (1975). The court fully reviewed the changing policies which permitted such a decision. Recognizing that prior courts operated in essence under a "legal fiction" by rationalizing away aesthetic purposes, the opinion held:

that aesthetics alone may justify the exercise of police power; that within the broad concept of "general welfare," cities and towns may enact reasonable billboard regulations designed to preserve and improve their physical environment. We live in a changing world where the law must respond to the demands of a modern society....Among these changes is the growing notion that towns and cities can and should be aesthetically pleasing; that a visually satisfying environment tends to contribute to the well-being of its inhabitants.

Id. 339 N.E.2d 709, 717. With this affirmative espousal of the aesthetics-only position, Massachusetts permits the enactment of legislation on the basis of aesthetics.

CASE LISTINGS AND REFERENCES

1899 Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77
Citing: no authority

Citing: Attorney General, supra

Citing: Opinion of the Justices, 234 Mass. 597, 127 N.E. 525 (1920)
Welch, supra
St. Louis Poster Adv. v. St. Louis, 249 U.S. 269 (1919)
Attorney General, supra
Goreib v. Fox, 274 U.S. 603 (1926)
Packer Corp. v. Utah, 285 U.S. 105 (1931)
General Outdoor Adv. Co. v. City of Indianapolis, 172 N.E. 309 (Ind. 1930)
People v. Sterling, 220 N.Y.S. 315 (1927)
State ex rel. Cirello v. New Orleans, 97 So. 440 (La. 1923)
State v. Kievman, 165 A. 601 (Conn. 1933)
Kansas City Gunning Adv. Co. v. Kansas City, 144 S.W. 1099 (Mo. 1911)
Ware v. Wichita, 214 P. 99 (Kan. 1923)
Horton v. Old Colony Bill Posting, 90 A. 822 (R.I. 1914)

46 A very similar opinion, John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 282 N.E.2d 661 (Mass. 1972) dealt with almost identical issues but did not involve the aesthetics question.
Walnut & Quince Street Corp. v. Mills, 154 A. 29 (Pa. 1931)
Cream City Bill Posting Co. v. Milwaukee, 147 N.W. 25 (Wis. 1914)

1949

122 Main Street Corp. v. City of Brockton, 323 Mass. 646, 84 N.E.2d 13
Citing:
  Welch, supra
  Opinion of the Justices, 127 N.E. 525, supra
  General Outdoor Adv., (Mass.) supra
  Tranfaiglia v. Building Comm'r of Winchester, 306 Mass. 495, 28 N.E.2d 537 (1940)

1955

Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557
Citing:
  Opinion of the Justices, 127 N.E. 525
  Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926)
  Welch, supra
  Aver v. Cram, 242 Mass. 30, 145 N.E. 262 (1924)
  122 Main Street, supra
  Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243 (1945)
  United States v. Gettysburg Electric Railway, 160 U.S. 668 (1895)
  State v. Kemp, 261 P. 556 (Kan. 1927)
  Flaccomio v. Mayor of Baltimore, 71 A.2d 12 (1949)

1975

Citing:
  St. Louis Poster Adv. v. St. Louis, supra
  Murphy v. Westport, 40 A.2d 177 (Conn. 1944)
  Mayor of Baltimore v. Mano Swartz, 299 A.2d 828 (Md. 1973)
  Euclid, supra
  Berman, supra
  General Outdoor Adv., (Mass.) supra
  Lexington, supra
  Oregon City v. Hartke, 400 P.2d 255 (Or. 1965)
  Westfield Motor Sales v. Westfield, 324 A.2d 113 (N.J. 1974)
  State v. Diamond Motors, 429 P.2d 825 (Haw. 1967)
  Jasper v. Commw., 375 S.W.2d 709 (Ky. 1964)
  Mississippi St. Highway Comm'n v. Roberts Enterprises, Inc., 304 So. 2d 637 (Miss. 1974)
  Cromwell v. Ferrier, 225 N.E.2d 749 (N.Y. 1967)
  Schloss v. Jamison, 136 S.E.2d (N.C. 1964)
ABSTRACT

The state of Michigan has not made a definitive ruling on the aesthetics issue since early in its case law. Currently, the courts uphold the auxiliary use of aesthetics consistently, and little recognition has been given to the modern pro-aesthetic trend. To the extent Michigan permits historic preservation as a legitimate motivation for the exercise of the police power, aesthetics may function incidentally in the legislation. Beyond this limitation, the status of the aesthetics-based legislation is uncertain.

AUXILIARY CONSIDERATION OF AESTHETICS

In Wolverine Sign Works v. City of Bloomfield Hills, 279 Mich. 205, 271 N.W. 823 (1937), the Supreme Court of Michigan affirmatively declared that aesthetics may be considered as an auxiliary goal to zoning decisions, but may not be the motivating factor in legislation. The court did not further elaborate on its reasoning or the application of this position.46

The Michigan courts remained relatively silent on the aesthetics issue from the Wolverine ruling until the early 1970s. At that time, the Court of Appeals of Michigan (intermediate level) issued several decisions on the topic. Perhaps the most fully articulated position was from Sun Oil Co. v. City of Madison Heights, 41 Mich. App. 47, 199 N.W.2d 525 (Ct. App. 1972). Reiterating the Wolverine conclusion on the auxiliary use of aesthetics, Sun Oil included more permissive language in its review of the modern trend:

In addition to protecting public safety, [the city] has sought to protect the aesthetic well-being of its citizens. The latter is a valid part of the public welfare....The decision of what is aesthetically best for the community is for the legislature....The modern trend is to recognize that a community’s aesthetic well-being can contribute to urban man’s psychological and emotional stability....We should begin to realize...that a visually satisfying city can stimulate an identity and pride which is the foundation for social responsibility and citizenship. These are proper concerns of the general welfare.

Id. 199 N.W.2d 525, 529. Though the Sun Oil court was unwilling to justify the ordinance limiting the height of free-standing signs on aesthetics alone, the treatment of the modern concept of the

46 However, Justice Butzel noted in his dissent the legal fictions that some decisions relied upon for permitting the consideration of aesthetics: “While numerous courts heretofore have approved the rule that ordinances of this character will not be upheld if they are based upon aesthetic reasons alone, many of the decision, in order to uphold ordinances of this type, have supplemented the aesthetic reasons with fantastic arguments that billboards are a menace to public safety, that they provide convenient places to harbor the criminal, and that they furnish a rendezvous for immorality.” Id. 271 N.W. 823, 824. The judge advocated adoption of the pro-aesthetic position.
role of aesthetics was encouraging. For all the positive words, however, the appellate court bowed away from the opportunity to change the doctrine.47

THE TREND TOWARDS THE MODERN VIEW

While the auxiliary use of aesthetics remained popular in most appellate decisions, one opinion from the Court of Appeals, National Used Cars, Inc. v. City of Kalamazoo, 61 Mich. App. 520, 233 N.W.2d 64 (Ct. App. 1975), ventured into the modern position and upheld an ordinance, requiring that the contents of junkyards be shielded from public view, on the basis of aesthetics alone. Justifying its decision, the court noted that

[the concept of police power is neither immutable nor capricious. Rather it must be flexible enough to satisfy the changing demands of society. The modern social conscience includes a need for an environment which reflects certain aesthetic qualities. And a community’s desire to enhance the scenic beauty of its neighborhoods by keeping junkyards concealed from view is clearly a legitimate feature of the public welfare. The importance of this objective, in the context of zoning and land use, has been recognized before by our own state legislature, the Congress, and the United States Supreme Court.

Id. 233 N.W.2d 64, 66-67 (footnotes omitted). This case, however, seems to be an anomaly. No other Michigan decisions from the appellate or supreme courts reflect a recognition of it or its holding. In fact, the status of the aesthetics issue becomes difficult to ascertain from this point forward.

The appellate courts, almost without exception, consistently rely on Wolverine and its prohibition of anything but an auxiliary role for aesthetics.48 But the devotion to the moderate position seems to be waning. The first indications of change appear in the language or results that other courts resolve cases with. For example, in Gackler Land Co. v. Yankee Springs Township, 138 Mich. App. 1, 359 N.W.2d 226 (Ct. App. 1984), aff’d, 427 Mich. 562, 398 N.W.2d 393 (1986), the appellate court flatly stated that "aesthetics is a proper concern of zoning."49 Id. 359 N.W.2d 226, 231. The supreme court, in affirming that the township could regulate the placement or variety of mobile homes, made a simple recognition that "the zoning ordinance will improve the aesthetics of the area, thereby advancing a reasonable government interest." Id. 398 N.W.2d 393,

In anticipation of future change in Michigan’s position, the appellate court particularly noted the adverse effects that incongruous signs could inflict:

The use of such signs for advertising is often done with little regard for their natural or man-made environment. Their garishness often intrudes on a citizen’s visual senses....[W]e do not think that the right to advertise a business is such that a businessman may appropriate common airspace and destroy common vistas. Nor do we believe that the right to advertise a business means the right to interfere with the landscape and the views along public thoroughfares. Id.


The appellate court cited Robinson Township v. Knoll, 410 Mich. 293, 302 N.W.2d 146 (1981) as authority. But Robinson merely ruled that the aesthetic considerations at issue could be met by the landowner; the case did not approve or disapprove any changes in policy from the Wolverine opinion.
Without further analysis or explanation, the import of the Gackler decision is unknown: does it permit aesthetic-based zoning ordinances? Until another case challenges the issue directly, the question, and its import for historic preservation ordinances, will remain unanswered.

CASE LISTINGS AND REFERENCES

1937  
Citing:  
no authority

1972  
**Sun Oil Co. v. City of Madison Heights**, 41 Mich. App. 47, 199 N.W.2d 525  
Citing:  
Wolverine, supra  

Citing:  
Wolverine, supra  
Sun Oil, supra  
Berman, supra  
Ver Hoven Woodward Chevrolet, Inc. v. Dunkirk, 351 Mich. 190, 88 N.W.2d 408 (1958)  

1975  
**National Used Cars, Inc. v. City of Kalamazoo**, 61 Mich. App. 520, 233 N.W.2d 64  
Citing:  
Jasper v. Commw., 375 S.W.2d 709 (Ky. 1964)  
State v. Buckley, 243 N.E.2d 66 (Ohio 1968)  
Oregon City v. Hartke, 400 P.2d 255 (Or. 1965)  
Berman, supra  
Wolverine, supra  
Sun Oil, supra

1981  
Citing:  
no aesthetics precedent

1983  
**Ottawa County Farms, Inc. v. Tp. of Polkton**, 131 Mich. App. 222, 345 N.W.2d 672  
Citing:  
Wolverine, supra  
Sun Oil, supra

1986  
Citing:  
ABSTRACT

Minnesota clearly ascribed to the moderate position on the use of aesthetics as grounds for the exercise of the police power (that aesthetics may be an auxiliary consideration) in the past. The present status of the law, however, is unclear. While there have been indications that the state courts will follow the modern trend and permit aesthetics to function as the sole justification of legislation, no clear articulation of this position has been made. Likewise, Minnesota decisions do not reflect what impact such a change in position may have on historic preservation issues.

AUXILIARY CONSIDERATION OF AESTHETICS

In Oscar P. Gustafson Co. v. City of Minneapolis, 231 Minn. 271, 42 N.W.2d 809 (1950), the Supreme Court of Minnesota hedged around the aesthetics issue. Allegedly, aesthetics served as the basis for the ordinance which required the removal of signs that projected over the sidewalks. Justifying the enactment on safety grounds, the court stated that the "motives of members of a council in the enactment of an ordinance of a strictly legislative nature cannot be judicially inquired into for the purpose of affecting the validity of such ordinance." Id. 42 N.W.2d 809, 812. Even as the court obviated the need for any in-depth inquiry into the legislative purposes with this statement, the justices noted the trend towards the acceptance of some aesthetic considerations:

[Here,] it is reasonable to assume that, in addition to other motives, an aesthetic [sic] one motivated the council. It is common knowledge that cities throughout the country are prohibiting overhanging signs, with resulting improvement in the appearance of the streets involved. An overhanging sign, for instance, extending over every 25-foot store front along a retail street would be an obstruction to light and view and would have potentialities of danger. It would also blight the whole street. A battery of signs would not only be offensive to the eye, but would also have a detrimental influence on real estate values.

Id. at 812. The court’s emphasis on the visual harms of signs implies that it contemplated aesthetics as, at least, a proper auxiliary consideration in legislation. Though the opinion cites several authorities to this end, the Gustafson decision does not elucidate the exact position of the supreme court on the matter.
Almost twenty years later, Naegele Outdoor Advertising Co. of Minnesota v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968) expressly permitted the auxiliary use of aesthetics in making zoning decisions. The supreme court found that the city had an implied authority to promote general welfare (as opposed to health, safety and morals) by requiring the removal of nonconforming billboards and that the ordinance accomplishing this task (and its amortization period) was constitutional.

Recognizing the different positions which allowed aesthetics, in varying degrees, to justify zoning ordinances, Naegele dodged the opportunity to select one to follow: "Whichever of these views is accepted, however, the test governing our decision on the constitutional issue presented is whether the village council in exercising its legislative prerogative acted reasonably...." Id. 162 N.W.2d 206, 212. At the least, the court acceded that an auxiliary use of aesthetics would not undermine a legitimate enactment:

The mere fact that the adoption of a zoning ordinance reflects a desire to achieve aesthetic ends should not invalidate an otherwise valid ordinance. Thus, if the challenged restriction is reasonably related to promoting the general welfare of the community or any other legitimate police-power objective, the fact that aesthetic considerations were a significant factor in motivating its adoption cannot justify holding it unconstitutional.

Id. at 212. In this particular case, the court determined that aesthetics was not the sole basis for the ordinance. Even so, the language in Naegele suggests that Minnesota would not accept the traditional arguments against the consideration of aesthetics: "such considerations of taste and beauty more likely reflect a community-wide opinion of what is necessary to advance and stabilize neighborhood values rather than the purely subjective opinions of members of the council." Id. With the Naegele decision, the path was paved for further expansion of the aesthetics doctrine.

THE TREND TOWARDS THE MODERN VIEW

Eventually, the supreme court advanced a more modern approach for Minnesota in Pine County v. State Department of Natural Resources, 280 N.W.2d 625, 13 Env't Rep. Cas. (BNA) 1883 (Minn. 1979). Though containing language friendly to the use of aesthetics as a justification for the exercise of state police power, the court reached a curious result with the rationale behind its holding. The ordinance in question, said the court, was authorized by the Minnesota's Wild and Scenic Rivers Act and was constitutional despite an aesthetic purpose.

Preserving the unique natural and scenic resources of this state does have an aesthetic purpose, but this purpose in no way diminishes the validity of the ordinance...Besides promoting aesthetics, the Kettle River ordinance promotes other valid zoning considerations [such as setback and minimum lot size regulations which]...are common to zoning ordinances generally. The Kettle River ordinance merely restricts uses of property which would have harmful spillover effects on a major public resource....These restrictions operate to the reciprocal advantage of all landowners with property near the river, who will reap the aesthetic and economic benefits of the preservation of the river corridor in its natural state.

Id. 280 N.W.2d 625, 630. So, even if aesthetics alone could sustain the ordinance, the court relied on more traditional zoning concepts to reinforce its ruling on the ordinance’s constitutionality. The literal language of Pine County might be construed to permit the modern view of the role of aesthetics as Minnesota’s position, but the decision makes this just less than clear.
FURTHER DEVELOPMENTS

None of the cases subsequent to Pine County have made Minnesota's position more definitive. One decision, White Bear Docking and Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174 (Minn. 1982), seems to have asserted that the use of aesthetics was still only proper as an auxiliary consideration. The court analogized the White Bear conclusion—that the grounds for the denial of a request to locate a mobile trailer on a piece of land were within the criteria of the zoning code and provided a rational basis for the denial—to the rules "set forth" in C.R. Investments, Inc. v. Village of Shoreview, 304 N.W.2d 320 (Minn. 1981). In fact, what the White Bear court cited was a direct quotation of the relevant ordinance in C.R. Investments, not the rule of law proposed in that decision. These few cases which have dealt with aesthetics recently have not articulated a clear position on the issue. Moreover, no case has applied the use of aesthetics to the historic preservation ordinance context. Perhaps a proper challenge on the issues would clarify Minnesota's position.

CASE LISTINGS AND REFERENCES

1950

Oscar P. Gustafson Co. v. City of Minneapolis, 231 Minn. 271, 42 N.W.2d 809
Citing:
State v. Wong Hing, 176 Minn. 151, 222 N.W. 639 (1929)
St. Louis v. St. Louis Theatre Co., 100 S.W. 627 (Mo. 1907)
State v. Wightman, 61 A. 56 (Conn. 1905)
Preferred Tires v. Village of Hempstead, 19 N.Y.S.2d 374 (N.Y. 1940)
Yale University v. City of New Haven, 134 A. 268 (Conn. 1926)
City of New Orleans v. Pergament, 5 So. 2d 129 (La. 1941)
State ex rel. Beery v. Houghton, 164 Minn. 146, 204 N.W. 569 (1925)
State ex rel. Minnesota Railway Const. Co. v. City of Lake City, 25 Minn. 404(1879)
Higgins v. Lacroix, 119 Minn. 145, 137 N.W. 417 (1912)
State ex rel. Rose Bros. Lumber and Supply Co. v. Clousing, 198 Minn. 35, 268 N.W. 844 (1964)
State ex rel. Twin City Building and Investment Co. v. Houghton, 144 Minn. 1, 174 N.W. 885, 176 N.W. 159 (1920)
Murphy, Inc. v. Town of Westport, 40 A.2d 177 (Conn. 1944)
Perlmutter v. Greene, 182 N.E. 5 (N.Y. 1932)

1968

Naegele Outdoor Adv. Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206
Citing:
Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962)
Olsen v. City of Minneapolis, 263 Minn. 1, 115 N.W.2d 734 (1962)
Western States Utilities Co. v. City of Waseca, 242 Minn. 302, 65 N.W.2d 255 (1954)
State v. Diamond Motors, 429 P.2d 825 (Haw. 1967)
Cromwell v. Ferrier, 255 N.E.2d 749 (N.Y. 1967)

C.R. Investments held that the denial of a special use permit was arbitrary where legally sufficient reasons were given but which were not substantially based in fact. The opinion did not contain a discussion of aesthetics at all, except for the recitation of the city's zoning plan which dealt with the issue.

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The case law from Mississippi is simple and straightforward. While at one time aesthetics were not considered to be a proper motivation in the exercise of the state's police power, the current opinion is that aesthetics alone will sustain legislation. No cases have specifically applied the Supreme Court of Mississippi's holding to historic preservation, but the articulation of a pro-aesthetics position suggests that such a challenge would succeed.

EARLY DECISIONS ON AESTHETIC CONCERNS

There are only two cases from Mississippi which address the aesthetics issue. The first, City of Jackson v. Bridges, 243 Miss. 646, 139 So. 2d 660 (1962), very flatly stated that "aesthetic considerations alone do not justify zoning regulations; and where such regulations are designed merely to preserve the appearance of a designated neighborhood, they are invalid." Id. 139 So. 2d 660, 664. The court went no further in its analysis. Whether aesthetics were completely precluded from consideration or could function in an auxiliary relationship to legislation was left unresolved.

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

Twelve years later, in the second case, Mississippi State Highway Commission v. Roberts Enterprises, Inc., 304 So. 2d 637 (Miss. 1974), the court totally reversed its earlier position.51 Citing numerous authorities from other jurisdictions which sustained aesthetic zoning, the court stated succinctly, "We are of the opinion that preservation of natural beauty was the major factor behind the passage of this legislation...[and] [w]e concur with the reasoning of the courts in these cases." Id. at 639-40. Additionally, the court took

51 The court did not explicitly overrule Jackson, but the holding is so completely opposite in Miss. St. Highway from the former that this might be presumed.
judicial notice of the fact that the state has many historic sites and recreational areas which attract thousands of visitors annually. The preservation of natural beauty along our highways make travel more enjoyable for tourists as well as Mississippians. Obviously, anything which promotes the tourist business affects the general welfare of the state. In our opinion, the preservation of natural beauty will support the exercise of the police power of the state.

Id. at 640. With this language, the court implies that, to the extent a connection between tourism, historic sites and aesthetics can be made, the legislation advancing those goals will be sustained. Regardless, aesthetics may function as the basis for legislation.

CASE LISTINGS AND REFERENCES

1962 City of Jackson v. Bridges, 243 Miss. 646, 139 So. 2d 660
Citing:
   City of Miami Beach v. First Trust Co., 45 So. 2d 681 (Fla. 1950)

1974 Mississippi State Highway Comm’n v. Roberts Enterprises, Inc., 304 So. 2d 637
Citing:
   Opinion of the Justices, 169 A.2d 762 (N.H. 1961)
   Ghaster Properties, Inc. v. Preston, 200 N.E.2d 328 (Ohio 1964)
   Moore v. Ward, 377 S.W.2d 881 (Ky. 1964)
   Jasper v. Commw., 375 S.W.2d 709 (Ky. 1964)
   City of Jackson v. McPherson, 162 Miss. 164, 138 So. 604 (1931)

MISSOURI

ABSTRACT

Whether aesthetics alone justify land use controls under the state’s police power is an unresolved question in Missouri. While the courts have acknowledged the modern pro-aesthetic trend in dicta of decisions, no case explicitly adopts this position. Since Missouri recognizes the validity of historic preservation ordinances and has hinted at acceptance of aesthetic justifications for ordinances, the climate might be favorable for a successful test of aesthetics as the basis for historic preservation enactments.

EARLY DECISIONS ON AESTHETIC CONCERNS

Initially, the Supreme Court of Missouri (highest court) did not permit consideration of aesthetics in zoning decisions. The St. Louis Gunning Advertising Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929, error dismissed, 231 U.S. 761 (1911) opinion exhaustively reviewed the case law from other jurisdictions on the topic. The court held that the regulation of billboards was permissible insofar as the city ordinances served the traditional police power purposes of health,
safety, morals and general welfare. Even though portions of the Gunning opinion seem to grasp at far-fetched connections between the ordinance and these concerns, the court concluded that aesthetic motivations did not constitute a valid reason for the regulation of billboards.

AUXILIARY CONSIDERATION OF AESTHETICS

A few decades later, however, the supreme court modified the Gunning position and recognized that aesthetics might serve as auxiliary considerations in zoning decisions. In City of St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475 (1948), the court stated that "[a]esthetic values alone are not a sufficient basis for classification, but are entitled to some weight where other reasons for the exercise of power are present." Id. 216 S.W.2d 475, 478. Without further analysis, the court summarily adopted a moderate approach to the aesthetics issue.

Subsequent decisions reiterated the position expressed in Friedman. Deimeke v. State Highway Commission, 444 S.W.2d 480 (Mo. 1969) sustained a junkyard licensing statute which required the screening of such businesses when located next to highways. The supreme court's language, however, suggests that Missouri was moving towards the modern trend of permitting aesthetic justifications alone for zoning enactments. First the opinion points out that "what constitutes the general welfare for purposes of exercise of the police power is a changing thing, depending upon the needs at that particular time of the society which it is intended to protect and to promote." Id. at 483. Noting that Missouri previously advocated a restrained role for aesthetic considerations, the court said, "the recent experiences of our nation, particularly in urban areas, indicate that offensive and unsightly conditions do have an adverse effect on people and that beauty and attractive surroundings are important factors in the lives of the public. The general welfare is promoted by action to insure the presence of such attractive surroundings." Id. at 484 (emphasis added). Finally, Deimeke concurred in the decisions from other jurisdictions which held that the legislature could capably determine that automobile junkyards impaired scenic beauty and should therefore be regulated.

Even with Deimeke's permissive language, the Supreme Court of Missouri still has not affirmatively stated that aesthetics alone justify police power regulations. A few cases come closer to articulating the modern position but fall short of doing so. At least, the courts have not closed the possibility of basing ordinances on aesthetics. Since Missouri expressly recognizes the validity of historic preservation ordinances, the judiciary's acceptance at this point of an historic preservation enactment which is grounded in aesthetics seems likely.

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52 The statute, however, provided state funds to compensate the landowners for the cost of constructing the fences. The entire scheme was found to be a valid exercise of the police power.

53 See State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305, 310 (Mo. 1970) which held that the denial of a building permit for a very modern home in an area of traditionally styled homes was not "arbitrary and unreasonable when the basic purpose to be served is that of the general welfare of persons in the entire community." Also, State ex rel. Wilkerson v. Murray, 471 S.W.2d 460 (Mo. 1971), cert. denied, 404 U.S. 851 (1971), upholding a provision which relegated mobile homes to limited, specific areas. The court noted the recent importance given to aesthetic considerations, and the possibility that aesthetics alone might suffice as a justification of zoning ordinances, but did not resolve the question expressly. Finally, in City of Independence v. Richards, 666 S.W.2d 1 (Mo. Ct. App. 1983), the Missouri Court of Appeals (intermediate court) acknowledged that the aesthetics issue was still unresolved. The decision's language, however, recognized that the premises of prior cases would allow ordinances to be grounded in aesthetics alone. The appellate court nevertheless dodged the resolution of the question and invalidated the ordinance which prohibited unsightliness on vagueness grounds.

54 See, Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856, 851 (Mo. Ct. App. 1977). (denied judicial review of historic district commission's refusal to permit demolition of a building within the district, noting that historic preservation ordinances were essentially zoning ordinances, the latter having been validated by the courts many times over).
CASE LISTINGS AND REFERENCES

1911

St. Louis Gunning Adv. Co. v. City of St. Louis. 235 Mo. 99, 137 S.W. 929
Citing:

City of St. Louis v. Heitzeger Packing Co., 141 Mo. 375, 42 S.W. 954 (1897)
Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1870)
Crawford v. Topeka, 33 P. 476 (Kan. 1893)
Bryan v. Chester, 61 A. 894 (Pa. 1905)
City of St. Louis v. Galt, 179 Mo. 8, 77 S.W. 876 (1903)
City of St. Louis v. McCann, 157 Mo. 301, 57 S.W. 1016 (1900)
City of St. Louis v. Hill, 116 Mo. 527, 22 S.W. 861 (1893)
Mugler v. Kansas, 123 U.S. 661 (1887)
Austin v. Murray, 33 Mass. (16 Pick.) 121 (1834)
Gains v. Buford, 31 Ky. (1 Dana) 481 (1833)
Wright v. Hart, 75 N.E. 404 (N.Y. 1905)
People v. Green, 83 N.Y.S. 460 (1903)
City of Chicago v. Gunning, 73 N.E. 1035 (III. 1905)
Bostock v. Sams 52 A. 665 (Md. 1902)
Bill Posting Sign Co. v. Atlantic City, 58 A. 342 (N.J. 1904)
State v. Whitlock, 63 S.E. 123 (N.C. 1908)
Western Co. v. Knickerbocker Co., 37 P. 192 (Cal. 1894)
Varney & Green v. Williams, 100 P. 867 (Cal. 1909)
Weinburgh v. Murphy, 88 N.E. 17 (N.Y. 1909)

1949

City of St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475
Citing:

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)
State ex rel. Oliver Cadillac Co. v. Christopher, 298 S.W. 720 (Mo. 1927)
Landau v. Levin, 213 S.W.2d 483 (Mo. 1948)

1969

Deimeke v. State Highway Commission, 444 S.W.2d 480
Citing:

Bellerive Investment Co. v. Kansas City, 13 S.W.2d 628 (Mo. 1929)
Oliver Cadillac, supra
St. Louis Gunning, supra
University City v. Dively Auto Body Co., 417 S.W.2d 107 (Mo. 1967)
Friedman, supra
Hoffman v. Kinealy, 389 S.W.2d 745 (Mo. 1965)
Oregon City v. Hartke, 400 P.2d 255 (Or. 1965)
People v. Stover, 191 N.E.2d 272 (N.Y. 1963)
Jasper v. Commw., 375 S.W.2d 709 (Ky. 1964)

1970

State ex rel. Stovanoff v. Berkeley, 458 S.W.2d 305
Citing:

Deimeke, supra
State ex rel. Civello v. City of New Orleans, 97 So. 440 (La. 1923)
People v. Stover, supra
ABSTRACT

Only one case from the Supreme Court of Montana expounds the state’s position on aesthetic-based exercises of the police power. Though aesthetics may serve as a valid basis for legislation and zoning ordinances, how far the parameters of this legitimate purpose extend is yet undetermined.

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

As the sole case resolving the aesthetics issue, State v. Bernhard, 173 Mont. 464, 568 P.2d 136 (1977) presented a simple and direct summary of the possible positions the state might take and then found that the Montana Constitution...
declares that the right to a "clean and healthful environment" is an inalienable right of a citizen of this state. Consistent with this statement and the cases cited, we hold that a legislative purpose to preserve or enhance aesthetic values is a sufficient basis for the state's exercise of its police power....

Id. 568 P.2d 136, 138 (emphasis added). The implications of the supreme court's language suggest that historic preservation might qualify, if properly phrased, as the preservation or enhancement of aesthetic values. Apparently, since no other cases raise this issue, Montana adheres to an unqualified pro-aesthetics position.

CASE LISTINGS AND REFERENCES

Citing:
  Oregon City v. Hartke, 400 P.2d 255 (Or. 1965)
  Racine County v. Plourde, 157 N.W.2d 591 (Wis. 1968)

ABSTRACT

The Supreme Court of Nebraska has not expressly adopted the modern view on the use of aesthetics alone as a justification for the exercise of the police power. However, the few decisions from the high court suggest that the state's law might expand to permit such legislation. Without a clear articulation of Nebraska's position on the issue, the likelihood of sustaining historic preservation ordinances on aesthetic grounds is, at best, uncertain.

AUXILIARY CONSIDERATION OF AESTHETICS

In Baker v. Somerville, 138 Neb. 466, 293 N.W. 326 (Neb. 1940), the Supreme Court of Nebraska (highest court) invalidated an ordinance prohibiting the construction of a one-story home in an area occupied by two-story homes. To the extent that the ordinance served aesthetics only, the city had overstepped the bounds of a proper exercise of the police power.

Beautiful city residences, homologous lines in architecture and symmetry in construction appeal to artistic tastes and should be respected in connection with substantial zoning regulations for the promotion of the public welfare, but aesthetics alone for the purpose of zoning ordinances do not seem to be a source of police power, according to the weight of authority.

Id. at 328. An ordinance with a "sole basis of aesthetic standards, does not promote public health, safety, morals, or the general welfare," the court declared. Id. at 329.

The position adopted by the Baker opinion was echoed in the high court's ruling in City of Scottsbluff v. Winters Creek Canal Co., 155 Neb. 723, 53 N.W.2d 543 (1952). Because the police power could not be invoked for purely aesthetic purposes, the city ordinance, which required the canal company to install pipes in certain canals, was invalid as applied. Similarly, in City of
Milford v. Schmidt, 175 Neb. 12, 120 N.W.2d 262 (1963), the court struck down the municipality's attempt to prevent the location of a mobile home near a trailer park because the ordinance served only aesthetic purposes.

While none of the more recent cases clarify Nebraska's position on the aesthetics issue, some zoning decisions sustain the legislature's ability to determine what meets the public good without excessive judicial interference. Perhaps these cases foreshadow a ruling in favor of historic preservation ordinances, whether or not based on aesthetics.

CASE LISTINGS AND REFERENCES

1940
Baker v. Somerville, 138 Neb. 466, 293 N.W. 326
Citing:
Larkin Co. v. Schwab, 151 N.E. 637 (N.Y. 1926)
Dowsey v. Village of Kensington, 177 N.E. 427 (N.Y. 1931)
Brookdale Homes, Inc. v. Johnson, 10 A.2d 477 (N.J. 1941)

1952
City of Scottsbluff v. Winters Creek Canal Co., 115 Neb. 723, 53 N.W.2d 543
Citing:
Baker, supra
Standard Oil Co. v. City of Kearney, 184 N.W. 109 (Neb. 1921)

1963
City of Milford v. Schmidt, 175 Neb. 12, 120 N.W.2d 262
Citing:
Scottsbluff, supra

ABSTRACT

There are no cases from the state of Nevada which directly address the appropriateness of using aesthetics alone as the basis for zoning legislation. Rather, the Supreme Court of Nevada seems to accept the validity of such use as an exercise of the state's police powers. In fact, no cases seem to have raised the question of whether zoning (including historic preservation) is permissible in Nevada. A few cases, however, suggest that the courts operate under a presumption of validity on these issues.

THE TREND TOWARDS THE MODERN VIEW

The first indication that the Supreme Court of Nevada recognized aesthetic-based statutes was in Beals v. County of Douglas, 93 Nev. 156, 560 P.2d 1373 (1977). This per curium decision upheld the amortization period connected with the Douglas County Advertising Control Ordinance. Summarizing their position, the court said, "[a]mortization of nonconforming signs has received widespread acceptance as a constitutionally permissible method of effectuating the removal of signs while properly safeguarding constitutional rights, due process, and just compensation." Id. at 1374. The constitutional challenge to the amortization provision was the plaintiff's "only

See, Appendix B: Other-Zoning Related Cases.
cognizable contention" in the court’s view. Perhaps the plaintiff raised the aesthetics question and the court refused to entertain it; the context of the case and its import for the use of aesthetics is almost entirely uncertain.

A case which ruled on the interpretation of an aesthetics-based law more than its validity was Alper v. State, 96 Nev. 925, 621 P.2d 492 (1980). Here the supreme court held that the federal and state highway beautification statutes should be construed broadly to permit the best effectuation of the purposes—one of which was "to preserve and enhance the natural scenic beauty and aesthetic features of the highways and adjacent areas." Id. at 494. The primary concern of the opinion was consistency between the federal and state laws. The implication is that Nevada accepts aesthetic purposes as a valid exercise of the police power.

The language of the Nevada high court in Board of County Commissioners of the County of Clark v. CMC of Nevada, Inc., 99 Nev. 739, 670 P.2d 102 (1983) lends credence to this presumption. Here the court held inter alia that the ordinance at issue permitted, at the discretion of the commission, whatever was necessary to satisfy the concerns of architectural supervision. The interpretation of the county commissioners' power was broad: "The Commission could hardly function in effective promotion of the recited purposes of the zoning title if it were restricted solely to considerations of aesthetics." Id. at 105 (emphasis added). Again, the interpretation of the court's language calls strongly for a presumption of the validity of aesthetic considerations in zoning laws.

CASE LISTINGS AND CITATIONS

1977  
Beals v. County of Douglas, 93 Nev. 156, 560 P.2d 1373  
Citing:  
Elliott Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970)  
Naegele Outdoor Adv. Co. v. Village of Minnetonka, 162 N.W.2d 206 (Minn. 1968)  
Grant v. Mayor of Baltimore, 129 A.2d 363 (Md. 1957)  
City of Los Angeles v. Gage, 274 P.2d 34 (Cal. 1954)

1980  
Alper v. State, 96 Nev. 925, 621 P.2d 492  
Citing:  
Yarbrough v. Arkansas State Highway Comm’n, 539 S.W.2d 419 (Ark. 1976)  
Mississippi State Highway Comm’n v. Roberts Enterprises, 304 So. 2d 637 (Miss. 1974)  
David v. Whitaker, 358 A.2d 404 (N.H. 1976)  
Markham, supra

1983  
Board of County Commissioners v. CMC of Nevada, Inc., 99 Nev. 739, 670 P.2d 102  
Citing:  
no authority
ABSTRACT

The determination of whether an exercise of the police power may be based on aesthetics alone has not been conclusively reached by the courts of New Hampshire. Initially, the state permitted an auxiliary consideration of aesthetic issues. Presently, the decisions reflect this position, and suggest that aesthetics alone might be a sufficient justification, but do not unequivocally adopt the modern view as the state’s. The combination of aesthetics and historic preservation received favorable treatment in the New Hampshire court system.

AUXILIARY CONSIDERATION OF AESTHETICS

The earliest case to address the aesthetics issue was Sundeen v. Rogers, 83 N.H. 253, 141 A. 142 (1928). The Supreme Court of New Hampshire (highest court) upheld the validity of a setback requirement for outbuildings within the city, notwithstanding the possibility that the ordinance was motivated in part by aesthetics. The opinion devoted considerable analysis to the issue:

*Just what is meant by the use of the term "aesthetic" is not entirely clear, but apparently it is intended to designate thereby matters which are evident to sight only, as distinguished from those discerned through smell or hearing. No very conclusive argument can be advanced to show that the line of legal right on the one hand and liability on the other should be drawn at this place. But most legal limitations are matters of degree, and the supposed rule is not to be condemned for that reason alone.*

*Id.* at 144 (emphasis added). The court did not find it necessary, however, to resolve the dilemma since the ordinance served ends other than aesthetics. Any consideration of aesthetics in addition to the other concerns was of no effect on the validity of the ordinance:

*It is not a valid objection to a regulation which can be sustained upon these grounds that it also has an aesthetic value. Nor would a showing that such aesthetic quality was a part of the inducement for making the regulation render it void. Even in those jurisdictions where the law is that aesthetic value alone cannot be made the basis for regulation, it is held that where other elements are present and justify the regulation under the police power, the aesthetic considerations may be taken into account in determining whether the power shall be exercised.*

*Id.* at 145. *Sundeen* thus represents an affirmative assertion by the court that an auxiliary use of aesthetics was acceptable.

THE TREND TOWARDS THE MODERN VIEW

After the *Sundeen* decision, the case history of the aesthetics issue diverges into two paths. One level of judicial analysis pursues the modern trends in resolving the question of aesthetic-based ordinances. The second prong of history permits the enforcement of ordinances which achieve aesthetic results de facto, yet does not consider the underlying motivations or use
A meshing of these two aspects of the New Hampshire decisions strongly suggests that aesthetic-based ordinances (especially those regarding historic preservation) will be upheld by the courts.

The Supreme Court of New Hampshire affirmed the Sundeen position in Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961). Here the court held that "the maintenance of the natural beauty of areas along interstate highways is to be taken into account in determining whether the police power is properly exercised." Id. 169 A.2d 762, 764. The justices found it "unnecessary" to determine if aesthetics alone would justify an ordinance, but noted the expansive nature of the police power:

if it [the police power] is to serve its purpose in the face of the magnitude and rapidity of the changes occurring today, it must be of a flexible and expanding nature to protect the public against new dangers and to promote the general welfare by different methods than those formerly employed.

Id. at 764. Because the state was "peculiarly dependent upon its scenic beauty to attract the hosts of tourists" for a significant part of its economy, the court concluded that "whatever tends to promote the attractiveness of roadside scenery for visitors relates to 'the benefit and welfare of this state' and may be held subject to the police power." Id. Citing authorities from both sides of the modern doctrine, the court deferred judgment on the question for a later date.

AESTHETICS AND HISTORIC PRESERVATION

Only three years later, the supreme court faced the issue again in the case of Town of Peering ex rel. Bittenbender v. Tibbetts, 105 N.H. 481, 202 A.2d 232 (1964). The court held that an ordinance prohibiting the construction of unapproved buildings within a certain distance of the town common was a proper exercise of the police power. Specifically, the case considered the historic nature of the area and the economic factors which the ordinance sought to protect and promote.

That such a purpose is a generally recognized basis for the exercise of the police power is now too well established to be open to question. The fact that aesthetic considerations having a purpose to foster civic beauty and preserve places of historic and architectural value were also factors motivating the enactment is not fatal.

Id. 202 A.2d 232, 234 (citation omitted)(emphasis added). However, the court did not find it necessary, again, to rely on the aesthetic elements alone in sustaining the ordinance. Beyond stating that it was "reasonably plain that more than aesthetics is involved," the opinion omits further discussion of those other factors. The implication of this holding is that when historic preservation matters are involved in a zoning ordinance, by default aesthetics is not the only

56 The second aspect of New Hampshire's case history refers to the "character" of an area as a worthy object of protection through zoning ordinances. For example, in Rockingham Hotel Co. v. North Hampton, 101 N.H. 441, 146 A.2d 253 (1958), the supreme court permitted the town to prohibit off-site advertising signs, with exception for those not injurious to the neighborhood, as a part of the town's comprehensive zoning plan. Preserving the residential character of an area, the court said, was not necessarily arbitrary or unreasonable. Later cases, such as Lachapelle v. Town of Goffstown, 107 N.H. 485, 225 A.2d 624 (1967) and Town of Bethlehem v. Robie, 111 N.H. 186, 278 A.2d 345 (1971) more closely allied the language with the detrimental effect of certain uses on the appearances of the neighborhood--a seemingly aesthetic motivation. These cases, however, stopped short of using the term "aesthetic" or fully adopting the aesthetics issue analysis from the other line of cases. The following discussion focuses on the first line of New Hampshire cases.
supporting justification. New Hampshire has not otherwise clarified the meaning of the Deering decision.

FURTHER DEVELOPMENTS

Whether Deering is conclusive or not, there are a few recent cases which suggest that the courts will look more scrupulously at the results of an ordinance in determining its validity. Specifically, Loundsbury v. City of Keene, 172 N.H. 1006, 453 A.2d 1278 (1982) requires the government to demonstrate that the ordinance prevented a harm—not just provided a public benefit at the landowner's cost. Thus, a wary municipality should consider framing the defense of an ordinance that is arguably based on aesthetics around the detrimental effects that the particular ordinance avoids.

CASE LISTINGS AND CITATIONS

1928  
Sundeen v. Rogers, 83 N.H. 253, 141 A. 142  
Citing:  
Gorieb v. Fox, 274 U.S. 603 (1927)  
Vill. of Euclid v. Ambler Realty, 274 U.S. 608 (1926)  
State v. White, 5 A. 828 (N.H. 1886)  
State v. Campbell, 13 A. 585 (N.H. 1888)  
Welch v. Swasey, 214 U.S. 91 (1909)  
Aver v. Commr's on Height of Bldgs. in Boston, 136 N.E. 338 (Mass. 1922)  
Wulfssohn v. Burden, 150 N.E. 120 (N.Y. 1925)

1958  
Rockingham Hotel Co. v. North Hampton, 101 N.H. 441, 146 A.2d 253  
Citing:  
Gelinas v. City of Portsmouth, 85 A.2d 896 (N.H.1952)  
Sundeen, supra  
Murphy, Inc. v. Town of Westport, 40 A.2d 177 (Conn. 1944)  
Stone v. Cray, 200 A. 517 (N.H. 1957)  
Welch Co. v. State, 199 A. 886 (N.H. 1949)  
Valley View Village v. Proffett, 221 F.2d 412 (6th Cir. 1955)  
Criterion Service, Inc. v. City of East Cleveland, 89 N.E.2d 475 (Ohio 1949)

1961  
Opinion of the Justices, 103 N.H. 268, 169 A.2d 762  
Citing:  
Noble State Bank v. Haskell, 219 U.S. 104 (1910)  
Murphy, supra  
State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217 (Wis. 1955)  
Rockingham, supra  
Chung Mee Restaurant Co. v. Healy, 171 A. 263 (N.H. 1934)
1964  
Citing:
- Sundeen, supra
- Opinion of Justices, supra
- Town of Lexington v. Govenar, 3 N.E.2d 19 (Mass. 1936)
- People v. Stover, 191 N.E.2d 272 (N.Y. 1963)

1967  
**Lachapelle v. Town of Goffstown**, 107 N.H. 485, 225 A.2d 624
Citing:
- no authority

1971  
**Town of Bethlehem v. Robie**, 111 N.H. 186, 278 A.2d 345
Citing:
- Rockingham, supra
- State v. Dean, 248 A.2d 707 (N.H. 1968)
- Deering, supra
- Plainfield v. Hood, 240 A.2d 60 (N.H. 1968)

1982  
**Loundsbury v. City of Keene**, 122 N.H. 1006, 453 A.2d 1278
Citing:
- Lachapelle, supra
- Flanagan v. Hollis, 293 A.2d 328 (N.H. 1972)

**NEW JERSEY**

**ABSTRACT**

Though the state of New Jersey has not always permitted the use of aesthetics alone to justify zoning ordinances, since 1974 the courts have recognized the concept as a valid exercise of the police power. Even in a pro-aesthetic position, the New Jersey courts have issued a few opinions that seem to limit the freedom with which the local governments may pass such enactments. Notwithstanding these digressions, the courts have upheld aesthetic-based zoning decisions in the context of historic preservation.

**EARLY DECISIONS ON AESTHETIC CONCERNS**

Initially, the Court of Errors and Appeals of New Jersey\(^{67}\) refused to permit aesthetic considerations to motivate property restrictions. In *City of Passaic v. Paterson Bill Posting, Advertising Sign Painting Co.*, 72 N.J.L. 285, 62 A. 267 (1905), the court struck down an ordinance which regulated the placement of billboards within the city because the ordinance did not limit the exercise of power "to cases where the structures may be in a condition dangerous to the public safety." *Id.* 62 A. 267. With language that was often cited by other jurisdictions to rule on similar cases, the New Jersey judges declared:

\(^{67}\) The highest court of the state, the Supreme Court of New Jersey, was formerly called the Court of Errors and Appeals.
We think the control attempted to be exercised is in excess of that essential to effect the security of the public. It is probable that the enactment...of the ordinance was due rather to aesthetic considerations than to considerations of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. 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.* at 268. The opinion focused on the necessity issue rather than aesthetics, thus it is not entirely clear whether the court intended to preclude aesthetics entirely from zoning decisions. The court's language, however, is patently unfavorable towards aesthetic considerations.

Almost fifty years after the Passaic decision, the New Jersey judiciary seemed to acknowledge an emerging trend in favor of aesthetics. Though the language in *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (1952) and *Fischer v. Bedminster Township*, 11 N.J. 194, 93 A.2d 378 (1952) did not specifically mention or resolve the aesthetics issue, the effect of the decisions heralded a growing judicial receptiveness towards aesthetic-based zoning. The Raritan court upheld an on- and off-site sign distinction under an ordinance which prohibited off-site advertising signs.\(^6\) The justification offered to sustain this position was the "unique nature" of such signs and the problems which they exacerbated—terms that the court did not elaborate upon further. Also, Fischer found the ordinance at issue, which required a minimum of five acre lots in a rural area, to be acceptable under the circumstances. Both of these cases foreshadowed an expansion of the New Jersey policy on aesthetics.

**AUXILIARY CONSIDERATION OF AESTHETICS**

By 1964, the Supreme Court of New Jersey began to directly address the use of aesthetic justifications for zoning decisions. *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964) upheld the zoning classification system in an ordinance which prohibited off-site outdoor advertising signs. However, unlike the Raritan decision, Metuchen expressly permitted aesthetic considerations under the traditional police power justification of general welfare. In examination of the issue, the court noted that

\[\text{[m]uch is said about zoning for aesthetics. If what is meant thereby is zoning for aesthetics as an end in itself, the issue may be said to be unexplored in our State, but if the question is whether aesthetics may play a part in a zoning judgment, the subject is hardly new. There are areas in which aesthetics and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound. We refer not to some sensitive or exquisite preference but to concepts of congruity held so widely that they are inseparable from the enjoyment of and hence the value of property.}\]

*Metuchen*, 198 A.2d 447, 449. The court recognized that the very act of zoning districts with different requirements "rests upon the proposition that aesthetics should not be ignored when one seeks to promote 'the general welfare.'" *Id.* at 449.

\(^6\) However, the court struck down the amortization period of the ordinance because the state enabling statute did not require removal of non-conforming uses.
However, the opinion imposed the caveat that aesthetics are "relevant when they bear in a substantial way upon land utilization." Id. What this meant, precisely, is uncertain. The Metuchen court found that the "aesthetic impact of billboards is an economic fact which may bear heavily upon the enjoyment and value of property. It is a relevant zoning consideration." Id. How the court made this determination is equally unclear. In Metuchen, shallow analysis left the aesthetics issue open for further interpretation, refinement, or alternatively, constriction.68

ADOPITION OF THE MODERN, PRO-AESTHETIC VIEW

Some of the New Jersey courts imposed limitations on auxiliary use of aesthetics which concerned first amendment constitutional issues.60 But by the mid-1970s, the modern trend towards recognizing aesthetic-based regulations gained full acceptance in Westfield Motor Sales Co. v. Town of Westfield, 129 N.J.Super. 528, 324 A.2d 113 (Super. Ct. Law Div. 1974). The decision, from a trial level court in the state, upheld a board's determination of noncompliance with a sign ordinance as a reasonable and constitutional decision, though based on aesthetics alone. After reviewing New Jersey's prior case law,

[this court today holds that it is now appropriate to permit a municipality, under proper safeguard, to legally deal with the problem of subterfuge. Zoning solely for aesthetic purposes is an idea whose time has come; it is not outside the scope of the police power....The modern view is to completely and openly accept aesthetic regulation for its own sake. The underlying reasoning is that times are changing and values are shifting.

Id. 324 A.2d 113, 119-20 (citation omitted). In fact, the court went beyond this very basic justification and found other substantive reasons, based on the circumstances in the case, to follow the modern view:

Undoubtedly, some signs by virtue of their design are more aesthetically pleasing than others, regardless of size. But a municipality may perceive that a plethora of signs of a certain size, no matter how tasteful, can have a cumulative effect upon the well-being of the entire community. Is the citizenry then powerless to deal with this problem when it beholds the fruits of a philosophy of noninterference? We think not. In such a situation, assuming the municipality acts reasonably and fairly in the process of balancing the various interests, the right of the businessman to promote his goods may become subservient to the community's interest in its appearance.

68 Other cases followed the Metuchen principles to permit auxiliary use of aesthetic considerations in zoning decisions. In Livingston v. Marchev, 85 N.J.Super. 428, 205 A.2d 65 (Super. Ct. App. Div. 1964), the Superior Court of New Jersey, Appellate Division sustained an ordinance which prohibited open-air storage of house trailers within the limits of the township. The intermediate court found that neighborhood aesthetics were integrally tied to property values and were relevant to zoning when bearing substantially on land use issues. Also, Piscitelli v. Township Committee of Township of Scotch Plains, 103 N.J.Super. 589, 248 A.2d 274 (Super. Ct. Law Div. 1968), though striking down the creation of an architectural review board as a usurpation of power from the board of adjustment, sustained the Metuchen concept of aesthetic considerations as relevant if and when substantially related to land use. The court expressly forbade zoning on the basis of aesthetics alone.

60 See, Farrell v. Township of Teaneck, 126 N.J.Super. 460, 315 A.2d 424 (Super. Ct. Law Div. 1974), which held that a zoning ordinance which prohibited all political signs was unconstitutional though property value is "inextricably" linked to aesthetics. (The court did not believe it could presume that all tasteless appearances would result in a decrease in property value.) Also, State v. Miller, 83 N.J. 402, 416 A.2d 829 (1980), which allowed a zoning ordinance to accommodate aesthetic interests and expressly invalidated all prior cases to the contrary (but the court found that the ordinance in question placed severe restrictions on landowner's political speech and therefore struck down the sign restrictions which it imposed).
Id. at 122 (emphasis added). Though granting initial validity to aesthetic-based zoning regulations, the court conditioned this power on the availability of judicial review for reasonability.61 Otherwise, Westfield Motor openly permitted aesthetic considerations to justify an exercise of police power.62

In Morristown Road Associates v. Mayor of Borough of Bernardsville, 163 N.J. 58, 394 A.2d 157 (Super. Ct. Law Div. 1978), the Superior Court (trial level) reviewed the sufficiency of regulatory standards set forth in a zoning ordinance. While the court did not question the government’s ability to regulate architectural designs, the court found that the standards of the ordinance were insufficient to guide the developer in creating plans and were unhelpful to the court in determining how the review board reached its decision. Without definitive standards the court could not uphold the enactment:

Because of the subjective elements which can be involved in matters of architectural design, the necessity for clear and definite standards is particularly applicable to ordinances which seek to control this aspect of construction. The formulation of such standards has been described as the "most troublesome problem encountered in municipal attempts to control architectural design." As design controls are enforced by administrative agencies, the prerequisite of definiteness will only be met when the standards sufficiently confine the process of administrative decision and provide a court with an understandable criterion for review.

Id. 394 A.2d 157, 161 (citation omitted). Because the standards relied heavily on the area’s "harmony," yet failed to define the concept or the ways it might be achieved, the court invalidated the ordinance.

AESTHETICS AND HISTORIC PRESERVATION

Subsequent cases from New Jersey reflect the modern position, conditioned on compliance with the legislative format requirements of the earlier decisions. Thus, when the appellate court considered historic preservation under an aesthetics-based zoning ordinance in Estate of Neuberger, v. Township of Middletown, 215 N.J. 375, 521 A.2d 1336 (Super. Ct. App. Div. 1987), the court required conformity in principle to the state’s enabling legislation. The court sustained the possibility of zoning historic districts as justified by aesthetic considerations by saying:

It is generally accepted that such historic designation ordinances are, in essence, zoning ordinances....Historic preservation has been classified as an aspect of aesthetics in zoning. Aesthetic considerations are proper subjects to be considered in exercise of the planning and zoning powers.

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61 "Ordinances based on aesthetics may still be scrutinized by the courts to determine their reasonableness in achieving their goals. Less confusion will result if the courts accept aesthetic zoning per se, instead of purporting to accept it and then dismissing it as inadequate." Id., at 122.

62 See also, Dock Watch Hollow Quarry Pit, Inc. v. Warren Township, 142 N.J. 103, 361 A.2d 12 (Super. Ct. App. Div.), aff'd, 74 N.J. 312, 377 A.2d 1201 (1977), holding that a regulatory ordinance based on, among other things, aesthetics was valid as applied to the "harmful and ugly" aspects of the quarry.

Some cases expanded the role of aesthetics by applying the doctrine to state statutes. See Toms River Affiliates v. Department of Environmental Protection, 140 N.J. 135, 355 A.2d 679 (Super Ct. App. Div. 1976), cert. denied, 71 N.J. 345, 364 A.2d 1077 (1976), holding that consideration of aesthetics in review of new construction under the Coastal Area Facility Review Act was appropriate though the considerations were not enumerated identically for housing projects and industrial projects.

89
Id. 521 A.2d 1336, 1340 (citation omitted). This particular ordinance, however, delegated the reviewing power to a township landmarks commission. Because this delegation violated the enabling statute, the court invalidated the ordinance. The Neubergner language suggests that, given an exercise of power by the proper authority, historic landmark ordinances are validly based on aesthetic considerations.\(^3\)

CASE LISTINGS AND REFERENCES

1905

**City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.,** 72 N.J.L. 285, 62 A. 267

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- People v. Green, 83 N.Y.S. 460 (1903)
- St. Louis v. Hill, 22 S.W. 861 (Mo. 1893)
- Bostock v. Sams, 52 A. 665 (Md. 1902)
- Rideout v. Knox, 19 N.E. 390 (Mass. 1889)

1952


Citing:
- Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917)
- Murphy, Inc. v. Town of Westport, 40 A.2d 177 (Conn. Sup. Ct. Error 1944)

**Fischer v. Bedminster Township,** 11 N.J. 194, 93 A.2d 378

Citing:
- no authority

1964

**United Advertising Corp. v. Borough of Metuchen,** 42 N.J. 1, 198 A.2d 447

Citing:
- Raritan, supra
- Pierro v. Baxendale, 118 A.2d 401 (N.J. 1955)

1974

**Westfield Motor Sales Co. v. Town of Westfield,** 129 N.J. Super. 528, 324 A.2d 113 (Super. Ct. Law Div.)

Citing:
- Cooper Lumber Co. v. Dammers, 125 A. 325 (N.J. 1924)

\(^3\) The most recent case on the issue is the only opinion which suggests that there may be any exception to this statement. In **Morris County Fair Housing Council, v. Boonton Township,** 230 N.J. Super. 345, 553 A.2d 814 (Super. Ct. App. Civ. 1989), the court held that the developer of "Mt. Laurel" (low-income) housing was entitled to a variance from the ordinance’s buffer zone requirements and that the board acted arbitrarily by denying the variance because the developer would not commit his project to a particular architectural style. The language in the court is odd and less than definitive on what limits the courts will impose on legislative regulations. For example, one passage tacitly implies that architectural requirements are inappropriate for "Mt. Laurel" housing because it adds costs to the project. Id. 553 A.2d 814, 820.
The state of New Mexico permits an exercise of the police power on the basis of aesthetic considerations. An early decision allowed aesthetic considerations to form an auxiliary basis for historic preservation ordinances. While no case has explicitly applied the modern approach to preservation ordinances, the case history on the issue suggests that such a ruling from the courts is plausible.
The first case which broached the aesthetics issue, *City of Santa Fe v. Gamble-Skolmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964), ruled that aesthetic considerations could be considered with other traditional police power purposes—health, safety, and general welfare—as a basis for statutes and ordinances. Specifically, the court upheld a regulation of window pane sizes in historic areas as a valid exercise of municipal police power. Examining the state's enabling legislation, the Supreme Court of New Mexico first determined that the purpose of the municipal historic preservation ordinance—which allowed the preservation of "a harmonious outward appearance"—was included within the meaning of general welfare. To an allegation that the window requirement was merely aesthetic, the decision noted that the small and individual regulations were part of a larger program of preservation that was not unwarranted under the police power. But the court declined to resolve the aesthetics issue fully. The justices believed it "unnecessary to decide here whether aesthetic considerations...furnish ground for the exercise of the police power," yet noted that "such considerations cannot be entirely ignored." *Id.* 389 P.2d 13, 17-18. Giving auxiliary consideration to the aesthetic motivations and emphasizing the traditional purposes driving the ordinance, the court sustained the regulations.

The adoption of the modern, pro-aesthetic view

In the early 1980's, however, the supreme court advocated a pro-aesthetic position for New Mexico. In *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 646 P.2d 565 (1982), the court acknowledged that some jurisdictions did not follow the modern trend, yet it asserted that the better doctrine permitted aesthetics alone to justify an exercise of police power. According to the opinion, "[t]he rationale for recognizing aesthetics is that aesthetics is inextricably intertwined with 'general welfare,' since it provides for comfort, happiness, and enhancement of the citizens' cultural life and sustains the value of property." *Id.* 646 P.2d 565, 571. Thus the court applied a municipal sign ordinance to the church despite a basis in aesthetics. This recognition of the pro-aesthetic doctrine was limited expressly by the court: the decision was not a blanket approval of all aesthetically grounded enactments, but such a basis would not invalidate the legislation as long as a reasonable relation to the purpose existed. "Moreover, if the ordinance in question were to impinge on a fundamental right, then the ordinance must 'directly advance' the interest of aesthetics." *Id.*

A combined reading of the Gamble-Skolmo and Temple decisions implies that the New Mexico judiciary would sustain an historic preservation enactment based on aesthetics. Gamble-Skolmo authorizes the application of historic preservation regulations while Temple permits ordinances grounded in aesthetics. These two principles together suggest that the courts would have to uphold otherwise valid preservation regulations that relied on aesthetic justifications.

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64 The supreme court also ruled on an aesthetics issue in *Holiday Management Co. v. City of Santa Fe*, 83 N.M. 95, 488 P.2d 730 (1971). The plaintiff, however, did not have standing to challenge the ordinance in issue and thus the court merely questioned in dicta the validity of the plaintiff's contention that the municipality could not "impose reasonable controls for aesthetic purposes." *Id.* 488 P.2d 730, 733.

66 The court classified the traffic safety considerations advanced by the city as "auxiliary" in this case. Believing that sign regulations advanced traffic safety, the court permitted this consideration to support the ordinance as well. Arguably the justices included the safety "crutch" to guard against further challenges to this ordinance. While it might appear to enhance the court's reliance on aesthetics alone by remaining an "auxiliary" consideration, the fact that the court pandered to the traditional safety justification seems to undermine the court's certainty on the issue.
ABSTRACT

The highest state court in New York, the Court of Appeals, currently permits a regulation based on aesthetics to qualify as a valid exercise of police power. The court reached this position after maintaining, first, that aesthetic considerations played no part in the usual police power concerns, and then, that aesthetic considerations combined with a traditional objective sustained an exercise of police power. Though lower courts are generally consistent with the present Court of Appeals position favoring aesthetics, some cases limit and/or clarify the requirements of a truly valid regulation.
EARLY DECISIONS ON AESTHETIC CONCERNS

Initially, New York courts refused to allow aesthetic regulations in *Wineburgh Advertising Co. v. Murphy*, 195 N.Y. 126, 88 N.E. 17 (1909); the Court of Appeals determined that "sky sign" regulations were an improper use of police power, unrelated to health, safety, morals or general welfare. By 1932 however, the court recognized that aesthetic considerations played an influential role in state and local zoning regulations. In *Perlmutter v. Greene*, 259 N.Y. 327, 182 N.E. 5 (1932), the high court allowed the State Superintendent of Public Works to screen a billboard from highway view, even if aesthetics motivated his decision. Admitting to past indecision on the issue, the court stated "that billboards may be prohibited in the interest of the safety, morality, health, and decency of the community...and that they may be excluded from residence districts by zoning ordinances." *Id.* 182 N.E. 5, 6. In a classic passage, the New York court declared that

*beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, or decency. It is, however, needless for the decision of the case [at hand] to delimit her sphere of influence.*

*Id.* at 6. While the court's express language did not permit aesthetics to be the sole consideration behind zoning ordinances, the de facto result of its opinion upheld such a regulation and created the opportunity for expansion of the policy.

AUXILIARY CONSIDERATION OF AESTHETICS

Five years later the same court handed down a murky decision in *Mid-state Advertising Corp. v. Bond*, 274 N.Y. 82, 8 N.E.2d 286 (1937). It invalidated the city ordinance, which was not necessarily based on aesthetics, but essentially prohibited all billboards within city bounds. In its short opinion, the majority attempted to distinguish the case from *Perlmutter*:

*We think the ordinance is void on its face. It is not an attempt by zoning to exclude billboards or other advertising signs from localities where such devices might mar the beauty of natural scenery or distract travelers on congested city streets. Even were we to assume that outdoor advertising on private property within public view may without compensation be restricted by law for cultural or aesthetic reasons alone, this prohibition, which includes all land in the city of Troy, without definition of the structures prescribed or other standard of regulation, cannot be sustained consistently with fundamental constitutional principles.*

*Id.* 8 N.E.2d at 286-87 (citations omitted)(emphasis added). In a thoughtful dissent, Judge Finch noted that the New York court had upheld the constitutionality of ordinances restricting billboards in prior cases. The high court would later turn to the dissenting arguments in *Mid-state* for support of purely aesthetic regulations.  

66 See similar case, *Dowsey v. Village of Kensington*, 257 N.Y. 221, 177 N.E. 427 (1931) which invalidated a city ordinance permitting only residential uses within the city limits.

67 Other cases continued to allow aesthetics to be a considered factor in regulation; see, *Baddour v. City of Long Beach*, 279 N.Y. 167, 18 N.E.2d 18 (1938), (court upheld a zoning ordinance prohibiting operation of businesses in residential areas, recognizing that police power extends beyond just health and safety and includes aesthetics); *New York State Thruway Authority v. Ashley Motor Court, Inc.*, 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S. 2d 640 (1961), (court upheld an injunction against an owner of a sign which violated limitation of proximity to highway; aesthetics are a proper consideration in conjunction with safety).
THE TREND TOWARDS THE MODERN VIEW

One New York supreme (county) court decision anticipated the doctrinal movement of the Court of Appeals towards acceptance of wholly aesthetic regulations. Preferred Tires, Inc. v. Village of Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (Sup. Ct. 1940), though holding that the ordinance met valid safety concerns of the police power, cited Judge Finch’s Mid-state dissent to express clearly that aesthetic considerations alone would support and justify municipal ordinances:

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, with the Legislature of the State specifically delegating the power to regulate or prohibit signs in the public streets, 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.

Id. 19 N.Y.S.2d 374, 377. With this language, the New York courts were prepared New York for adoption of the modern position on the use of aesthetics.

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

The high court opinion in People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 743 appeal dismissed sub nom. Stover v. New York, 375 U.S. 42, 82 S.Ct. 147, 11 L.Ed. 2d 107 (U.S. 1963) settled the aesthetics issue for New York. The Court of Appeals upheld an ordinance prohibiting clotheslines in front of homes; though questioning the public safety benefits, the court found that the ordinance could be sustained solely on aesthetic grounds. After looking to New York case law which allowed aesthetic considerations in conjunction with other factors, the court stated:

Once it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power....And, indeed, this view finds support in an ever-increasing number of cases from other jurisdictions which recognize that power. Cases may undoubtedly arise,...in which the legislative body goes too far in the name of aesthetics but the present, quite clearly, is not one of them....[T]he ordinance [here] imposes no arbitrary or capricious standard of beauty or conformity upon the community. It simply proscribes conduct which is unnecessarily offensive to the visual sensibilities of the average person. It is settled that conduct which is similarly offensive to the senses of hearing and smell may be a valid subject of regulation under the police power...and we perceive no basis for a different result merely because the sense of sight is involved.

Id. 240 N.Y.S.2d 743, 747-48 (citations omitted). The important messages of the Stover decision were, first, that aesthetics do promote health and safety, i.e. police power goals, and second, that

98 Other decisions however, like Town of Vestal v. Bennett, 199 Misc. 41, 104 N.Y.S.2d 830 (Sup. Ct. 1950) and Village of Larchmont v. Sutton, 30 Misc. 2d 245, 217 N.Y.S.2d 929 (Sup. Ct. 1961), continued to insist on a connection between aesthetics and “valid” police power goals.
mere consideration of aesthetics is not a sufficient basis for invalidating an ordinance, unless the means of the ordinance are arbitrary and irrational.

Besides reinforcing the Stover holding, the Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22, reargument denied, 19 N.Y.2d 862, 227 N.E.2d 408, 280 N.Y.S.2d 1025 (1967) decision clarified the limits of aesthetic regulations and explicitly overruled Mid-state. The court upheld billboard restrictions based on aesthetics, and precisely described the test of validity:

In concluding that the ordinance is constitutional...it does not mean that any esthetic consideration suffices to justify prohibition. The exercise of the police power should not extend to every artistic conformity or nonconformity. Rather, what is involved are those aesthetic considerations which bear substantially on the economic, social, and cultural patterns of a community or district.

Id. 279 N.Y.S.2d 22, 29-30 (emphasis added). Reaction by lower state courts to the Stover and Cromwell decisions complied with the holdings but occasionally sought out a general welfare or safety justification to ensure the validity of an ordinance, even though Stover/Cromwell dispensed with necessity of justification beyond aesthetics.68

FURTHER DEVELOPMENTS

With initial recognition and definition of state authority to regulate aesthetics in Stover and Cromwell, only a few decisions affected the doctrine expounded by the high court. The Court of Appeals refined the test for regulations in People v. Goodman, 31 N.Y.2d 262, 290 N.E.2d 139, 338 N.Y.S.2d 97 (1972), reargument denied, 32 N.Y.2d 705, 296 N.E.2d 459, 343 N.Y.S.2d 1026 (1973). Ordinances motivated by aesthetics, like other police power enactments, must be reasonable; the "inquiry, therefore, is limited to determining whether, under all the circumstances, the means adopted in this ordinance are reasonably related to the community policy sought to be implemented, and are not unduly oppressive." 338 N.Y.S.2d 97, 101. (emphasis added). To assess reasonableness, the court looked to the "setting of the regulating community." Id. at 101. This clarification of the validity inquiry left the Stover/Cromwell precedents otherwise intact.


the public benefit gained from the immediate implementation of a regulation enacted pursuant to police power to effectuate these objectives may not necessarily be of equal significance (as those pursuant to safety, etc.)...In contrast to a safety-motivated exercise of the police power, a regulation enacted to enhance the aesthetics of a community generally does not provide a compelling reason for immediate implementation with respect to existing structures or uses. True, the public will

68 See, People v. Berlin, 62 Misc. 2d 272, 307 N.Y.S.2d 96 (Co. Dist. Ct. 1970), (court upheld aesthetics-based ordinance which regulated hedge and fence heights as a valid exercise of police power, but also considered safety); Friedland v. Diamond, 67 Misc. 2d 642, 324 N.Y.S.2d 578 (Sup. Ct. 1971), (prohibitory ordinance was a reasonable exercise of police power, as applied to a campsite for transient persons, since it was essential to the safety, health, "peace and good order" of the town); also the highest state court decision in Old Farm Road, Inc. v. Town of New Castle, 26 N.Y.2d 462, 259 N.E.2d 920, 311 N.Y.S.2d 500 (1970), (decided on other grounds).
benefit from a more aesthetically beautiful community, but absent the urgency present in a safety-motivated regulation, the immediate benefit gained [by immediate compliance with the ordinance] does not outweigh the loss suffered by those individuals adversely affected.

Modieska, 373 N.E.2d 255, 261. Since the ordinance in question provided an amortization period, therefore not bringing immediate implementation into issue, the above quotation is largely dicta. Otherwise, the court believed the ordinance passed the constitutional tests under takings, due process, and first amendment freedom of speech and thus upheld the prohibition on advertising signs in the Catskill and Adirondack Parks by state authorities.

The only other Court of Appeals case which substantially affected aesthetics regulation is DeSena v. Board of Zoning Appeals of the Village of Hempstead, 45 N.Y.2d 103, 379 N.E.2d 1144, 108 N.Y.S.2d 14 (1978). The court argued that the local board had no authority to deny a variance for a permitted use on the basis of aesthetics:

Although aesthetic considerations are indeed a valid concern of land use regulations, in this case the Zoning Board of Appeals was without power to deny an area variance on aesthetic grounds. The criteria to be applied by a zoning board must in the first instance be delineated by local law, for such a body may exercise only that authority properly delegated to it. In the present case, the record is bare of any indication that appellant is authorized to apply aesthetics as a criterion in considering applications for area variances. Absent specific authorization which provides sufficient guidance to prevent complete arbitrariness, a Zoning Board of Appeals may not deny an area variance for aesthetic reasons alone.

ld. 408 N.Y.S.2d 14, 16 (citations omitted). Logically, this ruling contravenes the recognition of valid police power use to regulate aesthetics since, if the state grants police power to a municipality, its various boards and branches may exercise that power as well. However, the court expected an expression of the exact powers that the zoning board possessed; to the extent this requirement is met, the DeSena opinion does not affect the Stover/Cromwell doctrine.

Basically, the intermediate courts follow the Stover/Cromwell decisions. For example, McCormick v. Lawrence, 83 Misc. 2d 64, 372 N.Y.S.2d 156, 8 Env’t Rep. Cas. (BNA) 1461, 5 Envtl. L. Rep. (Envtl. L. Inst.) 20,650 (Sup. Ct. 1975), aff’d, 54 A.D.2d 123, 387 N.Y.S.2d 919, 6 Envtl. L. Rep. (Envtl. L. Inst.) 20,795 (App. Div. 1976), appeal denied, 41 N.Y.2d 801, 362 N.E.2d 626, 393 N.Y.S.2d 1025, appeal dismissed, 41 N.Y.2d 900, 362 N.E.2d 641, 393 N.Y.S.2d 1029 (1977), held that, given the pristine condition of the surrounding area, a ban on boathouses on the basis of aesthetics was not arbitrary, capricious, or an abuse of the regulating agency’s discretion. Citing Goodman, the court remarked, "[i]t is now well established New York law that aesthetics is a valid subject of legislative concern and that legislation aimed at promoting the governmental interest in preserving the appearance of an area is a permissible exercise of the police power." ld. 387 N.Y.S.2d 919, 920.

Other appellate decisions, while upholding Stover/Cromwell principles, have thwarted the implementation of some aesthetic regulations (see, Rochester Telephone Corp. v. Village of Fairport, 84 A.D.2d 455, 446 N.Y.S.2d 823 (App. Div. 1982) (village must pay cost to relocate utility wires underground since ordinance requiring change was not of "necessity," therefore
constituted a taking\textsuperscript{70}, and \textit{Sackson v. Zimmerman}, 103 A.D.2d 843, 478 N.Y.S.2d 354 (App. Div. 1984) (board failed to produce evidence as to substantial offense and material effect on community, therefore their decision was invalid); really, these opinions can be seen as further refinements of the judicial expectations for valid exercise of police power when regulating aesthetics. With the exception of \textit{Penn Central Transportation Co. v. City of New York}, 438 U.S. 103 (1978), the classic historic preservation opinion from the United States Supreme Court, New York does not appear to have addressed aesthetics in the context of historic preservation. Given the status of the New York law, and the seminal message of \textit{Penn Central}, the need for such a case may be obviated.

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1931 \textbf{Dowsey v. Vill. of Kensington}, 257 N.Y. 221, 177 N.E. 427

Citing:
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People ex rel. Publicity Leasing v. Ludwig, 113 N.E. 532 (N.Y. 1916)
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Perlmutter, supra
Opinion of the Justices, 128 N.E.2d 563 (Mass. 1955)

1938 \textbf{Baddour v. City of Long Beach}, 279 N.Y. 167, 18 N.E.2d 18

Citing:
Lincoln Trust Co. v. Williams Bldg. Corp, 229 N.Y. 313, 128 N.E. 209 (1920)

\textsuperscript{70} This contravenes the holding of \textit{In re Sleepy Hollow Lake, Inc. v. Public Service Commission}, 43 A.D.2d 439, 352 N.Y.S.2d 274 (App. Div. 1974) (Commission had authority to decide, based on substantial evidence and aesthetic considerations, that underground wiring should be mandatory).

1940
Preferred Tires, Inc. v. Village of Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374
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1950
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1963
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Churchill & Tait v. Rafferty, 32 Phil. Rep. 580 (1915)
1967  
**Cromwell v. Ferrier.** 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22  
Citing:  
- Stover, supra  
- United Adv. Corp. v. City of Raritan, 93 A.2d 362 (N.J. 1952)  
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- Ghaster Properties, Inc. v. Preston, 200 N.E.2d 328 (Ohio 1964)  
- In re Franklin Builders, 207 A.2d 12 (Del. 1964)  
- Norate Corp. v. Zoning Bd., 207 A.2d 690 (Pa. 1965)  
- Schloss v. Jamison, 136 S.E.2d 691 (N.C. 1964)  
- Superior v. Reimel Sign, 107 N.W.2d 808 (Mich. 1961)

1970  
**People v. Berlin.** 62 Misc.2d 272, 307 N.Y.S.2d 96  
Citing:  
- Stover, supra  
- Cromwell, supra

**Old Farm Road, Inc. v. Town of New Castle.** 26 N.Y.2d 462, 259 N.E.2d 920, 311 N.Y.S.2d 500  
Citing:  
- Stover, supra  

1971  
**Friedland v. Diamond.** 67 Misc.2d 642, 324 N.Y.S.2d 578  
Citing:  
- Mid-state, supra  
- Stover, supra  
- Cromwell, supra

1972  
**People v. Goodman.** 31 N.Y.2d 262, 290 N.E.2d 139, 338 N.Y.S.2d 97  
Citing:  
- Dr. Bloom Dentist v. Cruise, 259 N.Y. 358, 182 N.E. 16 (N.Y. 1932)  
- Larchmont, supra  
- People v. Lou Bern Broadway, 68 Misc.2d 112, 325 N.Y.S.2d 806 (1971)  
- Preferred Tires, supra

1977  
**Modjeska Sign Studios, Inc. v. Berle.** 43 N.Y.2d 468, 373 N.E.2d 225, 402 N.Y.S.2d 359  
Citing:  
- Penn Central Transportation v. City of New York, 438 U.S. 103 (1978)  
- Cromwell, supra  
- Goodman, supra
The state of North Carolina, like many other states did not allow aesthetics to justify uses of state or local police power. As the modern trend—which recognized that aesthetics alone may sustain zoning ordinances—gained popularity, North Carolina began to permit aesthetic-based enactments in limited circumstances. Notably, a case connecting aesthetics to historic preservation was the first instance to acknowledge the pro-aesthetics movement. Shortly thereafter North Carolina permitted full reliance on aesthetics, but only if certain requirements were met.
EARLY DECISIONS ON AESTHETIC CONCERNS

In State v. Whitlock, 149 N.C. 542, 63 S.E. 123 (1908), the Supreme Court of North Carolina flatly declared that "[a]esthetic considerations will not warrant its [an ordinance's] adoption, but those only which have for their object the safety and welfare of the community." Id. 63 S.E. 123. This position remained valid for over fifty years until State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959), overruled sub nom., State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982) reconsidered the possibility of using aesthetics in conjunction with the traditional purposes for the exercise of police power (health, safety, morals and general welfare).

Brown held that a statute which required junkyards to be concealed from view of paved highways was based only on aesthetics and not traditional justifications. In the supreme court’s opinion, "the statute, as it relates to junk yards, was enacted solely for aesthetic reasons--that is, to make our hard-surfaced highways, particularly those which carry heavy interstate traffic, more attractive." Id. 108 S.E.2d 74, 77. Though "in sympathy with every legitimate effort to make...highways attractive and to keep them clean," the court could not find authority to justify sustaining a "regulation based purely on aesthetic grounds without any real or substantial relation to the public health, safety or morals, or the general welfare." Id. at 78.

Even though the language of the Brown decision arguably would have sustained an auxiliary justification of aesthetics, none of the court’s decisions used such a doctrine when reviewing cases. Finally, the supreme court took full notice of the modern trend in State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972). The court declined to resolve the issue in the Vestal case, but North Carolina had moved closer to following a pro-aesthetics position.

AESTHETICS AND HISTORIC PRESERVATION

Though some other states first acknowledged that aesthetics could sustain ordinances and then applied the rationale to historic preservation ordinances, the supreme court in North Carolina upheld aesthetics alone as a justification for the exercise of police power when the purpose served by the ordinance furthers historic preservation goals. In A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979), the court elaborated:

Although we are not now prepared to endorse...a broad concept of the scope of police power, we find no difficulty in holding that the police power encompasses the right to control the exterior appearance of private property when the object of such control is the preservation of the State's legacy of historically significant structures....The preservation of historically significant residential and commercial districts protects and promotes the general welfare in distinct yet intricately related ways. It provides a visual, educational medium by which an understanding of our country's historic and cultural heritage may be imparted to present and future generations. That understanding provides in turn a unique and valuable perspective on the social, cultural, and economic mores of past generations of Americans, which remain operative to varying degrees today.

71 Little Pep Delmonico Restaurant, Inc. v. City of Charlotte, 252 N.C. 324, 113 S.E.2d 422 (1960), overruled by State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982), followed Brown in holding that a sign ordinance was enacted for aesthetics only and that due to the burden on the landowner, a temporary injunction barring enforcement of the law was appropriate. Besides following old precedents, the court dodged the aesthetics issue entirely in Schloss v. Jamison, 262 N.C. 108, 136 S.E.2d 691 (1964) by declaring that an ordinance which distinguished between "business signs" and "advertising signs" was simply not based on aesthetics.
Id. 258 S.E.2d 444, 450 (emphasis added). With this language, the court very clearly sanctioned the use of aesthetics to justify historic preservation ordinances. The shift in position on the aesthetics issue foreshadowed additional policy changes that would expand the role of aesthetics in zoning.

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

The next step in broadening the use of aesthetics in police power actions was made by the Court of Appeals of North Carolina in County of Cumberland v. Eastern Federal Corp., 48 N.C. App. 518, 269 S.E.2d 672 (Ct. App.), review denied, 301 N.C. 527, 273 S.E.2d 453 (1980). The appellate court found that aesthetics, among other considerations, was sufficient to sustain an advertising sign ordinance as a valid exercise of police power, given government's particular concern with such signs. In somewhat cavalier terms, the court anticipated the path of the supreme court on the aesthetics issue:

We find it hard to conceive that our constitutional founders believed that visual blight and ugliness were a fundamental aspect of our national heritage or that our state and local governments were to be powerless in protecting the beauty and harmony in our human as well as our natural environments. Given the cautious wording of our Supreme Court in A-S-P Associates, supra, we do not go so far as to say in all cases that purely aesthetic considerations may be the basis for reasonable governmental regulation of land use. We do hold, however, that the Cumberland County sign ordinance in this case could lawfully be based upon aesthetic considerations and we see no need to play with euphemisms to reach this result.

Id. 269 S.E.2d 672, 676. Thus the scope of aesthetic considerations broadened in application with the Cumberland ruling.

Just two years later, however, the supreme court approved general use of aesthetics as a justification for ordinances within certain constraints. The State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982) decision held that, under the specific circumstances, regulations may be based on aesthetic considerations and be valid exercises of the police power.

In light of our 1972 perception in Vestal that the trend was growing toward allowing such regulation,...and our agreement with the views expressed in the recent cases,...we expressly overrule our previous cases to the extent that they prohibited regulation based upon aesthetic considerations alone. We do not grant blanket approval of all regulatory schemes based upon aesthetic considerations. Rather we adopt the test...that the diminution in value of an individual's property should be balanced against the corresponding gain to the public from such regulation....We therefore hold that reasonable regulation based on aesthetic considerations may constitute a valid basis for the exercise of the police power depending on the facts and circumstances of each case.
Id. 290 S.E.2d 675, 681 (emphasis added). This decision gave full recognition to the use of aesthetics, even though its use with historic preservation matters was already in place. Cases subsequent to Jones have either clarified the court's test, or affirmed the use of aesthetics in the exercise of police power.

CASE LISTINGS AND REFERENCES

1908  
**State v. Whitlock, 149 N.C. 542, 63 S.E. 123**  
Citing:  
Crawford v. Topeka, 33 P. 476 (Kan. 1893)  
People v. Green, 83 N.Y.S. 460 (N.Y. 1903)  
Chicago v. Gunning System, 73 N.E. 1035 (Ill. 1905)  
Letts v. Kessler, 42 N.E. 765 (Ohio 1896)  
Bostock v. Sams, 52 A. 665 (Md. 1902)  
Bryan v. Chester, 61 A. 894 (Pa. 1905)  
Koblegard v. Hale, 53 S.E. 793 (W. Va. 1906)

1959  
**State v. Brown, 250 N.C. 54, 108 S.E.2d 74**  
Citing:  
Turner v. City of New Bern, 187 N.C. 541, 122 S.E. 469 (1924)  
Gionfriddo v. Town of Windsor, 81 A.2d 266 (Conn. 1951)  
City of Wateska v. Blatt, 50 N.E.2d 589 (Ill. Ct. App. 1943)

1960  
**Little Pep Delmonico Restaurant, Inc. v. City of Charlotte, 252 N.C. 324, 113 S.E.2d 422**  
Citing:  
Brown, supra  
In re O'Neal, 243 N.C. 714, 92 S.E.2d 189 (1956)  
State v. Staples, 157 N.C. 637, 73 S.E. 112 (1911)  
Barger v. Smith, 156 N.C. 323, 72 S.E. 376 (1911)  
Whitlock, supra

1964  
**Schloss v. Jamison, 262 N.C. 108, 136 S.E.2d 691**  
Citing:  

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**72** The court outlined the considerations that weighed in the balancing test: "private concerns such as whether the regulation results in confiscation of the most substantial part of the value of the property or deprives the property owner of the property's reasonable use, and such public concerns as the purpose of the regulation and the manner in achieving a permitted purpose." Id. at 681. Also, there are a number of corollary benefits which merit being balanced against the landowner's interest in the use of his property without regulation. The test emphasizes the reasonableness of the benefits and burdens.

**73** See Goodman Toyota, Inc. v. City of Raleigh, 63 N.C. App. 660, 306 S.E.2d 192 (Ct. App. 1983), review denied, 310 N.C. 477, 312 S.E.2d 884 (1984) which found that an ordinance constituted a reasonable use of police power if the aesthetic purpose outweighed the burden imposed on the landowner. Goodman held that an ordinance prohibiting the use of windblown signs did not violate the constitution despite its aesthetic purpose since it was reasonable.

**74** See **Issuance of a CAMA Minor Development Permit v. Town of Bath, 82 N.C. App. 32, 345 S.E.2d 699 (Ct. App. 1986).** The court found that the evidence supported the conclusion that the ordinance would meet its objective of maintaining aesthetic qualities of the area.
Silver v. Zoning Bd. of Adjustment, 112 A.2d 84 (Pa. 1955)
Criterion Service v. East Cleveland, 88 N.E.2d 800 (Ohio Ct. App. 1949)
Murphy v. Westport, 40 A.2d 177 (Conn. 1944)
Rockingham Hotel Co. v. North Hampton, 146 A.2d 253 (N.H. 1958)
Kelbro v. Myrick, 30 A.2d 527 (Vt. 1943)
Opinion of the Justices, 169 A.2d 762 (N.H. 1961)
Varney & Green v. Williams, 100 P. 867 (Cal. 1909)
Whitlock, supra

1972

State v. Vestal, 281 N.C. 517, 189 S.E.2d 152
Citing:
    Murphy v. Town of Westport, 40 A.2d 177 (Conn. 1944)
    City of Shreveport v. Brock, 89 So. 2d 156 (La. 1956)
    Lachapelle v. Town of Goffstown, 225 A.2d 624 (N.H. 1967)
    Nagele Outdoor Adv. Co v. Village of Minnetonka, 162 N.W.2d 206 (Minn. 1968)
    People v. Stover, 240 N.Y.S.2d 734 (N.Y. 1963)

1979

A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444
Citing:
    Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975)
    Bohannan v. City of San Diego, 106 Cal. Rptr. 333 (1973)
    Figarsky v. Historic District Commission, 368 A.2d 163 (Conn. 1976)
    Rebman v. City of Springfield, 250 N.E.2d 282 (Ill. 1969)
    City of New Orleans v. Levy, 64 So. 2d 798 (La. 1953)
    Opinion of the Justices, 128 N.E.2d 557 (Mass. 1955)
    Opinion of the Justices, 128 N.E.2d 563 (Mass. 1955)
    City of Santa Fe v. Gamble-Skogomo, Inc., 389 P.2d 13 (N.M. 1964)
    Berman, supra
    Vestal, supra

1980

Citing:
    Vestal, supra
    A-S-P, supra
    Schloss, supra

1982

State v. Jones, 305 N.C. 520, 290 S.E.2d 675
Citing:
    Horton v. Gulledge, 177 S.E.2d 885 (N.C. 1970)
    Vestal, supra
    A-S-P, supra
    State v. Smith, 618 S.W.2d 474 (Tenn. 1981)
    Rockdale County v. Mitchell's Used Auto Parts, 254 S.E.2d 847 (Ga. 1979)
NORTH DAKOTA

ABSTRACT

Only one case from the Supreme Court of North Dakota has addressed the issue of whether aesthetics will justify an exercise of state or local police power. The court permits aesthetic-based purposes to uphold statutes and ordinances if traditional purposes (health, safety, and welfare) are served as well. No case has addressed the use of aesthetic considerations in historic preservation regulations.

AUXILIARY CONSIDERATION OF AESTHETICS

The legal history of the aesthetics issue in North Dakota seems limited to the supreme court’s decision in Newman Signs, Inc. v. Hielle, 268 N.W.2d 741, 8 Envtl. L. Rept. (Envtl. L. Inst.) 20,890 (N.D. 1978), appeal dismissed, 440 U.S. 901, 99 S.Ct. 1205, 59 L.Ed. 2d 449 (U.S. 1979). To a constitutional challenge of the North Dakota Highway Beautification Act, the court held that, among other things, the several purposes which the legislature enumerated in the statute were within the state’s police power:

[The Legislature has clearly identified the purposes it intended to achieve by adopting Chapter 24-17 [the Act], which include restoring, enhancing, and preserving scenic beauty along the Interstate and primary highway systems of the State; promoting the safety and convenience of those travelling on the highways; protecting the public investment in the State highway system; and promoting the enjoyment and recreational value of the State highways. We conclude that these purposes are within the proper scope of the police power of a State.

Id. 268 N.W.2d 741, 757. The court relied exclusively on decisions from other jurisdictions to sustain its conclusion; this suggests that no other aesthetics decisions existed in North Dakota prior to Newman Signs. By permitting the aesthetics-based purpose in this case, the court sanctioned
the auxiliary use of aesthetic considerations in legislative decisions when other traditional goals were also advanced.

The court briefly analyzed the aesthetics issue beyond auxiliary consideration. Though noting that "some courts have recognized that aesthetic considerations alone may form the basis for a valid exercise of the police power," the supreme court declined to resolve this aspect of the issue for North Dakota: "We need not decide whether aesthetic considerations alone justify this regulation because the regulation is based upon a combination of purposes which we find to be within the police power." Id. at 757.

Two elements of the opinion suggest that North Dakota might rule in favor of a challenged enactment grounded on aesthetics. First, the court cited cases which have upheld such regulations, but did not consider cases which have held against aesthetic-based laws. This tacit acknowledgement of the modern pro-aesthetic trend may represent a judicial acceptance of the doctrine as a sound legal policy. Second, the court did not entertain a challenge to the statute's proffered safety purpose. "Although some courts have questioned the validity of the assertion that outdoor advertising signs have a detrimental effect on traffic safety, we have been provided with no evidence to indicate that such a relationship does not exist." Id. at 759. The court deferred to the legislature's determination that safety might be endangered by the roadside signs. This statement demonstrates an openness to legislative determinations that might sustain a carefully-worded enactment connecting aesthetics to a traditional part of the police power. At the least, the Newman Sign decision permits auxiliary consideration of aesthetics in North Dakota.

CASE LISTINGS AND REFERENCES

1978 Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741
Citing:
- Cromwell v. Ferrier, 225 N.E.2d 749 (N.Y. 1967)
- Oregon city v. Hartke, 400 P.2d 255 (Or. 1965)
- Jasper v. Commw., 375 S.W.2d 709 (Ky. 1964)
- People v. Stover, 191 N.E.2d 272 (N.Y. 1963)
- Westfield Motor Sales Co. v. Town of Westfield, 324 A.2d 113 (N.J. 1974)

ABSTRACT

The early Ohio cases which addressed aesthetics-based zoning regulations only allowed auxiliary consideration of aesthetics; primarily, the zoning ordinance had to meet traditional police power concerns: health, safety, morals, or welfare. In the 1960s, however, the courts shifted their view of the role of aesthetics in zoning legislation to permit increasing reliance on such considerations. Presently, Ohio case law allows the exercise of police power on the basis of aesthetics alone; it may permit such justifications in historic preservation matters.
AUXILIARY CONSIDERATION OF AESTHETICS

The earliest case to address aesthetics,76 City of Youngstown v. Kahn Brothers Building Co., 112 Ohio St. 654, 148 N.E. 842 (1925), recognized the validity of zoning ordinances in general, but cautioned that "the police power cannot be invoked for purely aesthetic considerations,...and that while a statute or ordinance is presumed to be valid a mere declaration therein that it is enacted to protect public safety, health, morals, will not render the statute valid...unless there is some reasonable relationship between such purpose and the regulation prescribed." Id. 148 N.E. 842, 843. In a detailed discussion of police power, the Supreme Court of Ohio set out its reasons for invalidating aesthetic-based ordinances:

The police power,...is based upon public necessity. There must be an essential public need for the exercise of the power in order to justify its use. This is the reason why mere aesthetic considerations cannot justify the use of the police power. It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. More over, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies...Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard entirely impractical as a standard for use restriction upon property. The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power. We are therefore remitted to the proposition that the police power is based upon public necessity, and that the public health, morals, or safety, and not merely aesthetic interest, must be in danger in order to justify its use.

Id. at 844 (citation omitted). Apparently, the court believed the practicalities of permitting aesthetics-based legislation would result in a public inability to determine the standards by which such ordinances would be enforced. The court relied on very little authority, even from other jurisdictions, for its conclusion. For the next thirty years, the Ohio courts would not waver from the auxiliary consideration of aesthetics view.76

THE TREND TOWARDS THE MODERN VIEW

A decision from the Court of Appeals of Ohio in 1963 began the shift of position on aesthetics. The holding in Reid v. Architectural Board of Review of the City of Cleveland Heights, 119 Ohio App. 67, 192 N.E.2d 74 (Ct. App. 1963) sustained the refusal of construction approval for a residence of a "radical design" since the building did not mesh with the general character of the neighborhood. Not only did the appellate court validate the ordinance "designed to protect values and to maintain 'a high character of community development'" as within the "public interest" and "general welfare," but the court permitted the delegation of such a purpose to the architectural board of review. Id. at 76. The ordinance, said the court,

sets out criteria and standards for the Board to follow in passing upon an application for the building of a new home which are definite as to the objective to be

76 Many cases refer to Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925) as upholding the auxiliary use of aesthetics in zoning regulations, but the Pritz decision primarily upheld zoning ordinances in general without exploring the aesthetics topic.

76 See, Wondrak v. Kelley, 129 Ohio St. 268, 195 N.E. 65 (1935) (held that an ordinance limiting the height of fences on property lines was an arbitrary and unreasonable use abridgement of property rights); City of Defiance v. Killion, 116 Ohio App. 60, 186 N.E.2d 634 (Ct. App. 1962) (ordinance prohibiting junkyards and storage of unsightly things was unconstitutional because it was based solely on aesthetics and therefore was an invalid exercise of police power).
attained,...specific as to matters to be considered and regulated,...instructive as to the method by which the matters specified are to be adjudged,...and informative as to the bounds within which it is to exercise these powers.

*Id.* at 76-77. While these characteristics supported the ordinance’s validity, the court did not directly analyze the actual effect or impact of the ordinance (strongly aesthetics-oriented). The language of the opinion hedges around the issue:

>[The house] would not only be out of keeping with and a radical departure from the structures now standing but would be most detrimental to the further development of the area....Esthetics [sic] was a consideration that played a part in the ruling of the Board, but there were many other factors that influenced its decision. The structure designed is a single-story home in a multi-story neighborhood; it does not conform to the general character of other houses; it would affect adjacent homes and three vacant lots; it is of such a radical concept that any design not conforming to the general character of the neighborhood would have to be thereafter approved; when viewed from the street, it could indicate a commercial building; it does not conform to standards of the neighborhood; it does not preserve high character of neighborhood; it does not preserve property values; it would be detrimental to neighborhood on the lot where proposed and it would be detrimental to the future development of the neighborhood.

*Id.* at 77-78. These justifications for the denial of construction approval fall into two categories: aesthetic-based and economic-based concerns. Because no prior case had upheld a zoning-related decision on the basis of these two kinds of concerns, the *Reid* opinion represents a radical departure from the *Youngstown* position which opposed using aesthetics as the basis of ordinances.

Notwithstanding the *Reid* decision, some courts apparently were reluctant to accept the change in view—at least, the courts did not enthusiastically champion the cause of aesthetics-based ordinances. Instead the courts gave tacit approval to such enactments. For example, in *Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425, 200 N.E.2d 328, 27 Ohio Op. 2d 388 (1964), the supreme court upheld the constitutionality of a statute which prohibited advertising signs adjacent to interstate highways by recognizing that "the 'general welfare' of the public encompasses more than the public health, safety, and morals. This has frequently been recognized in cases dealing with legislation enacted under the police power to regulate or prohibit billboards." *Id.* 200 N.E.2d 338, 336. The court's language on one hand endorses the expansion of the police power to include aesthetic considerations, but parts of the opinion could be construed to retain the *Youngstown* auxiliary approach. As an "out," the court advocated deference to the legislature's decision: "In enacting these statutes, the General Assembly determined that they do bear a real and substantial relationship to the public safety and general welfare. In our opinion, that determination was not clearly erroneous, and, therefore, it should not be disturbed." *Id.* at 337 (citation omitted). In essence, the decision gives implicit approval to aesthetics as a part of general welfare concerns, as long as the legislatively body can reasonably make out a relationship thereto. Otherwise, the *Ghaster* court made no express statement of a policy change from *Youngstown.*

77 See, *Village of Deshler v. Hoops*, 196 N.E.2d 476, 26 Ohio Op. 2d 30, (Ct. C.P. 1963) (ordinance which essentially prohibited junkyards within the village, but was based on public access and/or view of the junk, violated the constitution and therefore was invalid).
A few years later, the high court ruled in *State v. Buckley*, 16 Ohio St. 2d 128, 243 N.E.2d 66, 45 Ohio Op. 2d 469 (1968), appeal dismissed, cert. denied sub nom., *Buckley v. Ohio by Barbuto*, 395 U.S. 163, 89 S.Ct. 1647, 23 L.Ed. 2d 174 (U.S. 1969) that a statute could require junkyards, but not scrapyards, to be screened from public view under the police power, even if the law was grounded in aesthetics.

We think that aesthetic considerations can support these statutes, because interference with the natural aesthetics of the surrounding countryside caused by an unfenced or inadequately fenced junk yard is generally patent and gross, and not merely a matter of taste. Certainly the junk yard here, wherein junk cars are stacked so that they are visible many feet above the top of the fence, is patently offensive, and it cannot be effectively argued in this case that the statutes would be unconstitutional as applied, either because the offensiveness in this fact situation is only a matter of taste or because the surrounding area has no aesthetic value to preserve.

Id. 243 N.E.2d 66, 70. The Buckley holding was limited very clearly by the court. First, a different set of facts might render the ordinance in question unconstitutional. Second, the court limited the scope of the Buckley ruling: "This holding is not to be construed as a blanket approval of all regulation based upon aesthetics." Id. at 70. The court declined to accept a larger grant of validity to aesthetics-based ordinances because "[s]o large a step presupposes an exact definition of beauty which is acceptable to all tastes." Id. at 70.

**APPellate Response**

The appellate courts responded to the Buckley decision over the next decade along two lines. Some sustained aesthetics-based zoning decisions, some did not. In *P & S Investment Co. v. Brown*, 40 Ohio App. 2d 535, 320 N.E.2d 675, 69 Ohio Op. 2d 460 (Ct. App. 1974), the court permitted aesthetic considerations to motivate a zoning decision without reservation. The use of dilapidated construction trailers as semi-permanent storage facilities, said the court, was in such "gross contrast" to the permitted uses of the area as to be "patently offensive" and therefore the zoning body's decision to prohibit such use was a valid exercise of the police power. Id. 320 N.E.2d 675, 680.

Conversely, *City of Euclid v. Fitzthum*, 48 Ohio App. 2d 297, 357 N.E.2d 402, 2 Ohio Op. 2d 278 (Ct. App. 1976) firmly reasserted the validity of the Youngstown principle—that aesthetics must remain an auxiliary consideration to health, safety, and public welfare. There the court struck down an ordinance, which claimed to serve the traditional purposes and required boats and campers on trailers to be stored inside buildings, because the regulations imposed actually compounded the problems meant to be solved. The court only mentioned in passing the modern trend in aesthetics.

Other courts, like the one which heard *City of Pepper Pike v. Landskroner*, 53 Ohio App. 2d 63, 371 N.E. 2d 579, 7 Ohio Op. 3d 44 (Ct. App. 1977), sustained aesthetic-based ordinances by round-about means. In *Pepper Pike*, the court upheld a zoning ordinance that prohibited outside storage of house-trailers in single-family residential zones by distinguishing ordinances enacted "principally" for aesthetic purposes from those "enacted for the purpose of preserving and protecting the orderly development, the character and the integrity of a single-family neighborhood" with an incidental aesthetic effect. Id. 371 N.E.2d 579, 586. Though the court reviewed the modern trend on the issue with a fair degree of thoroughness, the decision suggests that the judges were somewhat confused as to what was meant by "aesthetics."
To straighten out some of the confusion, one appellate court, in *Sun Oil Co. of Pennsylvania v. City of Upper Arlington*, 55 Ohio App. 2d 27, 379 N.E.2d 266, 9 Ohio Op. 3d 166 (Ct. App. 1977), construed the P & S and Buckley holdings very narrowly and created a new gross contrast/patently offensive test for cases involving aesthetics. Under this limitation, the court upheld the aesthetic basis for the ordinance, but invalidated the enactment because it conflicted with a state statute. The position on aesthetics in Ohio was certainly unclear through the 1970s; fortunately, the supreme court clarified the state's view in the following decade.

**ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW**

Because the police power "must be able to expand or contract in response to changing conditions and needs," the supreme court ruled that aesthetic considerations would sustain exercises of the police power in *Village of Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d 69, 458 N.E.2d 852, appeal dismissed, 467 U.S. 1237, 104 S.Ct. 3503, 82 L.Ed. 2d 814 (U.S. 1984). Noting the prior position of Buckley, which did not extend approval to all such ordinances, the court recognized that

> the evolving trend has been to grant aesthetic considerations a more significant role. We believe that this is the correct approach as the appearance of a community relates closely to its citizen’s happiness, comfort and general well-being. Accordingly, it is our finding that there is a legitimate governmental interest in maintaining the aesthetics of a community and that, as such, aesthetic considerations may be taken into account by the legislative body in enacting zoning legislation.

*Id.* 458 N.E.2d 852, 856 (footnote omitted)(emphasis added). The court also included the protection of real estate values as part of the general welfare. This case tangentially involved historic preservation since the challenged ordinance authorized the Architectural and Historic Board of Review to issue permits or stop work orders for building alterations.

**AESTHETICS AND HISTORIC PRESERVATION**

Because the Supreme Court adopted the pro-aesthetics position with the *Hudson* decision, it is reasonable to presume that aesthetic-based ordinances, though specifically pertaining to preservation, would be valid in Ohio. Combined with the Supreme Court decision in *Franchise Developers, Inc. v. City of Cincinnati*, 30 Ohio St. 3d 28, 505 N.E.2d 966 (1987), which upheld a zoning scheme that protected "environmental quality districts" as a proper exercise of the police power to preserve and protect the character of neighborhood that bore importantly on the city’s quality of life, validation for aesthetic-based historic preservation ordinances seems quite likely.

**CASE LISTINGS AND REFERENCES**

1925  
*City of Youngstown v. Kahn Brothers Building Co.*, 112 Ohio St. 654, 148 N.E. 842  
Citing:  

> Pritz v. Messer, 149 N.E. 30 (Ohio 1925)  
> Ingersoll v. Village of South Orange, 126 A. 213 (N.J. Super. 1924)

1935  
*Wondrak v. Kelly*, 129 Ohio St. 268, 195 N.E. 65  
Citing:  

> Pritz, supra
1962  
**City of Defiance v. Killian**, 116 Ohio App. 60, 186 N.E.2d 634

Citing:
- *Bothlev v. Crofoot*, 7 Ohio L. Abs. 667 (1929)
- *Letts v. Kessler*, 54 Ohio St. 73, 42 N.E. 765 (1896)

1963  
**Reid v. Architectural Board of Review**, 119 Ohio App. 67, 192 N.E.2d 74

Citing:
- *Benjamin v. City of Columbus*, 146 N.E.2d 854 (Ohio 1957)
- *State ex rel. Saveland Park Holding Co. v. Wieland*, 69 N.W.2d 217 (Wis. 1955)
- *Froelich v. City of Cleveland*, 124 N.E. 212 (Ohio 1955)
- *City of Cincinnati v. Correll*, 49 N.E.2d 412 (1943)

1963  

Citing:
- *Bohley*, supra
- *City of Defiance*, supra

1964  

Citing:
- *Kelbro v. Myrick*, 30 A.2d 527 (Vt. 1943)
- *Curtiss v. City of Cleveland*, 170 Ohio St. 127, 163 N.E.2d 682 (1959)
- *New York State Thruway Authority v. Ashley Motor Court, Inc.*, 176 N.E.2d 566 (N.Y. 1961)
- *Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964)
- *Murphy v. Westport*, 40 A.2d 177 (Conn. 1944)

1968  

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1977  
**City of Pepper Pike v. Landskroner.** 53 Ohio App. 2d 63, 371 N.E.2d 579, 7 Ohio Op. 3d 44

Citing:
- **Berman**, supra
- **Euclid/Fitzthum**, supra
- **City of Cleveland Heights v. Antael**, Ct. App. Cuyahoga County No. 33364 (July 25, 1974)
- **Youngstown**, supra
- **People v. Stover**, 191 N.E.2d 272 (N.Y. 1963)
- **Best v. Zoning Bd. of Adjustment**, 141 A.2d 606 (Pa. 1958)
- **Pritz**, supra
- **Reid**, supra
- **Buckley**, supra
- **Ghaster**, supra

**Sun Oil Co. of Pennsylvania v. City of Upper Arlington.** 55 Ohio App. 2d 27, 379 N.E.2d 266, 9 Ohio Op. 3d 196

Citing:
- **Wondrak**, supra
- **Youngstown**, supra
- **Ghaster**, supra
- **Buckley**, supra
- **P & S**, supra

1984  
**Village of Hudson v. Albrecht, Inc.**, 9 Ohio St. 3d 69, 458 N.E.2d 852, appeal dismissed, 467 U.S. 1237

Citing:
- **State ex rel. Killeen Realty v. City of East Cleveland**, 169 Ohio St. 375, 160 N.E.2d 1, 9 Ohio Op. 2d 409 (1959)
- **Wondrak**, supra
- **Youngstown**, supra
- **Pritz**, supra
- **Vill. of Euclid/Ambler**, supra
- **Correll**, supra
- **Ghaster**, supra
- **Buckley**, supra

1987  
**Franchise Developers, Inc. v. City of Cincinnati.** 30 Ohio St. 3d 28, 505 N.E.2d 966

Citing:
- **Hudson**, supra
ABSTRACT

Apparently, Oklahoma has not ruled on the aesthetics issue in more than one case. The language of that opinion suggests that the state courts might favor aesthetic-based regulations as a valid exercise of the police power.

THE TREND TOWARDS THE MODERN VIEW

In State Department of Transportation v. Pile, 603 P.2d 337 (Okla. 1979), cert. denied, 453 U.S. 922, 101 S.Ct. 3158, 69 L.Ed.2d 1004 (U.S. 1981), the Supreme Court of Oklahoma ruled on a state statute which essentially prohibited all billboards on rural roads. The court found that the statute could not apply to noncommercial billboards without violating the first amendment to the United States Constitution. Otherwise, the opinion treated the aesthetics issue receptively:

The state urges us under the authority of Berman v. Parker, to recognize the public utility of this legislation as a valid exercise of the police power designed to promote the general welfare of the state and its citizens by preserving the natural scenic beauty of the state and encouraging tourism, etc. That the State, under the police power, may "determine the community should be beautiful as well as healthy" is not denied as a general statement. It is, however, inappropriate,... to interfere with a first amendment right to openly discuss the issues of the day to accomplish that end. The power of the state to infringe upon these first amendment rights on behalf of the physical beauty of the community has been denied heretofore.

Id. at 341-342 (citation omitted)(emphasis added).

The court notably did not condition the use of the aesthetics justification on the traditional police power objectives of health, safety, morals, or general welfare. Rather than prohibiting the use of aesthetics, the court appears to have accepted the Berman statement on aesthetics wholeheartedly. The Pile opinion suggests therefore that a challenged ordinance which was grounded in aesthetics would be sustained by the high court.78

78 Caution must govern this interpretation of Pile. In the court’s summation of the case’s first amendment issue, the justices noted that the alleged safety concerns of the state conflicted with the aesthetically motivated considerations:

[T]he considerations of public safety and beauty as proffered by the state as a basis for prohibiting the speech signified by the defendant’s billboard are mutually inconsistent. The argument is made that our residents are entitled to look at the beauty of the countryside, untrammeled by the blight of billboards, in the face of the statement that billboards can be banned because they constitute a distraction to the drivers of automobiles. Using this reasoning, one could argue the countryside should be covered with billboards to reduce the temptation to avert one’s eyes from the road.

Id. at 342-43.
The Supreme Court of Oregon accepts aesthetics as a justification for the exercise of the police power. The history of the state's case law is recent in comparison to other states. The courts, however, have been particularly accommodating to the issue and it appears that use of the aesthetics justification in an historic preservation ordinance might be sustained in Oregon.

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

The first known case to address aesthetics was Oregon City v. Hartke, 240 Or. 35, 400 P.2d 255 (1965) wherein the supreme court allowed the aesthetic motivations of an ordinance to preclude a use from a particular zone. Noting that the old concepts of the police power did not permit aesthetic bases for zoning laws, the court supported

*a growing judicial recognition of the power of a city to impose zoning restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings. This change in attitude is a reflection of the refinement of our tastes and the growing appreciation of cultural values in a maturing society. The change may be ascribed more directly to the judicial expansion of the police power to include within the concept of "general welfare" the enhancement of the citizen's cultural life.*

Id. 400 P.2d 255, 261 (emphasis added). The court thus resolved the question by following the modern trend: "We join in the view 'that aesthetic considerations alone may warrant an exercise of the police power.'" Id. at 262.

The ordinance in Oregon City had precluded entirely the use of land within the city for automobile wrecking yards. The supreme court found this aspect unobjectionable:

We hold that it is within the police power of the city wholly to exclude a particular use if there is a rational basis for the exclusion. The city commission has the responsibility for the planning and development of the city in a manner which meets the needs of the community. The commission may interpret those needs as including the elimination of uses which are not in keeping with the character of the city as it then exists or as the community would desire it to be in the future. The prevention of unsightliness by wholly precluding a particular use within the city may inhibit the economic growth of the city or frustrate the desire of someone who wishes to make the proscribed use, but the inhabitants of the city have the right to forego the economic gains and the person whose business plans are frustrated is not entitled to
have his interest weighed more heavily than the predominant interest of the others in the community.

Id. at 263 (footnote omitted)(emphasis added). This important language of the opinion grants a significant amount of discretion to legislative bodies in developing aesthetic-based zoning ordinances. As long as a governmental unit can muster support for an enactment, the Oregon City case implies that the ordinance will be upheld, provided that the law is rationally related to its objective.

FURTHER DEVELOPMENTS

The Court of Appeals of Oregon has followed the permissive attitude of the supreme court which found expression in Oregon City. Several cases have interpreted the aesthetics language of that case in expansive terms. For example, in Frankland v. City of Lake Oswego, 493 P.2d 163 (Or. Ct. App. 1972), the appellate court permitted consideration of a landowner's aesthetic view interests in determining an amount of damages caused by new construction. The court overturned the trial court's dismissal of the case, which challenged the municipality's rezoning to allow new four- and five-story apartment buildings in a single-family residential zone. Recognizing that aesthetic considerations, like the view from one's home, may "affect the market value of the property," the Frankland decision concluded that they "must" be considered in calculating damage awards. Id. at 172.

More specifically, the appellate courts have interpreted the concluding language of Oregon City to permit regulations when the state declares that an interest is within its police power. In Scott v. State, 23 Or. App. 99, 541 P.2d 516 (Ct. App. 1975), the court upheld the constitutionality of regulations under the Scenic Waterways Act because the state's citizens could choose to make such a decision about the natural conservation issue. The only constraint which the courts have imposed addresses constitutional violations. The language of the Oregon City decision, as interpreted by the appellate courts in favor of aesthetic-based regulations, thus suggests that Oregon would likely sustain an historic preservation ordinance which relied on aesthetics for its underlying rationale.

CASE LISTINGS AND REFERENCES

1965

Oregon City v. Hartke, 240 Or. 35, 400 P.2d 255

Citing:
Milwaukee Co. of Jehovah's Witnesses v. Mullen, 214 Or. 281, 330 P.2d 5 (1958)
People v. Stover, 191 N.E.2d 272 (N.Y. 1961)

1972

Frankland v. City of Lake Oswego, 493 P.2d 163

Citing:
Oregon City, supra
Perkins v. Marion County, 448 P.2d 374 (Or. 1968)

79 See Van v. Travel Information Council, 52 Or. App. 399, 628 P.2d 1217 (Ct. App. 1981) which held that, while aesthetic concerns are legitimate motivations for the exercise of police power, such regulations may not work to impose violations of the first amendment to the constitution.
Citing:
   Milwaukee Co., supra
   Oregon City, supra

1981 Van v. Travel Information Council, 52 Or. App. 399, 628 P.2d 1217
Citing:
   Oregon City, supra
   John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980)
   State v. Lotze, 593 P.2d 811 (Wash. 1979)
   Stuckey's Stores, Inc. v. O'Cheskey, 600 P.2d 258 (N.M. 1979)
   Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978)
   Veterans v. Steamboat Springs, 575 P.2d 835 (Colo. 1978)

PENNSYLVANIA

ABSTRACT

The Pennsylvania Supreme Court generally holds that aesthetics alone may not serve as a basis of police power regulation. The court fails to consistently follow the precedent, though the cases expounding this position never have been overruled. Likewise, the intermediate courts bounce back and forth between the traditional view and the modern, "pro-aesthetic" position; these appellate decisions contemplate a growing recognition of the police power which allows aesthetic regulations as a part of the "general welfare" duty of government. Given the status of the present law, it is unlikely that historic preservation ordinances would be sustained on aesthetic grounds alone.

EARLY DECISIONS ON AESTHETIC CONCERNS

The earliest cited opinion on the issue is Appeal of White, 287 Pa. 259, 134 A. 409 (1926). White represented that setback ordinances, based on aesthetic considerations, violated the Constitution as an invalid use of police power:

There is one matter that is quite certain, the power to thus regulate does not extend to an arbitrary, unnecessary or unreasonable intermeddling with the private ownership of property, even though such acts be labeled for the preservation of health, safety,
and general welfare. The exercise must have a substantial relation to the public good within the spheres held proper. It must not be from an arbitrary desire to resist the natural operation of economic laws or purely aesthetic considerations....While such regulations may not physically take the property, they do so regulate its use as to deprive the owner of a substantial right therein without compensation.

Id. 134 A. 409, 412 (citations omitted). White's strong language against building setback requirements still acknowledged state and local zoning powers, but the concepts precluded aesthetic justifications for those regulations.

AUXILIARY CONSIDERATION OF AESTHETICS

In Appeal of Liggett, 291 Pa. 109, 139 A. 619 (1927) and Appeal of Kerr, 294 Pa. 246, 144 A. 81 (1928), the Pennsylvania Supreme Court expanded the role of aesthetic considerations in zoning matters:

With the court below, "we recognize the principle which forbids zoning legislation that rests entirely upon esthetic [sic] considerations"...but, as said in St. Louis Poster Adv. Co. v. St. Louis... "the incidental consideration of a question of esthetics [sic] will not invalidate the exercise of the police power when the particular regulation is founded on other substantial grounds."

Liggett, 139 A. 619, 622 (citations omitted). Appeal of Lord, 368 Pa. 121, 81 A.2d 533 (1951) which more clearly articulated the particular limitations on zoning boards, held that the boards may not deprive owners of a property use merely because the resulting structure is unartistic or unaesthetic. These cases, though limiting the use of aesthetics, began to recognize the auxiliary function of such considerations in exercises of the police power.

But in complete derogation to these holdings that permitted auxiliary aesthetic considerations, the supreme court subsequently held that aesthetics, alone or combined with other factors, could not sustain a valid exercise of police power for the general welfare. Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954). The court cited White and Lord as precedent, though it is not clear that they represent this position. Additionally, the Medinger court observed in the opinion that an exercise of police power which was based on aesthetics was not substantially related to health, safety, morals, or general welfare in any manner. Thus, Medinger prohibited any aesthetic regulation in Pennsylvania.

Two decisions of 1958 realigned the court's position with the more permissive, auxiliary approach: Best v. Zoning Board of Adjustment of City of Pittsburgh, 393 Pa. 106, 141 A.2d 606, (1958), and Bilbar Construction Co. v. Board of Adjustment of Easttown Township, 393 Pa. 62, 141 A.2d 851 (1958). Best upheld the consideration of aesthetics and property values in making zoning decisions. The opinion implies that aesthetics alone are sufficient; "[n]ot only is the preservation of the attractive characteristics of a community a proper element of the general welfare, but also the preservation of property values is a legitimate consideration." Id. 141 A.2d 606, 612 (emphasis added). But the later decisions of the supreme court refuse to recognize this expansion of the doctrine.

Bilbar also affirmed the use of police power to regulate aesthetics when coupled with general welfare concerns. The opinion recognized that determinations of "general welfare," and methods to achieve it, fall within the legislature's realm; the court declined to substitute its judgment for the legislature's. Bilbar, recognized that
"while a zoning ordinance cannot be sustained merely on aesthetic ground[s], that may be considered in connection with questions of general welfare." Since with the passing of time, urban and suburban planning have become an accredited adjunct of municipal government, aesthetic considerations have progressively become more and more persuasive at sustaining reasons for the exercise of police power.

"Id. 141 A.2d 851, 857. Thus, Bilbar and Best restored the court to the auxiliary use of aesthetics view. From this position, allowing aesthetic considerations and other factors to form an auxiliary justification for legislation, the supreme court does not waver, though some decisions arguably thwart assertions of the police power when it relies more heavily on aesthetics.

In National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) held consistently with the Lingert line of cases that aesthetics may not be the sole basis for zoning regulations. However, the court made further assertions, based on no cited authority, that the "character of an area" differed from "aesthetics" and thus required a different analysis. Cleaver v. Board of Adjustment of Tredyffrin Township, 411 Pa. 367, 200 A.2d 408 (1964), which held the "character" of property, neighborhoods, and districts to be an "important" factor of consideration in zoning decisions, could have supplied authority for the National Land court’s distinction, but not for their variant test. The National Land opinion invalidated the use of zoning power to preserve open space and to maintain a proper setting for historic sites because it did not benefit the public nor was justified by the historic significance of some properties. Id. 215 A.2d 597, 610-11. In effect, the court denied zoning officials the control over the township’s appearance without disturbing the legal precedents of the line of cases.

Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) claimed to reaffirm the National Land holding but instead equated "character" and "aesthetics": "protecting the character--really the aesthetic nature--of the municipality is not sufficient justification for an exclusionary zoning technique." Id. 263 A.2d 395, 398 (emphasis added). The Girsh language arguably would allow aesthetic regulations which were not "exclusionary" since the opinion states of the township: "certainly it can protect its attractive character" with "reasonable" standard zoning requirements. Id. at 399.

LOWER COURT DECISIONS: TOWARDS THE MODERN VIEW?

The 1970s featured the Pennsylvania Commonwealth Court’s struggle between supporters and opponents of aesthetic regulation. Cox v. New Sewickley Township, 4 Pa. Commw. Ct. 1971) provided the most favorable opinion allowing aesthetic regulations, as long as the connection with traditional police power concerns existed, and even if the general welfare provision alone protected aesthetics:

the decision of the Pennsylvania Supreme Court indicates that the concept of the general welfare admits of aesthetic considerations and may be a sufficient basis to justify a police power regulations. In Bilbar and Best, the...Court held that general welfare alone, unconnected with health, safety or morals was a justifiable basis for zoning....Keeping in mind that the community has a definite interest in preserving the value of property in the community, in providing a pleasant environment for its citizens, and in protecting the scenic value of the community for its residents and

80 The Bilbar court notably limited Medinger as pertaining to interior regulations (regarding habitable square footage) as opposed to exterior and public regulations (regarding property frontage on roads). Unfortunately, no other court decision has recognized this limitation of Medinger.

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visitors, the planting requirement [based on aesthetic considerations] serves to promote the general welfare of the Township of New Sewickley and is, therefore, valid and constitutional and a legitimate exercise of the police power.

Cox, 284 A.2d 829, 833 (citations omitted). The court also upheld two regulations partially based on aesthetic considerations. Noting that other jurisdictions prohibited regulations based solely on aesthetics, the court stated that the present regulations, though involving aesthetics "to one degree or another," bore "a substantial relationship to proper objects of the police power, namely, public health and safety, and the general welfare, and are therefore a legitimate exercise of that power." id.

That same year, the same judges delivered a per curiam opinion that overturned a zoning board’s denial of special exception from the local ordinance on the basis of aesthetics. The court reverted to the Medinger holding, that "neither esthetic [sic] 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, morals, or safety of the community." Appeal of Manns, 3 Pa. Commw. 242, 281 A.2d 355, 360 (Commw. Ct. 1971) The court notably ignored the general welfare considerations and misplaced its reliance on Medinger which the supreme court had already limited in Bilbar. Arguably, the court meddled in legislative matters against the holding of Bilbar. 81


While we recognize the legitimate interest of the Township to advance its aesthetic goals as part of its protection of the general welfare, purely aesthetic judgments are far too subjective to alone carry the burden of showing detriment to the public interest....Without doubt, Susquehanna Township has a right to protect the scenic beauty along the River Relief Route and other roads in the Township....[The Board of Commissioners] can establish rigorous objective standards in its ordinance for placement, size, materials or coloration of signs to ensure that the offensiveness of the billboard is minimized as much as possible. What the Board cannot do, however, is grant or deny permits for billboards solely by the discretionary exercise of its subjective aesthetic judgment.

Id. 455 A.2d 29, 33. White Advertising, perhaps more than any other Pennsylvania decision, fairly assesses the judicial precedents in the state and suggests that if the ordinance is based upon

aesthetics it may be valid, though power to make aesthetic decisions, vested in a zoning body, is invalid. Regretfully, the intermediate court still vacillates back to the non-aesthetics based position on occasion.\(^2\) No decisions have pointedly addressed the use of aesthetics in an historic preservation context. The final resolution of the conflicting opinions, and the preservation issue, must come from the state's supreme court.

CASE LISTINGS AND REFERENCES

1926


Citing:

- **Boyd v. United States**, 116 U.S. 616 (1885)
- **Welch v. Swasey**, 214 U.S. 91 (1909)
- **Connage v. State of Kansas**, 236 U.S. 1 (1914)
- **St. Louis Poster v. City of St. Louis**, 249 U.S. 269 (1918)
- **Penn. Coal v. Mahon**, 260 U.S. 393 (1922)
- **Spann v. City of Dallas**, 235 S.W. 513 (Tex. 1921)

1927

**Appeal of Liggett**, 291 Pa. 109, 139 A. 619

Citing:

- **St. Louis Poster**, supra
- **White**, supra

1928

**Appeal of Kerr**, 294 Pa. 246, 144 A. 81

Citing:

- **Eubank v. City of Richmond**, 226 U.S. 137 (1912)
- **White**, supra
- **Sundeen v. Rogers**, 141 A. 142 (N.H. 1928)

1951

**Appeal of Lord**, 368 Pa. 121, 81 A.2d 533

Citing:

- **White**, supra
- **Liggett**, supra

1954

**Appeal of Medinger**, 377 Pa. 217, 104 A.2d 118

Citing:

- **Boyd**, supra
- **Welch**, supra
- **Connage**, supra
- **St. Louis Poster**, supra
- **White**, supra
- **Lord**, supra
- **Pincus v. Power**, 376 Pa. 175, 101 A.2d 914 (1954)

1958

**Best v. Zoning Board of Adjustment**, 393 Pa. 106, 141 A.2d 606

Citing:

- **Berman**, supra
- **Swade**, supra

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Kerr, supra
Fischer v. Bedminster Township, 93 A.2d 378 (N.J. 1952)
Pierro v. Baxendale, 118 A.2d 401 (N.J. 1955)
West Hartford Methodist Church v. Zoning Board of Adjustment, 121 A.2d 640 (Conn. 1956)
Opinion of the Justices, 128 N.E.2d 557 (Mass. 1955)
State ex rel. Saveland v. Wieland, 69 N.W.2d 217 (Wis. 1955)

Bilbar Construction Co. v. Board of Adjustment, 393 Pa. 62, 141 A.2d 851
Citing:
Berman, supra
Appeal of Ward, 289 Pa. 458, 137 A. 630 (1926)
Ligget, supra
Kerr, supra
Appeal of Jenning, 198 A. 621 (Pa. 1938)
Appeal of Dunlap, 87 A.2d 299 (Pa. 1952)
Landau Advertising v. Zoning Board of Adjustment, 128 A.2d 559 (Pa. 1957)
Swade, supra

1964

Cleaver v. Board of Adjustment, 414 Pa. 367, 200 A.2d 408
Citing:
Gratton v. Conte, 364 Pa. 578, 73 A.2d 381 (1950)
Medinger, supra
Sun Oil Co. v. Zoning Board of Adjustment, 403 Pa. 409, 169 A.2d 294 (1961)

1965

Citing:
Anstine v. Zoning Board of Adjustment, 411 Pa. 33, 190 A.2d 712 (1963)

1970

Appeal of Girsh, 437 Pa. 237, 263 A.2d 395
Citing:
Appeal of O'Hara, 389 Pa. 35, 131 A.2d 587 (1957)
National Land, supra

1971

Appeal of Manns, 3 Pa. Commw. 242, 281 A.2d 355
Citing:
O'Hara, supra
Medinger, supra

Cox v. New Sewickley Township, 4 Pa. Commw. 28, 284 A.2d 829
Citing:
Bilbar, supra
Best, supra
Vermont Salvage v. St. Johnsbury, 34 A.2d 188 (Vt. 1943)
Murphy v. Westport, 40 A.2d 177 (Conn. 1944)
Town of Vestal v. Bennett, 104 N.Y.S.2d 830 (1950)
City of Akron v. Klein, 168 N.E.2d 564 (Ohio 1960)
City of Defiance v. Killion, 186 N.E.2d 634 (Ohio 1962)
People v. Sevel, 261 P.2d 359 (Cal. 1953)
City of Shreveport v. Brock, 89 So. 2d 156 (La. 1956)

1972

**Campbell v. Ughes**, 7 Pa. Commw. 98, 298 A.2d 690
Citing:
- Dunlap, supra
- Appeal of Volpe, 384 Pa. 374, 121 A.2d 97 (1956)
- Bilbar, supra

1973

**Fayette County v. Holman**, 11 Pa. Commw. 357, 315 A.2d 335
Citing:
- Swade, supra
- Bilbar, supra
- Best, supra
- Anstine, supra
- Cleaver, supra

1974

Citing:
- O’Hara, supra
- Medinger, supra

1978

Citing:
- Anstine, supra
- Fayette County, supra

1979

Citing:
- Fayette County, supra
- Soble, supra

1980

Citing:
- Best, supra
- Anstine, supra
- Mont-bux, supra

1982

**Redevelopment Authority v. Woodring**, 498 Pa. 180, 445 A.2d 724
Citing:
- Medinger, supra
Citing:
Rogalski, supra
Fayette County, supra
Mont-bux, supra
Berk, supra

Citing:
Medinger, supra

RHODE ISLAND

ABSTRACT
The state of Rhode Island has seen almost no litigation on the issue of whether aesthetics alone will sustain an exercise of the police power. Only one case squarely addresses the question. Given the age of the decision, perhaps Rhode Island is ripe for a change to the modern trend which allows aesthetic-based ordinances; however, there is no case law which intimates that such a change is imminent or likely.

EARLY DECISIONS ON AESTHETIC CONCERNS

City of Providence v. Stephens, 47 R.I. 387, 133 A. 614 (1926) upheld the state statute which permitted the classification of use districts and the separation of uses through municipal zoning ordinances. The Supreme Court of Rhode Island expressly stated, however, that "purely aesthetic considerations do not supply sufficient basis for the exercise of the police power." Id. 133 A. 614, 617. There appear to be no other decisions from the state courts which explicitly deal with the aesthetics issue. This fact renders a particularly slim likelihood of success in Rhode Island with an aesthetics-based ordinance.

CASE LISTINGS AND REFERENCES

1926 City of Providence v. Stephens, 47 R.I. 387, 133 A. 614
Citing:
no authority
SOUTH CAROLINA

ABSTRACT

There are no cases from South Carolina which address the propriety of basing an exercise of the police power on aesthetic considerations. The only indication of the state's position on the matter is from the State Attorney General's office. Op. No. 84-67 (June 12, 1984). The opinion stated that a prior attorney general's opinion that a landscaping ordinance would be unconstitutional represented "the minority viewpoint and that a municipality would now most probably have the authority to draft an ordinance based on aesthetic considerations." Id.

SOUTH DAKOTA

There is no case law on the aesthetics issue from South Dakota. See Appendix B: Other Zoning-Related Cases.

TENNESSEE

ABSTRACT

Though initially not permitting aesthetics alone to serve as a basis for zoning ordinances, the state of Tennessee presently follows the modern trend which permits an exercise of the police power for aesthetic-based purposes. No case directly addresses the relationship between historic preservation and aesthetics, but the opinions together suggest that an ordinance merging the two elements would survive legal challenge.

EARLY DECISIONS ON AESTHETIC CONCERNS

The first case to establish Tennessee's position on the aesthetics question was State v. Newton, 3 Tenn. Civ. App. 93 (1912). The appellate court determined that the city exceeded the authority granted to it by charter in denying a building permit to the relator. The denial appeared to be based on the character of the proposed new building; this the court found unacceptable. After discussing authority from other jurisdictions, the opinion concluded: "It is too well settled to require further citation of authorities, that mere aesthetic considerations form no ground upon which to pass an ordinance." Id. at 107. Notably, the appeals court did not preclude the consideration of aesthetics entirely.

AUXILIARY CONSIDERATION OF AESTHETICS

The next case to deal with the issue, City of Norris v. Bradford, 204 Tenn. 319, 321 S.W.2d 543 (1958), held that an ordinance which prohibited fences in front yards in residential areas was invalid. The Supreme Court of Tennessee did not believe that the enactment demonstrably advanced health, safety, morals or general welfare—the traditional police power justifications. Though noting other jurisdictions' authority which allowed auxiliary consideration of aesthetics, the Norris opinion did not express definite parameters for the use of aesthetics in zoning decisions. The only prohibition was against aesthetic bases alone. Norris was cited in Hagaman v.
Slaughter, 354 S.W.2d 818 (Tenn. Ct. App. 1962) to sustain the same principle, but there the intermediate court upheld a junkyard ordinance as advancing the public health and welfare.

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

In 1981, however, the supreme court changed position on the issue. In State v. Smith, 618 S.W.2d 474 (Tenn. 1981), the court held that an ordinance which regulated the operation of automobile junkyards, even if based on aesthetics alone, was valid. Acknowledging the modern trend, the court said:

in recent years most courts which have considered junkyard regulations similar to those involved here have had no difficulty in sustaining them as a proper exercise of the police power...even if scenic or aesthetic considerations have been found to be the only basis for their enactment...Although some authorities to the contrary may be found, we find these [cited] cases to be better reasoned and more in accord with modern concerns for environmental protection, control of pollution and prevention of unsightliness.

Id. at 477 (citations omitted). The court pointedly noted that the rule in Norris represented the outdated position on the aesthetics issue and then continued, holding "that in modern society aesthetic considerations may well constitute a legitimate basis for the exercise of police power, depending upon the facts and circumstances." Id. (emphasis added).83 Though there appear to be no cases from Tennessee on the issue of historic preservation, the "facts and circumstances" of such a case arguably justify the satisfaction of aesthetic purposes with legislation, given the language of Smith.

CASE LISTINGS AND REFERENCES

1912 State v. Newton, 3 Tenn. Civ. App. 93
Citing:
Haller Sign Works v. Physical Culture School, 94 N.E. 920 (Ill. 1911)
St. Louis v. Hill, 22 S.W. 861 (Mo. 1893)

1958 City of Norris v. Bradford, 204 Tenn. 319, 321 S.W.2d 543
Citing:
Newton, supra
Spann v. Dallas, 235 S.W. 513 (Tex. 1921)
Appeal of White, 134 A. 409 (Pa. 1926)
State Bank & Trust v. Vill. of Wilmette, 193 N.E. 131, (Ill. 1934)
Spencer-Sturla Co. v. City of Memphis, 290 S.W. 608 (Tenn. 1927)

1962 Hagaman v. Slaughter, 354 S.W.2d 818
Citing:
Norris, supra
Crabtree v. City Auto Salvage Co., 340 S.W.2d 940 (Tenn. 1960)

The ordinance in Smith also met other non-aesthetic factors which the court perceived as further justification for sustaining the ordinance.
**ABSTRACT**

The Texas case law is somewhat sparse and inconclusive on the issue of whether aesthetics may serve as the basis for zoning ordinances. While the state is generally amenable to historic preservation, no case directly addresses the question of whether purely aesthetic-based enactments are valid, nor the question of aesthetics and historic preservation together.

**EARLY DECISIONS ON AESTHETIC CONCERNS**

The first case to cover the aesthetics issue was *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513 (1921). Here the Supreme Court of Texas struck down an ordinance which purported to exclude businesses from residential districts.84 The justices could find no connection of the ordinance with the traditional police power goals:

> An aesthetic sense might condemn a store building within a residence district as an alien thing and out of place, or as marring its architectural symmetry. But it is not the law of this land that a man may be deprived of the lawful use of his property because his tastes are not in accord with those of his neighbors. The law is that he may use it as he chooses, regardless of their tastes, if in his use he does not harm them.

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84 Arguably this case has been overruled by subsequent decisions from the Texas courts that uphold zoning plans generally; these decisions, in light of the subsequent cases reviewed herein, may not affect the position of the court on the aesthetics question.

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Id. 235 S.W. 513, 516. The court continued, however, to prohibit expressly only pure aesthetic motivations for ordinances. No ruling was made in Spann on the auxiliary consideration of aesthetics.

AUXILIARY CONSIDERATION OF AESTHETICS

Almost twenty years later, the intermediate level Court of Civil Appeals of Texas concluded that indeed municipalities must consider aesthetics in passing zoning measures. Connor v. City of University Park, 142 S.W.2d 706 (Tex. Civ. App. 1940). The opinion first points out that the concept of the police power is an expansive one: "we see that the police power is not static by any means, but may be applied to any new situation, as the necessity demands." Id. at 711. With this language the court proceeded to hold that an ordinance forbidding dentists' offices in residential areas was a valid exercise of the police power, given all the considerations.

Connor analyzed the aesthetics question with fair thoroughness, noting that the "general welfare is served by the promotion of prosperity and the conservation of values." Id. at 712. The state statute which authorized local zoning measures made it the duty of such [municipal government] bodies to so regulate as to conserve property values, encourage the most appropriate use of property throughout the municipality; necessarily forbidding any regulation that would affect adversely the value of property, or encourage inharmonious or inappropriate use thereof." Id. (emphasis added). To this extent, "the aesthetic consideration is not to be ignored. Harmonious appearance, appropriateness, good taste and beauty displayed in a neighborhood not only tend to conserve the value of property, but foster contentment and happiness among homeowners." Id. While firmly permitting consideration of aesthetics in the zoning process, the appellate court's decision did not define specific parameters for this element. The implications of Connor are that the court would uphold an ordinance based solely on aesthetics insofar as aesthetics promote the general welfare by maintaining property values.

OTHER DEVELOPMENTS

The appellate court bypassed the opportunity to adopt the modern pro-aesthetic position in the City of Houston v. Johnny Frank's Auto Parts Co., 480 S.W.2d 774 (Tex. Civ. App. 1972) decision. Here the court upheld an ordinance, which required solid fences around automobile junkyards, as within the city's police power because the express purpose of the ordinance was to preserve property values. The secondary aesthetic results achieved by the ordinance, to the court, were inconsequential. The court found that the purposes stated by the ordinance, which were not aesthetically-oriented, necessarily meant that the ordinance was based on considerations other than aesthetics. The explicit message of the Johnny Frank opinion is that auxiliary consideration of aesthetics is appropriate; implicitly then, if another purpose, such as historic preservation, is served by an enactment, consideration of aesthetics is permissible.86

CASE LISTINGS AND REFERENCES

1921 Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513
Citing:
Bostock v. Sams, 52 A. 665 (Md. 1902)
Haller Sign Works v. Physical Culture School, 94 N.E. 920 (Ill. 1911)

86 See, City of Dallas v. Crownrich, 506 S.W.2d 654 (Tex. Civ. App. 1974) which upheld a building permit freeze until the process and passage of an historic preservation ordinance was completed.
ABSTRACT

The state of Utah follows the modern trend and permits the use of aesthetics as a justification for the exercise of police power. Though no case appears to rule on the combination of historic preservation and aesthetics, a fair presumption is that the state courts would sustain such an ordinance.

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

The only case which squarely addresses the aesthetics issue is Buhler v. Stone, 553 P.2d 292 (Utah 1975). The Supreme Court of Utah held that the ordinance, which required the removal of "unsightly" objects upon notice, was not unconstitutionally vague. In fact, the court reasoned, the county could regulate unsightly surroundings in the promotion of general welfare:

*It is true that the police power is generally stated to encompass regulation of matters pertaining to the health, safety or welfare. But those are generic terms.*
promotion of general welfare does not rigidly limit governmental authority to a policy that would "scorn the rose and leave the cabbage triumphant." Surely among the factors which may be considered in the general welfare, is the taking of reasonable measures to minimize discordant, unsightly and offensive surroundings; and to preserve the beauty as well as the usefulness of the environment.

Id. at 294 (emphasis added). This language fully adopts the modern pro-aesthetic position as the view Utah courts take towards zoning ordinances. The likelihood of sustaining historic preservation ordinances on the same grounds is substantial.

CASE LISTINGS AND REFERENCES

1975  
**Buhler v. Stone**, 533 P.2d 292
Citing:
- *Oregon City v. Hartke*, 400 P.2d 255 (Or. 1965)

VERMONT

ABSTRACT

The case law of Vermont which addresses the question of whether aesthetics alone will justify the exercise of police power is sparse. The most ready conclusion to be drawn is that aesthetics may be given auxiliary consideration. The courts do not appear to have ruled on the validity of historic preservation nor the propriety of using aesthetics to meet such a goal.

EARLY DECISIONS ON AESTHETIC CONCERNS

A very early, and very short, opinion from the Supreme Court of Vermont held that land conditions offending aesthetics would not constitute a nuisance. *Woodstock Burial Ground Association v. Hager*, 68 Vt. 488, 35 A. 431 (1896). The high court ruled that an "unsightly and disfigured" condition of neighboring ground was not synonymous with nor equivalent to a finding that the lot became and was a nuisance. The law will not declare a thing a nuisance because it is unsightly and disfigured, nor because it is not in a proper and suitable condition, nor because it is unpleasant to the eye, and a violation of the rules of propriety and good taste, nor because the property of another is rendered less valuable. No fanciful notions are recognized.

Id. 35 A. 431, 432. The language of the opinion apparently precluded all consideration of aesthetics.

AUXILIARY CONSIDERATION OF AESTHETICS

Near the middle of this century, however, the high court began to recognize the modern trend towards accepting aesthetics as a basis for police power actions. In *Vermont Salvage Corp. v. Village of St. Johnsbury*, 113 Vt. 341, 34 A.2d 188 (1943), the court expressly permitted
auxiliary consideration of aesthetics. Citing the court’s previous position in *Woodstock*, and *Vermont Salvage* noted that

> even though aesthetic considerations alone may not warrant police regulation, they may be taken into account where other elements are present to justify regulations, and that the fact that such considerations enter into the reasons for the passage of an ordinance will not invalidate it where other elements within the scope of the police power are present.

*Id.* 34 A.2d 188, 195. Nevertheless, the court struck down the section of the ordinance in issue which restricted the location of junkyards near roadways as overly broad and unreasonable.

The *Vermont Salvage* opinion represents the clearest articulation of the court’s position on the aesthetics issue. One other case suggests that the court would respond favorably to a challenged ordinance grounded in aesthetics. *Galanes v. Town of Brattleboro*, 136 Vt. 235, 388 A.2d 406 (1978) upheld a zoning ordinance which reclassified a small parcel of land in a residential zone from commercial to residential. The court found a legitimate purpose in preserving the "character" of the neighborhood; it did not violate the landowner’s constitutional rights: "[[l]t is a valid public purpose under the police power to secure reasonable neighborhood uniformity and to exclude structures and occupations which clash therewith." *Id.* 388 A.2d 406, 410. The *Galanes* language does not expressly regard aesthetic matters, but the implicit message is favorable to the issue. Perhaps the court is prepared to accept historic preservation enactments which promote "neighborhood uniformity," alias aesthetics.

**CASE LISTINGS AND REFERENCES**

1896  
Citing:  
no authority

1943  
*Vermont Salvage Corp. v. Village of St. Johnsbury*, 113 Vt. 341, 34 A.2d 188  
Citing:  
*Woodstock*, supra  
*Mansback Scrap Iron Co. v. Ashland*, 30 S.W.2d 968 (Ky. 1930)  
*State v. Speyer*, 32 A. 476 (Vt. 1895)

1978  
Citing:  
*City of Rutland v. Keiffer*, 205 A.2d 400 (Vt. 1964)  

**ABSTRACT**

Virginia permits auxiliary consideration of aesthetics in the exercise of the police power. Only one case addresses the aesthetics issue as it intersects with historic preservation. Generally, if
the ordinance—whatever its type—meets one of the traditional police power functions, the use of aesthetics will not affect the validity of the ordinance.

**AUXILIARY CONSIDERATION OF AESTHETICS**

The earliest case to rule on the aesthetics question was *West Brothers Brick Co. v. City of Alexandria*, 169 Va. 282, 192 S.E. 881, (1937). There the Supreme Court of Appeals of Virginia (highest court) flatly stated that "[a]esthetic considerations alone are not enough [to justify an enactment] but they should be considered." *Id.* 192 S.E. 881, 885. The West Brothers decision essentially validated general zoning plans with its holding, but did little to assert a definitive position on the role aesthetics could play in police power actions.

The *Kenvon Peck, Inc. v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969) case clearly established that aesthetics could be given auxiliary consideration. In upholding an ordinance which prohibited moving signs, the court noted that

> aesthetic considerations are not wholly without weight and need not be disregarded in adopting legislation to promote the general welfare....Although aesthetic considerations alone may not justify police regulations, the fact that they enter into the reasons for the passage of an act or ordinance will not invalidate it if other elements within the scope of police power are present.

*Id.* 168 S.E.2d 117, 120 (citations omitted). This articulation of Virginia's position aligned the state with the intermediate view towards the role of aesthetics.

**AESTHETICS AND HISTORIC PRESERVATION**

Finally, the *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) merged the aesthetics issue into an historic preservation context. The case concluded that the state's historic preservation enabling statute granted limited power to local boards of supervision which included the ability to create historic landmarks and districts, but not to preserve the commercial value of an area as a tourist attraction. On the aesthetics issue, the court determined that auxiliary consideration of aesthetics would not invalidate an ordinance, but the ordinance would remain valid only if it met an element within "the scope of police power." Though acknowledging that the protection of property values was within the police power, the particular entity involved in the case did not possess the authority to pursue this goal. The *Board of Supervisors* case, at least, did not thwart the historic preservation purposes, but merely confined the enforcing board to its express powers.

**CASE LISTINGS AND REFERENCES**

1937

*West Brothers Brick Co. v. City of Alexandria*, 169 Va. 282, 192 S.E. 881

Citing:

*State ex rel. Carter v. Harper*, 196 N.W. 451 (Wis. 1923)

1969

*Kenvon Peck, Inc. v. Kennedy*, 210 Va. 60, 168 S.E.2d 117

Citing:

*West Bros., supra*

+Sundeen v. Rogers*, 141 A. 142 (N.H. 1928)

+Welch v. Swasey*, 214 U.S. 91 (1928)

+Wulfsbohm v. Burden*, 150 N.E. 120 (N.Y. 1925)
ABSTRACT

Washington has ruled somewhat inconsistently on the issue of using aesthetics as a basis for the exercise of police power. The case law, at the least, permits the auxiliary consideration of aesthetic concerns. To this extent, the Washington courts approve of the use of aesthetics in historic preservation ordinances. The development of the law in the general zoning context, however, suggests that the judiciary might recognize the use of aesthetics alone, though no opinion directly adopts this position.

AUXILIARY CONSIDERATION OF AESTHETICS

The first ruling from the Supreme Court of Washington on the aesthetics issue appears in Lenci v. City of Seattle, 63 Wash. 2d 664, 388 P.2d 926 (1964). Determining that aesthetics alone would not sustain a zoning ordinance, the high court still upheld an ordinance requiring a screening fence around automobile junkyards as a reasonable and warranted exercise of police power. The court noted additionally that "if a regulation finds reasonable justification in serving a generally recognized ground for the exercise of the municipal police power, the fact that aesthetic considerations play a part in its adoption does not affect its validity." Id. 388 P.2d 926, 934. The determination that the ordinance in question served traditional police power purposes was reserved particularly to the municipal authorities as they, not the courts, possessed the power to address the problem alleged (here, traffic safety). Lenci thus established the auxiliary use of aesthetics as a permissible part of the police power.

Following the Lenci decision, the supreme court sustained a state statute which regulated outdoor advertising signs as a legitimate exercise of police power in Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968), appeal dismissed, 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed. 2d 512 (U.S. 1969). The decision achieved peculiarly aesthetic ends but justified the law with the breadth of the state's police power. The justices noted that the promotion of "'convenience and enjoyment of public travel,'" attracted of visitors to the state and the conservation of "'the natural beauty of areas' adjacent to our highways...are properly included within the scope of the 'public welfare.'" Id. 439 P.2d 248, 259. The aesthetic goals were underscored by judicial notice of the state's scenic beauty; "one of the common purposes of travel along our highways," said the opinion, "is to enjoy that beauty." Id. at 260. Though permitting auxiliary consideration of aesthetics as Lenci had, the Markham decision did not offer resolution on the question of aesthetic purposes alone.
AESTHETICS AND HISTORIC PRESERVATION

A tenuous position on the aesthetics-alone question was reflected in subsequent decisions from both the supreme and appellate courts. For example, in City of Seattle v. Louis Investment Co., 16 Wash. App. 158, 554 P.2d 379 (Ct. App. 1976), the Court of Appeals of Washington distanced the issues of the case from the aesthetics question. The appellate court determined that a city's condemnation, and subsequent sale, of an old hotel in an historic district was proper where the original owner refused to develop low-income housing in the building. The urban renewal plans incorporated many concerns which could justify the exercise of police power in this situation:

Urban renewal or redevelopment is generally defined as a plan for the renewal or redevelopment, for all types of uses, of areas suffering from blight or decay, through a program of cooperation between government and private enterprise. There has also been an increasing recognition by the courts of the public interest in the preservation of historical buildings, places and districts. Judicial approval has been extended to the creation of such historic districts as the Vieux Carre Section of New Orleans and the old island whaling village of Nantucket. In the Vieux Carre and Nantucket cases, as in the present case, aesthetic considerations were not the sole reason for the legislation in question, however.

Id. 554 P.2d 379, 383 (citations omitted)(emphasis added). With little additional analysis or discussion by the court, the Seattle opinion is puzzling. The court, at the least, sanctioned the auxiliary use of aesthetics in an historic preservation context. The emphasized language, however, could be construed to opposite conclusions on the status of the aesthetics-alone issue.

OTHER DEVELOPMENTS

Other cases from the supreme court did not articulate points of any greater clarity than Seattle. However, on an occasion of greater receptivity towards the use of aesthetic justifications in State Department of Ecology v. Pacesetter Construction Co., 89 Wash. 2d 203, 571 P.2d 196, 8 Envtl. L. Rep. (Envtl. L. Inst.) 20,119 (1977), the supreme court affirmed a lower court ruling that neighboring property owners were entitled to damages for the loss of view caused by new buildings and issued a permanent injunction that ordered the buildings' removal. The decision markedly pointed out the modern trend in aesthetics:

Much decisional law upholds a government regulation protective of aesthetic values whether or not accompanied or combined with the protection of economic values. Many cases hold protection of aesthetic values alone justify [sic] the exercise of police power without payment of compensation. Moreover, the legislature has given expression to this state's public policy of supporting protection of aesthetic values by the enactment of Shoreline Management Act and similar statutes.

Id. 571 P.2d 196, 200 (citations omitted)(emphasis added). But the court did not find it necessary to resolve the aesthetics-alone question in this case. The loss of view suffered by the neighbors--essentially an aesthetic harm with economic repercussions--justified an award of damages to those harmed.86

86 See also, Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 578 P.2d 1309, 11 E.R.C. 1689, 8 Envtl. L. Rep. (Envtl. L. Inst.) (1978) which noted that the court had not expressly precluded the use of aesthetics alone. The court found other harms (including aesthetic ones) that justified a denial of a building permit under a state statute.
In the late 1970s, the Washington courts stalled what appeared to be a progression towards the modern approach to the use of aesthetics in legislation. For example, in Duckworth v. City of Bonney Lake, 91 Wash. 2d 19, 586 P.2d 860 (1978), the supreme court construed its prior uncertainty on the issue as a preclusion to the use of aesthetics alone in zoning ordinances. However, the case ruled that where a city made provision for mobile home developments, it could then exclude mobile homes from single-family districts without violating the constitution. Other considerations were said to justify the regulations, though the result of Duckworth smacks of aesthetic-based concerns. Similarly, in Hunt v. Anderson, 30 Wash. App. 437, 635 P.2d 156 (Ct. App. 1981) the court of appeals required a mobile home owner to move his structure so as not to interfere with his neighbor’s view. The motivations of the decision were largely aesthetic-based, but the court, again, refused to rule on the aesthetics only question by finding other considerations that sustained the order. The fits and starts of the Washington courts on the aesthetics issue leave the role of aesthetics in an uncertain posture. The decisions reflect an ambivalence by the courts that is still unresolved. At least it is clear that an auxiliary use of aesthetics is acceptable when exercising the police power.

CASE LISTINGS AND REFERENCES

1964

Lenci v. City of Seattle, 63 Wash. 2d 664, 388 P.2d 926
Citing:
- New Orleans v. Southern Auto Wreckers, 192 So. 2d 523 (La. 1959)
- Shreveport v. Brock, 89 So. 2d 156 (La. 1956)
- Town of Vestal v. Bennett, 104 N.Y.S.2d 830 (N.Y. 1950)
- Vermont Salvage Corp. v. Vill. of St. Johnsbury, 34 A.2d 188 (Vt. 1943)
- State v. Kievman, 165 A. 601 (Conn. 1933)
- Defiance v. Killion, 186 N.E.2d 634 (Ohio 1962)
- People v. Dickenson, 343 P.2d 809 (Cal. 1959)
- Highway 100 Auto Wreckers v. City of W. Allis, 96 N.W.2d 85 (Wis. 1959)

1968

Markham Adv. Co. v. State, 73 Wash. 2d 405, 439 P.2d 248
Citing:
- Lenci, supra
- Opinion of the Justices, 169 A.2d 762 (N.H. 1961)
- Ghaster Properties, Inc. v. Preston, 200 N.E.2d 328 (Ohio 1964)
- N.Y.S. Thruway Authority v. Ashley Motor Court, 176 N.E.2d 566 (N.Y. 1961)

1976

City of Seattle v. Loutsis Investment Co., 16 Wash. App. 158, 554 P.2d 379
Citing:
- Opinion of the Justices, 128 N.E.2d 557 (Mass. 1955)
- New Orleans v. Levy, 64 So. 2d 798 (La. 1953)
- Berman, supra
1977  
**State Dept. of Ecology v. Pacesetter Construction Co.,** 89 Wash. 2d 203, 571 P.2d 196

Citing:
- **Berman**, supra
- **Stone v. Maitland**, 446 F.2d 83 (5th Cir. 1971)
- **People v. Stover**, 191 N.E.2d 272 (N.Y. 1963)
- **Oregon City v. Hartke**, 400 P.2d 255 (Or. 1965)
- **Markham**, supra
- **Lenci**, supra
- **State ex rel. Saveland Park Holding Corp. v. Wieland**, 69 N.W.2d 217 (Wis. 1955)

1978  
**Polygon Corp. v. City of Seattle,** 90 Wash. 2d 59, 578 P.2d 1309

Citing:
- **Pacesetter**, supra

**Duckworth v. City of Bonney Lake,** 91 Wash. 2d 19, 586 P.2d 860

Citing:
- **Lionshead Lake, Inc. v. Wayne Tp.,** 89 A.2d 693 (1952)
- **Polygon**, supra
- **Pacesetter**, supra

1981  
**Hunt v. Anderson,** 30 Wash. App. 437, 635 P.2d 156

Citing:
- **Pacesetter**, supra
- **Polygon**, supra
- **Portage Bay-Roanoke Park Community Council v. Shorelines Hearings Board,** 92 Wash. 2d 1, 593 P.2d 151 (Wash. 1979)

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**WEST VIRGINIA**

**ABSTRACT**

The case law from the Supreme Court of Appeals of West Virginia has not clearly established a position on the issue of whether aesthetics alone may justify an exercise of the police power. At the least, aesthetics may receive auxiliary consideration. None of the cases address the use of aesthetics in historic preservation efforts, but the language of some decisions hints at the favorable treatment such a case might receive.

**AUXILIARY CONSIDERATION OF AESTHETICS**

An early case, **Fruth v. Board of Affairs of City of Charleston,** 75 W. Va. 456, 84 S.E. 105 (1915), held that while aesthetics alone could not sustain an exercise of the police power, such
considerations might be made in an exercise of the power of eminent domain. If traditional purposes apply to the police power action, however, then aesthetics may be considered. The Fruth case struck down an ordinance establishing setback lines for buildings. To the extent that this case contravenes modern thought on a municipality’s ability to impose such restrictions, Fruth’s usefulness is limited. However, the basic proposition it advanced—that an auxiliary consideration of aesthetics is acceptable—has never been abandoned by the West Virginia courts.

In 1937, the decision in Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 191 S.E.2d 368 (1937) introduced a permissive perspective on the role aesthetics might play in common law nuisance cases. The court began with an acknowledgement that previous decisions had not permitted aesthetically displeasing factors to constitute a nuisance because the standards by which such was determined were uncertain and relative. But, the court noted, with an expanded view of the police power, a different trend was gaining momentum:

There is a growing belief that which is offensive to the view, an eye-sore, a landscape-blight, may attain such significance as to warrant equitable interposition....Happy, the day has arrived when persons may entertain appreciation of the aesthetic and be heard in equity in vindication of their love of the beautiful, without becoming objects of opprobrium. Basically, this is because a thing visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes, and may produce a decided reduction in property values. Courts must not be indifferent to the truth that within essential limitations aesthetics has a proper place in the community affairs of modern society.

Id. 191 S.E.2d 368, 370-71 (emphasis added). Continuing in its analysis, the court determined that unsightly nuisances could not be banned solely on account of their appearances, but rather should be properly placed within the municipality to prevent undue disturbances to their neighbors. In this light, the court struck down the requirements placed on an automobile wrecking business since the site was not located in a predominantly residential area.

Though the language of Parkersburg seems expansive of the role that aesthetics may play in zoning decisions, a subsequent case did not interpret it this way. Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960) maintained that aesthetic considerations alone would not substantiate an exercise of the police power. Observing the divergent opinions in other jurisdictions on the issue, the Supreme Court of Appeals stated:

We commence a consideration of this proposition [that aesthetics alone is improper] by a frank acknowledgement that it presents a difficult question. It would serve no useful purpose to engage in an extended discussion of the place of aesthetic [sic] considerations in the enactment of legislation under the police power. It can not be gainsaid that at this time the great weight of authority is to the effect that aesthetic [sic] considerations alone will not justify the exercise of legislative authority under the police power. But on the other hand, it is perhaps just as well established that

87 The court declined to decide if an eminent domain action without compensation would be void if based on aesthetics.

88 The court plainly took on a duty to accept the expansion of the police power when necessary: "The modern tendency to yield to such expansion is clearly illustrated in recent holdings of our highest court giving enlarged meaning to certain provisions of our organic law deemed to be necessary to meet changing conditions in our national life. Therefore, we need not shirk our responsibility in matters of this character when necessity for action is made clear on impelling grounds of public good, even though the result be attained through liberalization of hitherto accepted restrictions respecting the safety, peace, morals and general welfare of the people." Id. 191 S.E.2d 368, 370.
esthetic [sic] considerations may be given due weight in connection with other factors which support legislative exercise of the police power. It is clear also that there is in this day a marked tendency to accord greater importance to aesthetic [sic] considerations. Courts have frequently been at pains to assign other basis for the validity of legislation when obviously the legislation being considered has been predicated predominately on aesthetic [sic] considerations.

Id. at 843-44 (emphasis original). The Farley decision detailed numerous opinions in support of zoning and the use of aesthetics, but ultimately confined the holding to approval of auxiliary uses: "to say the very least, the prior decisions of this Court are authority for the proposition that unsightliness may be considered with other proper factors in upholding a legislative enactment based on an exercise of the police power." Id. In fact, the court may have intended to permit reliance on aesthetic grounds,99 but the express language of the Farley opinion stops short of such a declaration.

CASE LISTINGS AND REFERENCES

1915 Fruth v. Board of Affairs, 75 W. Va. 456, 84 S.E. 105
Citing:
Eubank v. City of Richmond, 226 U.S. 137 (1912)
Welch v. Swasey, 79 N.E. 745 (Mass. 1907)
State ex rel. Berger v. Hurley, 48 A. 215 (Conn. 1901)
People ex rel. Kemp v. D'Oench, 18 N.E. 862 (N.Y. 1888)
Wineburgh Adv. Co. v. Murphy, 88 N.E. 17 (N.Y. 1909)
City of Rochester v. West, 58 N.E. 673 (N.Y. 1900)
Varney & Green v. Williams, 100 P. 867 (Cal. 1909)

1937 Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 191 S.E.2d 368
Citing:
Euclid v. Ambler Realty, 272 U.S. 365 (1926)
Yeager v. Traylor, 160 A. 108 (Pa. 1932)
State ex rel. Carter v. Harper, 196 N.W. 451 (Wis. 1923)
Block v. McCown, 123 So. 213 (Ala. 1929)

Citing:
West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881 (Va. 1937)
State v. Kievman, 165 A. 601 (Conn. 1933)
State ex rel. Civello, v. City of New Orleans, 97 So. 440 (La. 1923)
General Outdoor Adv. Co. v. City of Indianapolis, 172 N.E. 309 (Ind. 1930)
Fruth, supra
Snyder v. Cabell, 1 S.E. 241 (W. Va. 1886)
Ritz v. Woman's Club of Charleston, 173 S.E. 564 (W. Va. 1934)

99 The opinion contains language implying that other justifications would be equally valid: "It is obvious that [the prior decisions] are adequate to support the validity of a legislative enactment based on an exercise of the police power if it appears that such enactment may reasonably be predicated on considerations to noise, unsightliness, a thing visually offensive, a tendency to depress neighborhood property values, and an interference with the use, comfort and enjoyment of surrounding residential properties." Id. at 848. Perhaps historic preservation goals would also be included today.
ABSTRACT

Wisconsin recognizes the validity of police power actions which are based on aesthetics. Though the state has maintained such a view on the role aesthetics may play in zoning decisions for many years, there appear to be no opinions that particularly address the topic with regard to historic preservation. Such a case, given the nature of the law at present, would likely result in the acceptance of aesthetic motivations for historic preservation regulations.

EARLY DECISIONS ON AESTHETIC CONCERNS

The first case to address the aesthetics issue was Jefferson County v. Timmel, 261 Wis. 39, 51 N.W.2d 518 (1952). The Supreme Court of Wisconsin sustained a county zoning ordinance which created a conservancy district along particular highways. This the court determined was a proper exercise of the police power given the traffic safety concerns which motivated the enactment to some degree. Though the trial court found the aesthetic concerns to be valid as well, the high court held "it unnecessary in upholding the validity of the ordinance to resort to aesthetic [sic] considerations because the promotion of safety on Highway 30 is sufficient to support the exercise of the police power." Id. 51 N.W.2d 518, 129.

THE TREND TOWARDS THE MODERN VIEW

Only a few years later, the court moved closer towards establishing a position on the issue in State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 84, 76 S.Ct. 81, 100 L.Ed. 750 (U.S. 1955). The court justified the ordinance—which required a finding by an architectural review board that the proposed construction would not be at variance with surrounding buildings—as a legitimate exercise of the police power because it served to protect property values. The logic behind the opinion's language is compelling on the preservation of property values issue and seems analogous to the reasoning which could have been employed on behalf of the aesthetics issue:

We have no difficulty in arriving at the conclusion that the protection of property values is an objective which falls within the police power to promote the "general welfare," and that it is immaterial whether the zoning ordinance is grounded solely upon such objective or that such purpose is but one of several legitimate objectives. 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. Just because...property values in a limited area only of the village are
at stake does not mean that such threatened depreciation of property values does not affect the general welfare of the village as a whole. If relator is permitted to erect a dwelling house on its land of such nature as to substantially depreciate the value of surrounding property, there is danger that this same thing may be repeated elsewhere within the village, thus threatening property values throughout the village.

Id. 69 N.W.2d 217, 222 (emphasis added). The Saveland decision, however, did not fully analyze the aesthetics issue. Instead, the court took notice of the modern trend, but skirted a direct declaration of opinion:

while the general rule is that the zoning power may not be exercised for purely aesthetic considerations, such rule [is] undergoing development. In view of the latest word spoken on the subject by the United States supreme court [sic] in Berman v. Parker, this development of the law has proceeded to the point that renders it extremely doubtful that such prior rule is any longer the law.

Id. (citation omitted). If any resolution of the question is discernable from Saveland, the position adopted by the court permitted auxiliary consideration of aesthetics in police power actions.

ADOPTION OF THE MODERN, PRO-AESTHETIC VIEW

Not until 1968 did the Wisconsin judiciary affirmatively rule on the aesthetics issue. In Racine County v. Plourde, 38 Wis. 2d 403, 157 N.W.2d 591 (1968), the court upheld an ordinance that prohibited automobile junkyards in certain districts and precluded generally the storing and dismantling of used automobiles. With very little analysis or discussion, the Racine opinion validated the use of aesthetics as a justification for zoning enactments: "[W]e are cognizant that aesthetic considerations alone may now be sufficient to justify a prohibited use in a zoning ordinance." Id. 157 N.W.2d 591, 595. Apparently no other cases subsequent to Racine address the aesthetics issue, therefore, whether an historic preservation ordinance may be based on aesthetics alone might be open to question. Given the treatment of the aesthetics question generally, however, such an ordinance is likely to be sustained.

CASE LISTINGS AND REFERENCES

1914 Cream City Bill Posting Co v. City of Milwaukee, 158 Wis. 86, 147 N.W. 25
Citing:
no authority

1952 Jefferson County v. Timmel, 261 Wis. 39, 51 N.W.2d 518
Citing:
no authority

1955 State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217
Citing:
Wulfsohn v. Burden, 150 N.E. 120 (N.Y. 1925)
State ex rel. Wisconsin Lutheran High School Conference v. Sinar, 267 Wis.

One case, Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis. 2d 637, 96 N.W.2d 85 (1959), declined to determine the issue of aesthetics. The court did not rule out the possibility that aesthetics alone might suffice for exercises of the police power; in the Highway case, however, more than just aesthetics was involved, according to the court.
91, 65 N.W.2d 43 (1954)
State ex rel. Beery v. Houghton, 204 N.W. 569 (Minn. 1925)
Rice v. Van Vranken, 229 N.Y.S. 32 (1928)
Lionshead Lake, Inc. v. Wayne Township, 89 A.2d 693 (N.J. 1952)
Fischer v. Bedminster Tp., 93 A.2d 378 (N.J. 1952)
Griggs v. City of Paterson, 39 A.2d 231 (N.J. 1944)
Elizabeth Lake Estates v. Waterford Tp., 26 N.W.2d 788 (Mich. 1947)
Jefferson Co., supra

1959

Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis. 2d 637, 96 N.W.2d 85

Citing:
Saveland, supra

1968

Racine County v. Plourde, 38 Wis. 2d 403, 157 N.W.2d 591

Citing:
Saveland, supra
Kamrowski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1966)

WYOMING

The state of Wyoming has not issued decisions on the aesthetics issue. See Appendix B: Other Zoning-Related Cases.
APPENDIX A
CASES UNDER REVIEW
BY STATE, CHRONOLOGICALLY

ABBREVIATIONS:

HS(M)W: Health, safety, (sometimes morals) and (general) welfare, the traditional goals served by exercises of the police power

LAL: Little aesthetics language appears in the opinion

NAL: No aesthetics language appears in the opinion

ARIZONA


ARKANSAS

Berkau v. City of Little Rock, 174 Ark. 1145, 298 S.W. 514 (1927)

Seiz v. City of Hot Springs, 194 Ark. 544, 108 S.W.2d 897 (1937)

Bachman v. State, 235 Ark. 339, 359 S.W.2d 815 (1962)


[Fisher Buick, Inc. v. City of Fayetteville, 286 Ark. 49, 689 S.W.2d 350 (1985) (restrictive ordinance was reasonable as applied to lessee (as opposed to lessor who owned the property); lessee had no standing to challenge ordinance; no aesthetics language)].


CALIFORNIA

Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909).

Abbey Land & Improvement Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068 (1914).


COLORADO


(South of Second Associates v. Georgetown, 196 Colo. 89, 580 P.2d 807 (1978). (no aesthetics language; upheld the sufficiency of "historical and/or architectural character" language of historic preservation ordinance when considered in context of other factors enumerated in ordinance therefore gave sufficient notice as to the kind of construction permitted)).


CONNECTICUT

Town of Windsor v. Whitney, 95 Conn. 357, 111 A. 354 (1920).


Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944).

Gionfriddo v. Town of Windsor, 137 Conn. 701, 81 A.2d 266 (1951).


DELAWARE


FLORIDA

Anderson v. Shackelford, 74 Fla. 36, 76 So. 343 (1917).

City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941).

Hav-a-Tampa Cigar Co. v. Johnson, 5 So. 2d 433 (Fla. 1942).

Merritt v. Peters, 65 So. 2d 861 (Fla. 1953).

International Co. v. City of Miami Beach, 90 So. 2d 906 (Fla. 1956).

Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960).


Eskind v. City of Vero Beach, 159 So. 2d 209 (Fla. 1963).


Moviematic Industries Corp. v. Board of County Commissioners of Metropolitan Dade County, 349 So. 2d 667 (Fla. Dist. Ct. App. 1977).


(Campbell v. Monroe County, 426 So. 2d 1158 (Fla. Dist. Ct. App. 1983) (held that ordinance was void as applied, though not facially, because it impermissibly required masonry home only, in derogation of the state statute, with no showing of a relation to aesthetics or safety)).


GEORGIA

Howden v. Mayor of Savannah, 172 Ga. 833, 159 S.E. 401 (1931).


(City of Atlanta Board of Zoning Adjustment v. Midtown North, Ltd., 257 Ga. 496 360 S.E.2d 569 (1987). (NAL; upheld zoning ordinance prohibiting commercial traffic within certain distance from residential zone so as to create a transitional zone)).

HAWAII


IDAHO


ILLINOIS


Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920 (1911)


Chicago Park District v. Canfield, 382 Ill. 218, 47 N.E.2d 61 (1943).

Trust Co. of Chicago v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951).


[City of Belleville v. Kessler, 101 Ill. App. 3d 710, 57 Ill. Dec. 67, 428 N.E.2d 617 (App. Ct. 1981). following Champaign, held that restrictive sign ordinance was a proper exercise of authority, which did not violate due process, and was related to public welfare].

[Gust v. Village of Westchester, 110 Ill. App. 3d 425, 66 Ill. Dec. 99, 442 N.E.2d 525 (App. Ct. 1982). (aesthetic factors can have a significant impact on zoning; homeowners met the burden of showing that the rezoning had no substantial relation to HSW and therefore was arbitrary and unreasonable)].

[Krych v. Village of Burr Ridge, 111 Ill. App. 3d 461, 67 Ill. Dec. 190, 444 N.E.2d 229 (1982). (held that ordinance did not violate First Amendment freedom of speech provision because the enactment was reasonable and furthered legitimate government interest; cities can regulate billboards in the interests of health, safety and aesthetics)].


INDIANA

General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930).

[Ailes v. Decatur County Area Planning Commission, 437 N.E.2d 1375 (Ind. Ct. App. 1982) (no aesthetics language; upheld amortization period for preexisting non-conforming uses of property as junkyards in a residential area as not unconstitutional per se and not an unreasonable exercise of police power)].

IOWA


Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956).

Plaza Recreational Center v. Sioux City, 253 Iowa 246, 111 N.W.2d 758 (1961).

[Anderson v. City of Cedar Rapids, 168 N.W.2d 739 (Iowa 1969). (held that evidence established that zoning amendment for shopping center was not unreasonable, discriminatory, arbitrary or capricious or against the zoning plan; amendment was related to traditional objectives; the little aesthetics language is not pertinent to the issue)].

Iowa Department of Transportation v. Nebraska-Iowa Supply Co., 272 N.W.2d 6 (Iowa 1979).

[E & G Enterprises v. City of Mount Vernon, 373 N.W.2d 693 (Iowa Ct. App. 1985) (city’s effort to preserve downtown business area is valid exercise of police power where ordinance allowing some businesses in one area, but not others, was enacted to promote public welfare including maintenance of property values)].

KANSAS

Crawford v. City of Topeka, 51 Kan. 148, 33 P. 476 (1893)

Ware v. City of Wichita, 113 Kan. 153, 214 P. 99 (1923).


KENTUCKY

Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964).

Moore v. Ward, 377 S.W.2d 881 (Ky. 1964).

LOUISIANA

[State ex rel. Giangrosso v. City of New Orleans, 159 La. 1016, 106 So. 549 (1925) (LAL; follows Civello saying that zoning ordinances do not necessarily rely on aesthetics and the court upheld the ordinance which prohibited construction of a business in a largely residential area)].

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

City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941).

City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953).

[City of Shreveport v. Brock, 230 La. 651, 89 So. 2d 156 (1956) (LAL; following Civello, Pergament, and Levy, the court sustained an ordinance requiring fences around automobile junkyards as primarily serving safety concerns with a secondary and permissible purpose of protecting property values and aesthetics)].

[State v. Baudier, 334 So. 2d 197 (La. 1976) (NAL; construction of oversized sign was a violation of size restrictions therefore under the ordinance, the parish had only two years in which to compel adherence to the requirements)].


[Trustees ex rel. Pomeroy v. Town of Westlake, 357 So. 2d 1299 (La. Ct. App. 1978) (LAL; court held that residential classification of property which was surrounded by industrial parcels was based on aesthetic benefit to its neighbors which was therefore a discriminatory classification that rendered the land virtually useless; almost no discussion of the aesthetics issue)].

MAINE

York Harbor Village v. Libby, 126 Me. 537, 140 A. 382 (1928).


Ace Tire Co. v. Municipal Officers of City of Waterville, 302 A.2d 90 (Me. 1973).

Barnard v. Zoning Board of Appeals of Town of Yarmouth, 313 A.2d 741 (Me. 1974).

Gabriel v. Town of Old Orchard Beach, 390 A.2d 1065 (Me. 1978).

Begin v. Town of Sabattus, 409 A.2d 1269 (Me. 1979).


MARYLAND

Garrett v. James, 65 Md. 260, 3 A. 597 (1886).

[Byrne v. Maryland Realty Co., 129 Md. 202, 98 A. 547 (1916) (ordinance prohibiting multi-family housing and requiring a certain distance between structures was unconstitutional as unrelated to the police power goals of HSMW)].

[Feldstein v. Kamnauf, 209 Md. 479, 121 A.2d 716 (1956) (plaintiff could not fully make out the nuisance claim therefore resolution of the aesthetics-only question was unnecessary)].


[Gosman v. Prince George’s County, 41 Md. App. 479, 397 A.2d 630 (Ct. Spec. App. 1979) (LAL; upheld ordinance restricting free-standing signs; the purpose was "not only aesthetics" but served traffic safety as well)].

MASSACHUSETTS


122 Main Street Corp. v. City of Brockton, 323 Mass. 646, 84 N.E.2d 13 (1949).


MICHIGAN

[Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (Ct. App. 1971) (LAL; city failed to demonstrate that a total exclusion of mobile home parks was valid as applied to owner's property)].


MINNESOTA

Oscar P. Gustafson Co. v. City of Minneapolis, 231 Minn. 271, 42 N.W.2d 809 (1950).

Naegele Outdoor Advertising Co. of Minnesota v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968).

Pine County v. State Department of Natural Resources, 280 N.W.2d 625, 13 Env’t Rep. Cas. (BNA) 1883 (Minn. 1979).


[Hubbard Broadcasting, Inc. v. City of Afton, 323 N.W.2d 757 (Minn. 1982) (LAL; held that city acted reasonably in denying a permit for a satellite station on a unique rock and land formation; consideration of aesthetic impact alone would not have justified the denial but is a factor to be considered)].

White Bear Docking and Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174 (Minn. 1982).
MISSISSIPPI

City of Jackson v. Bridges, 243 Miss. 646, 139 So. 2d 660 (1962).


[Robbins v. Mississippi State Highway Commission, 369 So. 2d 765 (Miss. 1979) (court held that the standard for measuring setback of billboards from highway was not more restrictive than the statute allowed)].

MISSOURI

St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 137 S.W.2d 929, error dismissed, 231 U.S. 761 (1911).

City of St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475 (1948).

Deimeke v. State Highway Commission, 444 S.W.2d 480 (Mo. 1969).

State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970).

State ex rel. Wilkerson v. Murray, 471 S.W.2d 460 (Mo. 1971).

Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. Ct. App. 1977).

City of Independence v. Richards, 666 S.W.2d 1 (Mo. Ct. App. 1983).

MONTANA


NEBRASKA


NEVADA


NEW HAMPSHIRE

Sundeen v. Rogers, 141 A. 142 (N.H. 1928).


[Piper v. Meredith, 110 N.H. 291, 266 A.2d 103 (1970) (LAL; upheld a town ordinance limiting the height of buildings as within the police powers granted to the town by state statute to promote the general welfare)].


[Town of Chesterfield v. Brooks, 126 N.H. 64, 489 A.2d 600 (1985) (LAL; the court struck down an ordinance regulating mobile homes because the ordinance was not narrowly tailored to achieve its goals without unreasonably and arbitrarily discriminating against mobile home owners)].

NEW JERSEY


[Place v. Board of Adjustment, 42 N.J. 324, 200 A.2d 601 (1964) court ruled that no grounds for a variance from ordinance were presented by plaintiff for his fallout shelter].


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NEW MEXICO


Holiday Management Co. v. City of Santa Fe, 83 N.M. 95, 488 P.2d 730 (1971).


[Battaalini v. Town of Red River, 100 N.M. 287, 669 P.2d 1082 (1983) little aesthetics language; followed Temple as permitting aesthetic based ordinances].

NEW YORK

Wineburgh Advertising Co. v. Murphy, 195 N.Y. 126, 88 N.E. 17 (1909).


Mid-State Advertising Corp. v. Bond, 274 N.Y. 82, 8 N.E.2d 286 (1937).


Preferred Tires, Inc. v. Village of Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (1940).


[People v. Artrol Corp., 67 Misc. 2d 1087, 325 N.Y.S.2d 800 (Vill. J. Ct. 1971). ordinance limiting size and character of signs, and the accompanying amortization period, were valid exercises of police power on the aesthetic considerations alone].

[People v. Diamond, 71 Misc. 2d 311, 335 N.Y.S.2d 711 (City Ct. 1972). no real aesthetics issue; invalidated ordinance prohibiting "for sale" and "sold" signs, but no other signs, in residential districts].


[Town of Smithtown v. Commack Gas & Washateria, 108 Misc. 2d 887, 438 N.Y.S.2d 930 (Dist. Ct. 1981). court held that the ordinance was not related to the promotion of aesthetics because other businesses were not prohibited from displaying similar signs and thus the application here became a restriction on the content of commercial signs and was therefore unconstitutional and invalid].


[Syracuse Savings Bank v. Town of DeWitt, 56 N.Y.2d 671, 436 N.E.2d 1315, 451 N.Y.S.2d 714 (1982). court modified dismissal to a declaratory judgment of constitutionality; ordinance which practically banned free-standing signs and regulated size and height of others was a permissible constraint on location and manner, not content].


[Town of Carmel v. Suburban Outdoor Advertising, 127 A.D.2d 204, 514 N.Y.S.2d 387 (App. Div. 1987). ordinance prohibiting billboards and signs was unconstitutional only to the extent that it impermissibly regulated non-commercial speech on such facilities].

NORTH CAROLINA

State v. Whitlock, 149 N.C. 542, 63 S.E. 123 (1908).


NORTH DAKOTA


OHIO


[Wondrak v. Kelley, 129 Ohio St. 268, 195 N.E. 65 (1935)].


[Northern Ohio Sign Contractors v. City of Lakewood, 32 Ohio St. 3d 316, 513 N.E.2d 324 (1986) upheld an ordinance requiring removal or modification of preexisting non-conforming signs within a five year period as constitutional].
OKLAHOMA


OREGON


PENNSYLVANIA


Appeal of Kerr, 294 Pa. 246, 144 A. 81 (1928).

Appeal of Lord, 368 Pa. 121, 81 A.2d 533 (1951).


Anstine v. Zoning Board of Adjustment of York Township, 411 Pa. 33, 190 A.2d 712 (1963). (LAL; court found insufficient evidence of negative aesthetic impact and held that failing to recognize mobile homes as "dwellings" was arbitrary therefore invalid; no ruling on aesthetics as a factor in zoning).


Norate Corp. v. Zoning Board of Adjustment of Upper Moreland Township, 417 Pa. 397, 207 A.2d 890 (1965). (approved police power regulation of signs but invalidated the ordinance as too "broad and unreasonable").


[Ros Kingdom, Inc. v. Zoning Hearing Board of Middletown Township, 489 A.2d 972 (Pa. Commw. Ct. 1985). (LAL; landowner failed to establish that sign ordinances were invalid because it sought to promote aesthetics only)].


RHODE ISLAND


SOUTH CAROLINA

TENNESSEE


TEXAS

Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921).


UTAH


VERMONT


[In re Wildlife Wonderland, 113 Vt. 507, 346 A.2d 645 (1975) (LAL; procedural regarding the consideration of aesthetics based ruling as unconstitutional was untimely raised)].


VIRGINIA


Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975).
WASHINGTON


[Portage Bay-Roanoke Park Community Council v. Shoreline Hearings Board, 92 Wash. 2d 1, 593 P.2d 151 (1979) (LAL; court held that board did not err in refusing to vacate a permit for the construction of moorings for houseboats where the state statute did not present a refined master program addressing such considerations)].


[Ackerley v. Seattle, 92 Wash. 2d 905, 602 P.2d 1177, 14 Env’t Rep. Cas. (BNA) 1302 (1979), cert. denied, 449 U.S. 804 (1980). (LAL; regulation of outdoor advertising is proper exercise of police power; the case was indistinguishable from Markham, supra)].


WEST VIRGINIA

Fruth v. Board of Affairs of City of Charlestown, 75 W. Va. 456, 84 S.E. 105 (1915).

[State ex rel. Sale v. Stahman, 81 W. Va. 335, 94 S.E. 497 (1917). (LAL; court reversed city’s decision to prohibit construction of a low building between two taller ones)].


WISCONSIN

Cream City Bill Posting Co. v. City of Milwaukee, 158 Wis. 86, 147 N.W. 25 (1914).

Jefferson County v. Timmel, 261 Wis. 39, 51 N.W.2d 518 (1952).

Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis. 2d 637, 96 N.W.2d 85 (1959).

Racine County v. Plourde, 38 Wis. 2d 403, 157 N.W.2d 591 (1968).

[Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761, 4 Env’t Rep. Cas. (BNA) 1841, 3 Envtl. L. Rptr. (Envtl. L. Inst.) 20,167 (1972). (LAL; ordinance to protect state waters from degradation are valid parts of the police power and comprise part of the public trust duty which requires the state to promote navigation and preserve the waters for recreation and scenic beauty)].
APPENDIX B
OTHER ZONING-RELATED CASES
By State, alphabetically.

ABBREVIATIONS:

HS(M)W: Health, safety, (sometimes morals) and (general) welfare, the traditional goals served by exercises of the police power

LAL: Little aesthetics language appears in the opinion

NAL: No aesthetics language appears in the opinion

ALABAMA

Arnett v. City of Mobile, 449 So. 2d 1222 (Ala. 1984). (NAL; where city required land for future street and lots on it were not sold because of the order, the city must pay compensation to the developer).

Leary v. Adams, 147 So. 393 (Ala. 1933). (NAL; upholding zoning plan and classifications which excluded gas stations from residential areas).

White v. Luquire Funeral Home, 129 So. 88 (Ala. 1930). (NAL; upholding zoning classifications generally).

ALASKA

No cases.

ARIZONA

City of Phoenix v. Superior Court in and for County of Maricopa, 158 Ariz. 214, 762 P.2d 128 (Ct. App. 1988). (NAL; held that city's annexation ordinance did not amount to a taking of private property).

Ranch 57 v. City of Yuma, 152 Ariz. 218, 731 P.2d 113 (Ct. App. 1986). (NAL; held that zoning ordinance establishing "clear zones" adjacent to the airstrip runways was a legitimate exercise of police power).

Wait v. City of Scottsdale, 127 Ariz. 107, 618 P.2d 601 (1980). (NAL; held that zoning ordinance is a legislative function and not subject to judicial encroachment and that the classification was not unconstitutional).
ARKANSAS

Blundell v. City of West Helena, 258 Ark. 123, 522 S.W.2d 661 (1975) (NAL; dealt with nonconforming use and requirements to qualify as such in regard to mobile home parks).

City of Fayetteville v. S & H, Inc., 261 Ark. 148, 547 S.W.2d 94 (1977) (LAL; amortization of signs, per ordinance, which were used in connection with a going business and did not hamper health, safety or morals was unconstitutional as a taking).

Hatfield v. City of Fayetteville, 278 Ark. 544, 647 S.W.2d 450 (1983) (upheld and ordinance requiring alteration of removal of nonconforming signs with a 7 year amortization period; citing Fayetteville/McIlroy as resolving the issues of the case).

Osage Oil & Transportation, Inc. v. City of Fayetteville, 541 S.W.2d 922 (Ark. 1976) (upheld summary removal of sign which violated a city sign ordinance as proper; NAL).

CALIFORNIA

Associated Home Builders of Greater East Bay, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976). (LAL; upheld zoning ordinance establishing moratorium on new residential buildings until city services were at a certain standard).

Burk v. Municipal Court, 229 Cal. App. 2d 696, 40 Cal. Rptr. 425 (Dist. Ct. App. 1964) (LAL; upheld zoning ordinance prohibiting all advertising signs in residential areas including "for rent" and "for sale" signs).


City of Escondido v. Desert Outdoor Advertising, Inc., 8 Cal. 3d 785, 505 P.2d 1012, 106 Cal. Rptr. 172, (1973). (LAL; court upheld city’s ability to regulate placement of signs based on safety and aesthetics (together) but not ban the signs totally; distinguished from Varney).


Desert Outdoor Advertising v. County of San Bernadino, 63 Cal. Rptr. 543 (Ct. App. 1967). (upholding zoning ordinance banning billboards in certain areas since based on the aesthetic and economic impacts they have).

Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, aff'd, 239 U.S. 394, 36 S.Ct. 142, 60 L.Ed. 348 (1913). (NAL; upheld prohibition of businesses in residential zoned areas on safety grounds).


Guinnane v. San Francisco City Planning Commission, 209 Cal. App. 3d 732, 257 Cal. Rptr. 742 (Ct. App. 1989). (board was empowered to use discretionary review and determine that the proposed residential development was unsuitable for the location).

Hart v. City of Beverly Hills, 73 P.2d 1229 (Cal. Dist. Ct. App. 1937) (LAL; struck down an ordinance prohibiting auction sales in residential districts as based on aesthetics only, citing Varney).


Metromedia v. City of Pasadena, 216 Cal. App. 2d 270, 30 Cal. Rptr. 731 (Dist. Ct. App. 1963). (NAL; court upheld classification of roof signs into on- and off-site as being reasonable therefore the ordinance requiring roof signs to be a part of the building was acceptable).

Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (Ct. App. 1976). (NAL; plaintiff failed to claim a cause of action regarding the rezoning alleged to be a public taking to create open spaces).

People v. Dickenson, 343 P.2d 810 (Cal. 1959). (struck down part of zoning ordinance requiring a solid fence around automobile junk yard as based on aesthetics only therefore was not within the police power).


Teachers Management and Investment Corp. v. City of Santa Cruz, 64 Cal. App. 3d 438, 134 Cal. Rptr. 523 (Ct. App. 1976). (upheld constitutionality of an ordinance prohibiting the city from owning, operating, etc. a proposed convention facility).


Twille v. Board of Public Works of City of Los Angeles, 255 P. 296 (Dist. Ct. App. 1927). (LAL; ordinance establishing setback lines sustainable on other than aesthetic grounds).


COLORADO

Board of Commissioners v. Echternacht, 194 Colo. 311, 572 P.2d 143 (1977). (NAL; court held that owner was violating permitted uses of land under the zoning ordinance).

Combined Communication Corp. v. City of Denver, 189 Colo. 462, 542 P.2d 79 (1975). (NAL; the ordinance had the effect of eliminating the entire billboard industry from the city and was beyond the city's police power).


Flynn v. Treadwell, 120 Colo. 117, 207 P.2d 967 (1949). (NAL; upheld residential front yard requirement of zoning ordinance as a valid exercise of the police power).

Mosgrove v. Town of Federal Heights, 190 Colo. 1, 543 P.2d 715 (1975). (NAL; upheld two kinds of fencing requirements around multiple family dwellings as necessary to promote HSW of the community).

Root Outdoor Advertising, Inc. v. City of Fort Collins, 759 P.2d 59 (Colo. 1988). (NAL; court found the ordinance to be preempted by state statute; the amortization period was not "just compensation" therefore the city had to seek removal of signs by eminent domain).


CONNECTICUT


Burns v. Barratt, 212 Conn. 176, 561 A.2d 1378 (1989). (statute prohibiting off-site signs within certain distances from highway interchanges was constitutional).
Corona's Auto Parts v. Zoning Board of Appeals, 158 Conn. 244, 259 A.2d 618 (1969). (NAL; board failed to produce evidence to support denial of auto junk yard on land where zoning ordinance otherwise permitted it).


Levine v. Board of Adjustment, 125 Conn. 478, 7 A.2d 222, (1939). (NAL; upheld junk yard zoning scheme as part of city's police power).

Malafroner v. Planning and Zoning Board of City of Milford, 230 A.2d 606 (Conn. 1967). (NAL; upheld zoning change to residential from commercial based on needs of community; a secondary purpose, once HSW met does not invalidated the ordinance).


State v. Hillman, 110 Conn. 92, 147 A. 294 (1929). (NAL; upheld comprehensive, general zoning ordinance).

State v. Wightman, 78 Conn. 86, 61 A. 56 (1905). (NAL; court upheld sign placement restrictions as within the city's police power (citing no authority)).

West Hartford Methodist Church v. Zoning Board, 121 A.2d 640 (Conn. 1956). (NAL; defined public convenience; found board's denial of permission to build a church was grounded in the facts).

Zelvin v. Zoning Board of Appeals of Town of Windsor, 30 Conn. Supp. 157, 306 A.2d 151 (Ct. C.P. 1973). (NAL; upheld boards deletion of a section permitting garden apartments when so many other permits had been granted that the board believed it to be in their interest to eliminate it).

DELAWARE

Marta v. Sullivan, 248 A.2d 608 (Del. 1968) (NAL; city unconstitutionally delegated legislative authority to neighbors of a development project in ordinance requiring their approval before construction).

Mayor of New Castle v. Rollins Outdoor Advertising, Inc., 459 A.2d 541 (Del. Ch. 1983) (NAL; ordinance which prohibited a use after amortization period was beyond the authority of the city as granted by state statute), rev'd, 475 A.2d 355 (Del. 1984).

FLORIDA

Brazil v. Division of Administration, 347 So. 2d 755 (Fla. Dist. Ct. App. 1977) (allowed state to compel removal of sign along federal highway but owner was entitled to compensation).

City of Boca Raton v. Tradewind Hills, Inc., 216 So. 2d 460 (Fla. Dist. Ct. App. 1968) (ordinance requiring spacing around gas stations was valid and as applied did not violate due process of the constitution).
City of Hollywood v. Hollywood, Inc., 432 So. 2d 1332 (Fla. Dist. Ct. App. 1983) (upheld zoning ordinance which reclassified land as compatible was fairly debatable therefore should not have been disturbed by trial court; and that the transfer of development rights concept was not invalid).


City of Sarasota v. Sunad, 181 So. 2d 11 (Fla. Dist. Ct. App. 1965) (on remand, court found no aesthetic pattern or goal in the ordinance as revised so held it invalid).

City of West Palm Beach v. State ex rel. Duffey, 158 Fla. 863, 30 So. 2d 491 (1947) (NAL; ordinance requiring new buildings to match appearance of surrounding buildings in square footage and height was void for uncertainty and allowing whim to govern the standards).

County of Brevard v. Woodham, 223 So. 2d 344 (Fla. Dist. Ct. App. 1969) (owner failed to demonstrate that zoning classification was confiscatory; validity of ordinance was, at least, fairly debatable therefore court upheld it).

Dade County v. City of Gould, 99 So. 2d 236 (Fla. 1957) (ordinance prohibiting advertising signs displaying rates, but no other prohibitions, was invalid).


La Pointe Outdoor Advertising v. Florida Department of Transportation, 398 So. 2d 1370 (Fla. 1981) (statute did not require compensation when the illegal, non-conforming sign was mandatorily removed).

Mayer v. Dade County, 82 So. 2d 518 (Fla. 1955) (set back ordinance was valid but as applied might amount to a taking if setback was measured properly).

Montemarte, Inc. v. Peters, 66 So. 2d 509 (Fla. 1953) (affirming the lower judgment, citing Miami Beach and Merritt).


Town of Miami Springs v. Scoville, 81 So. 2d 189 (Fla. 1955) (ordinance severely restricting gasoline price signs was not justified in fact or in law as an exercise of the police power).

Walker v. State Department of Transportation, 366 So. 2d 96 (Fla. Dist. Ct. App. 1979) (statute required reasonable notice to renew permits, where there was no threat to safety, before requiring removal).

Watson v. Mayflower Properties, Inc., 223 So. 2d 368 (Fla. Dist. Ct. App. 1969) (limitations on number of units in multiple-family zoned area was reasonably calculated to prevent excessive traffic therefore was valid).

William Murray Builders, Inc. v. City of Jacksonville, 254 So. 2d 364 (Fla. Dist. Ct. App. 1971) (zoning ordinance which maintained single-family classifications when property was not suited to such was arbitrary and unreasonable and therefore invalid).
GEORGIA

**City of Doraville v. Turner Communications Corp.**, 236 Ga. 385, 223 S.E.2d 798 (1976). (NAL; upheld two year amortization period and stated that state law had not preempted the police power of cities to regulate signs).


**Flournoy v. City of Brunswick**, 248 Ga. 573, 285 S.E.2d 16 (1981). (plaintiff failed to meet burden of proof that zoning decision was so detrimental to him and so unrelated to HSMW as to be unconstitutional regarding the denial of rezoning of a double lot).

**Gradous v. Board of Commissioners**, 256 Ga. 269, 349 S.E.2d 707 (1986). (NAL; owner failed to meet burden of proof showing that denial of mixed-use rezoning was unconstitutional).


**Jones v. City of Marietta**, 248 Ga. 773, 285 S.E.2d 730 (1982). (NAL; plaintiff failed to meet burden of proof to show that ordinance which prohibited junked automobile storage to be unconstitutional).

**Koppar Corp. v. Griswell**, 246 Ga. 539, 272 S.E.2d 272 (1980). (NAL; larger residential lot requirement was not unreasonable and ordinance would not be overturned just because it denied developer more profitable use of land).


**Matthews v. Fayette County**, 233 Ga. 220, 210 S.E.2d 758 (1974). (NAL; mobile home is a structure and subject to regulations of zoning ordinance; plaintiff failed to make an arbitrary and unreasonable evidentiary showing to overturn the classification).

**National Advertising Co. v. State Highway Department**, 230 Ga. 119, 195 S.E.2d 895 (1973). (NAL; state may use police power to proscribe use of land in the future (advertising signs within a certain distance from highway) without creating a taking that would require compensation).

**Palmer v. Tomlinson**, 217 Ga. 399, 122 S.E.2d 578 (1961). (NAL; resident of area where zoning ordinance is in force properly applied for injunction to restrain a violation by another resident).


**Schofield v. Bishop**, 192 Ga. 732, 16 S.E.2d 714 (1941). (NAL; upheld zoning efforts of city to create residential areas in various stages).

HAWAII

Puna Sugar Co. v. Territory, 13 Haw. 272, (1901). (NAL; court held that statute's prohibition of cutting trees within 250 feet of a road to be a taking of private property without just compensation).

State v. Bloss, 637 P.2d 1117 (Haw. 1982). (NAL; ordinance which prohibited all commercial speech was unconstitutional and the ordinance was unconstitutionally vague).

IDAHO

Drake v. Craven, 105 Idaho 734, 672 P.2d 1064 (Ct. App. 1983). (NAL; sustained a denial of application for rezoning as constitutional and part of the comprehensive plan).


ILLINOIS


Bright v. City of Evanston, 206 N.E.2d 772 (Ill. 1965). (NAL; insufficient evidence to overcome presumption of validity of zoning ordinance).


City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925). (NAL; held zoning ordinance was (in general) constitutional and not unreasonable).

City of Carbondale v. Reith, 316 Ill. 538, 147 N.E. 422 (1925). (NAL; regarding widening of street to relieve traffic congestion was not unreasonable).


City of Colinsville v. Seiber, 82 Ill. App. 3d 719, 403 N.E.2d 90, 38 Ill. Dec. 75 (App. Ct. 1980). (junkyard ordinance was not unconstitutional and evidence was sufficient to prove nuisance).

City of Monmouth v. Lawson, 345 Ill. App. 44, 102 N.E.2d 191 (App. Ct. 1951). (ordinance requiring permit but not stating criteria for approval or disapproval was unreasonable, oppressive, and void).

Drogo's v. Village of Bensenville, 100 Ill. App. 3d 48, 426 N.E.2d 1276, 55 Ill. Dec. 902 (App. Ct. 1981). (classification as applied was invalid but owners failed to prove that rezoning was a reasonable use).

Dunlap v. City of Woodstock, 405 Ill. 410, 91 N.E.2d 434 (1950). (NAL; evidence was insufficient to overcome ordinances presumption of validity).


Federal Electric Co. v. Zoning Board of Appeals, 398 Ill. 142, 75 N.E.2d 359 (1947). (Limit on building height is acceptable if not enacted just for aesthetics but if enacted with reasonable connection to HSW; citing, Haller and Gunning).

Finfrock v. City of Urbana, 39 Ill. App. 3d 641, 349 N.E.2d 494 (App. Ct. 1976). (owner failed to establish that the proposed use was reasonable under all circumstances therefore it was not necessary to determine validity of the zoning ordinance generally).

First National Bank of Lake Forest v. County of Lake, 7 Ill. 2d 213, 130 N.E.2d 274 (1955). (NAL; insufficient evidence to challenge zoning ordinance's validity; to determine reasonableness look to character, etc. of the area; citing Trust Co. and Galt).

Galt v. Cook County, 405 Ill. 396, 91 N.E.2d 395 (1950). (NAL; ordinance zoning land as residential in a predominantly business area was unreasonable and void).

Gibson v. Village of Wilmette, 97 Ill. App. 3d 1033, 425 N.E.2d 434, 54 Ill. Dec. 569 (App. Ct. 1981). (ordinance was invalid as applied to property purchased before the ordinance was passed where no showing of damage was made if the subdivision of lots occurred).

Gordon v. City of Wheaton, 12 Ill. 2d 284, 146 N.E.2d 39 (1957). (ordinance which prohibited use of land for auto sales was arbitrary and unreasonable as applied).

Grand Trunk Western Railroad Co. v. City of Chicago, 346 Ill. App. 376, 105 N.E.2d 154 (App. Ct. 1952). (change in zoning was unreasonable given the use of the last 50 years).


Jacobson v. City of Evanston, 10 Ill. 2d 61, 139 N.E.2d 209 (1956). (NAL; plaintiff had no standing; no evidence as to arbitrary or unreasonableness as applied to plaintiff).


Koos v. Saunders, 349 Ill. 442, 182 N.E. 415 (1932). (NAL; under the circumstances the ordinance requiring consent of the majority of landowners, on the basis of lot frontage, to allow a gas station was arbitrary and void).

Kovanda v. County of DuPage, 32 Ill. App. 3d 626, 336 N.E.2d 81 (App. Ct. 1975). (insufficient evidence to establish that ordinance as applied was not substantially related to HSW nor unconstitutional as a taking).

LaSalle National Bank v. City of Chicago, 4 Ill. 2d 253, 122 N.E.2d 519 (1954). (NAL; denial of permit for shopping center in residential area was reasonable and related to HSMW).

LaSalle National Bank v. City of Chicago, 126 N.E.2d 643 (Ill. 1955). (NAL; evidence failed to establish that amendment to zoning ordinance preventing gas station was arbitrary and unreasonable).

LaSalle National Bank v. City of Chicago, 24 Ill. 2d 59, 179 N.E.2d 675 (1962). (under particular facts the ordinance as applied was arbitrary and unreasonable).

LaSalle National Bank v. County of Lake, 215 N.E.2d 852 (Ill. App. Ct. 1966). (zoning ordinance as applied was arbitrary and unreasonable since the proposed use was consistent with surrounding uses).


Liberty National Bank of Chicago v. City of Chicago, 10 Ill. 2d 137, 139 N.E.2d 239 (1956). (NAL; city council has authority to decide if area should be characterized by residences on one side or businesses on the other; not for the court to decide.)

Mahoney v. City of Chicago, 9 Ill. 2d 156, 137 N.E.2d 40 (1956). (NAL; more stringent zoning requirements on one side of the street than the other was upheld as related to public HSW).


McGuire v. Purcell, 7 Ill. App. 2d 407, 129 N.E.2d 598 (App. Ct. 1955). (NAL; sign ordinance, enacted to prevent depreciation of residential land values, was a valid exercise of the police power).


Mundelein Estates, Inc. v. Village of Mundelein, 409 Ill. 291, 99 N.E.2d 144 (1951) (NAL; ordinance which zoned one side of street residential and the other side commercial was not unreasonable, arbitrary or discriminatory).

National Brick Co. v. County of Lake, 9 Ill. 2d 191, 137 N.E.2d 496 (1956). (NAL; change in zoning was not justified given extensive harm to business with little comparable public gain).


Oak Forest Mobile Home Park v. City of Oak Forest, 27 Ill. App. 3d 303, 326 N.E.2d 473 (App. Ct. 1975). (NAL; ordinance prohibiting all mobile home parks within the city was void. Court took judicial notice of shortage of low cost housing that is remedied by mobile homes).


People v. Husler, 34 Ill. App. 3d 977, 342 N.E.2d 403 (App. Ct. 1975). (as applied, ordinance restricting use of mobile home to 30 days as a residence was within the authority of city but was unreasonable and arbitrary as applied in the instant case).

People v. Village of Oak Park, 266 Ill. 365, 107 N.E. 636 (1914). (NAL; ordinance requiring neighbor’s approval in residential area before constructing a detached garage was not unreasonable; the power was conferred to village).

People ex rel. Herman Armanetti, Inc. v. Chicago, 415 Ill. 165, 112 N.E.2d 616 (1953). (NAL; ordinance restricting the size of electric signs permitted to protrude over public property was not discriminatory, unreasonable, oppressive or unjust).

Schmidt v. City of Darien, 31 Ill. App. 3d 617, 333 N.E.2d 681 (App. Ct. 1975). (prohibition of use as shopping center was reasonably related to HSMW and plaintiff failed to overcome presumption of validity).

Singer v. City of Highland Park, 31 Ill. App. 3d 1071, 335 N.E.2d 585 (App. Ct. 1975). (NAL; where owner wanted to alter a lot size to maximize profit, denial of rezoning was proper and loss of money was insufficient to overcome the presumption of validity).
Smith v. County Board of Madison County, 86 Ill. App. 3d 708, 408 N.E.2d 452, 42 Ill. Dec. 74 (App. Ct. 1980). (trial court's findings as to refusal to rezone and ordinance being unreasonable and arbitrary were not against the weight of the evidence).

Stanek v. County of Lake, 60 Ill. App. 3d 357, 376 N.E.2d 743, 17 Ill. Dec. 597 (App. Ct. 1978). (plaintiff provided sufficient evidence to show denial of permit to operate a dog kennel was arbitrary and unreasonable).

Tarala v. Village of Wheeling, 25 Ill. App. 3d 349, 323 N.E.2d 460 (App. Ct. 1974). (ordinance rezoning single family area to multi-family was valid as supported by the evidence).

Tomasek v. City of Des Plaines, 64 Ill. 2d 172, 354 N.E.2d 904 (1976). (landowners failed to produce evidence to overcome presumption of validity of ordinance).

Village of Western Springs v. Bernhagen, 326 Ill. 100, 156 N.E. 753 (1927). (NAL; upheld general validity of zoning ordinance).


Indiana


Goldsmith v. City of Indianapolis, 196 N.E. 525 (Ind. 1935). (upheld zoning ordinance regulating the kinds of businesses permitted and required set back from park and other kinds of land).

Iowa

Anderson v. City of Cedar Rapids, 168 N.W.2d 739 (Iowa 1969) (NAL; upheld an amendment to the zoning ordinance which permitted construction of a shopping center; based the amendment on demographics).

Board of Supervisors of Cerro Gordo County v. Miller, 170 N.W.2d 358 (Iowa 1969) (ordinance requiring termination of automobile junkyard within 5 years did not deny due process when owner made no showing as to financial loss or hardship).

City of Central City v. Knowlton, 265 N.W.2d 749 (Iowa 1978). (NAL; involved determination of whether junkyard expansion violated zoning ordinance).

Hanna v. Rathje, 171 N.W.2d 876 (Iowa 1969) (ordinance rezoning land to allow mobile home park was fairly debatable as to reasonableness therefore was not arbitrary, unreasonable or discriminatory).

Jaffe v. City of Davenport, 179 N.W.2d 554 (Iowa 1970) (zoning change was not unreasonable, arbitrary, or capricious, even though it was spot-zoning).
Kasperek v. Johnson County Board of Health, 288 N.W.2d 511 (Iowa 1980) (retroactive ordinance requiring minimum 5 acre lot for septic tank sewer was not reasonably necessary to effectuate a substantial public purpose).

KANSAS

Board of County Commissioners of Lincoln Co. v. Berner, 5 Kan. App. 2d 104, 613 P.2d 676 (Ct. App. 1980). (NAL; court found that zoning regulations adopted by planning board were validly enacted).

City of Goodland v. Popejoy, 98 Kan. 183, 157 P. 410 (1916). (NAL; ordinance prohibiting deposit of refuse on one’s land was too broad to be within the city’s power to prevent nuisances).

Commissioners of Franklin County v. Lathrope, 9 Kan. 309 (1872). (NAL; creation of trust by city when lands sold adjacent to an area were used by the public).

Golden v. City of Overland Park, 584 P.2d 130 (Kan. 1978) (NAL; court found that denial of rezoning was unreasonable in view of the evidence).

Hukle v. City of Kansas City, 212 Kan. 627, 512 P.2d 457 (1973). (upheld board’s denial of rezoning to permit townhouses; matter of preventing increase in population density in an area is a legislative concern and not a matter for the courts; is a proper matter for the zoning board to consider; NAL).

Johnson County Memorial Gardens, Inc. v. City of Overland Park, 239 Kan. 221, 718 P.2d 1302 (1986). (Court held that city had authority to seek cemetery to obtain permit for construction of storage building).

Paola v. Wentz, 79 Kan. 148, 98 P. 775 (1908). (NAL; city may not arbitrarily decide to remove a shade tree to permit the relocation of a sidewalk without a sufficient legal reason).

Remington v. Walthall, 82 Kan. 234, 108 P. 112 (1910). (NAL; city may in good faith decide to remove trees but removal by officer without good faith will not protect him from action to compensate for the loss).

Robert L. Rieke Building Co. v. City of Olathe, 10 Kan. App. 2d 239, 697 P.2d 72 (Ct. App. 1985). (NAL; upheld city’s rezoning of property as not arbitrary, capricious, or unreasonable; was no breach of contract).


State v. Weniger, 9 Kan. App. 2d 705, 687 P.2d 643 (Ct. App. 1984). (upheld misdemeanor conviction for failure to screen junkyard under ordinance which court believed to be clear enough to be constitutional; NAL).
Thurman v. City of Mission, 214 Kan. 454, 520 P.2d 1277 (1974). (plaintiff failed to show that denial of rezoning was arbitrary and capricious or unreasonable).

KENTUCKY

Hofgesang v. McMakin, 457 S.W.2d 950 (Ky. Ct. App. 1969). (NAL; evidence supported finding that excavation pit was not a non-conforming use and that it violated special uses permitted).

Marshall v. City of Louisville, 244 S.W.2d 756 (Ky. Ct. App. 1951). (struck down an ordinance requiring illuminated signs to be on until a certain time as unrelated to public HSMW; NAL).

Mr. B’s Bart Lounge, Inc. v. City of Louisville, 630 S.W.2d 564 (Ky. Ct. App. 1981). (NAL; upheld ordinance regulating "adult entertainment activities").

Schloemer v. City of Louisville, 298 Ky. 286, 182 S.W.2d 782 (Ct. App. 1944). (NAL; upheld zoning decision making a residential zone next to a commercial zone).

Turner v. Peters, 327 S.W.2d 958 (Ky. Ct. App. 1959). (LAL; court found a public interest in regulating the location of junkyards so as not to offend community esthetics as acceptable).

LOUISIANA

City of New Orleans v. La Nasa, 230 La. 289, 88 So. 2d 226 (1956). (NAL; upheld zoning ordinance as applied to the situation regarding temporary permits).

City of New Orleans v. Southern Auto Wreckers, Inc., 193 La. 895, 192 So. 523 (1939). (NAL; upheld fencing requirement around junk yards as a safety measure within the city’s police power).

City of Shreveport v. Provenza, 231 La. 514, 91 So. 2d 779 (1956). (NAL; court sustained an ordinance which prohibited the storage of rubbish on premises in a residential area).

Garrett v. City of Shreveport, 154 So. 2d 276 (La. Ct. App. 1963). (NAL; upheld denial of permit for bowling alley on residential land which was bordered by commercial zone).

Plebst v. Barnwell Drilling Co., 243 La. 874, 148 So. 2d 589 (1963). (NAL; statute giving parish (county) authority to zone areas near city was valid and constitutional).


Sampere v. City of New Orleans, 166 La. 776, 117 So. 828 (1928). (NAL; upheld the continuing non-conforming uses though new businesses were not allowed to start in the area).


State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 316 (1929). (NAL; ordering a (non-conforming use) drug store to liquidate and close was a valid exercise of the police power via zoning ordinance).
State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 615 (1929). (NAL; authority to enact zoning ordinances carries with it the power to enforce them).

State ex rel. Manhein v. Harrison, 164 La. 564, 114 So. 161 (1927). (NAL; upheld ordinance which prohibited the maintenance of non-conforming uses in specific zones).

State ex rel. Palma v. City of New Orleans, 161 La. 1103, 109 So. 917 (1926). (NAL; upheld zoning ordinance segregating certain businesses from the city business area).

Vieux Carre Property Owners and Association, Inc. v. City of New Orleans, 246 La. 788, 167 So. 2d 374 (1964). (NAL; struck down ordinance which exempted some property owners from regulations in Vieux Carre District).

West v. City of Lake Charles, 375 So. 2d 206 (La. Ct. App. 1979). (NAL; evidence failed to show that council's refusal to rezone such that would permit the shopping center was not unreasonable or arbitrary).

MAINE

In re Spring Valley Development, 300 A.2d 736 (Me. 1973) (upheld a statute requiring notification of Environmental Improvement Commission of proposed development which would substantially affect the environment; LAL).

Inhabitants of Boothbay v. National Advertising Co., 347 A.2d 419 (Me. 1975) (LAL; upheld ordinance prohibiting off-site advertising signs with a 10-month amortization period as proper under the police power; no attack upon the purpose served (safety and scenic beauty) therefore not addressed by the court).

Naiman v. Bilodeau, 225 A.2d 760 (Me. 1967) (mobile home permanently affixed to a foundation met the definition of "dwelling"; NAL).

Robinson v. Board of Appeals of Town of Kennebunk, 356 A.2d 196 (Me. 1976) (ordinance forbidding dwellings on less than 3 acres of land in forest or farm land did not apply to proposed camp ground).

State v. National Advertising Co., 387 A.2d 745 (Me. 1978) (state had legitimate interest in keeping costs for control of highway signs to a minimum therefore the classification of what qualified for compensation upon removal was valid).

Toulouse v. Board of Zoning Adjustment, 147 Me. 387, 87 A.2d 670 (1952) (NAL; under ordinance, the pre-existing, non-conforming use was entitled to continue).

Town of Windham v. LaPointe, 308 A.2d 286 (Me. 1973) (NAL; struck down an ordinance which gave total discretion to planning board to approve or disapprove a trailer park was unconstitutional).

Your Homes, Inc. v. City of Portland, 432 A.2d 1250 (Me. 1981) (upheld zoning ordinance prohibiting dwellings in industrial zones as a constitutional enactment).
MARYLAND

Bostock v. Sams, 95 Md. 400, 52 A. 665 (1902). (NAL; court found ordinance requiring new construction to be "conformable to the general character of neighboring buildings" to be beyond the scope of the city's police power when not tied to HSW).


City of Annapolis v. Anne Arundel County, 271 Md. 265, 316 A.2d 807 (1974). (NAL; upheld city's jurisdiction over county on denial for demolition permit for historic county building within the city).


Colati v. Jirout, 47 A.2d 613 (Md. 1946). (NAL; upheld non-conforming use provisions in zoning ordinance).

County Commissioners of Anne Arundel County v. Ward, 46 A.2d 684 (Md. 1946). (NAL; upheld comprehensive zoning ordinance generally).

County Commissioners of Queen Anne's County v. Miles, 246 Md. 355, 228 A.2d 450 (1967). (NAL; upheld zoning provision which allowed five acre lots).

Feldstein v. LaVale Zoning Board, 227 A.2d 731 (Md. 1967). (NAL; evidence did not support city's claim that owner of non-conforming junk yard was actually expanding his business).

Garrett v. James, 65 Md. 260, 3 A. 597 (1886). (upheld city ordinance regulating the location of porches and porticoes in the Monument area of Baltimore as a valid and reasonable exercise of given statutory power).

Goldman v. Crowther, 147 Md. 282, 128 A. 50 (1925). (LAL; striking down a zoning ordinance as unrelated to HSMW (but city could regulate land if so related)).

Grant v. City of Baltimore, 212 Md. 301, 129 A.2d 363 (1957). (NAL; upheld amortization period in ordinance requiring removal of billboards from residential areas).

Jack Lewis, Inc. v. Baltimore, 164 Md. 146, 164 A. 220 (1933). (upheld zoning ordinance prohibiting funeral home in residential district as it would "adversely affect health and comfort" of those living near it).

MacDonald v. Board of County Commissioners for Prince George County, 238 Md. 549, 210 A.2d 325 (1965). (NAL; evidence did not support rezoning decisions when original comprehensive ordinance has presumption of correctness).


State v. Clay, 35 A.2d 824 (Md. 1944). (NAL; upheld a statute prohibiting billboards advertising the solicitation or performance of marriages as constitutional under due process and equal protection concepts).

State v. Greenberg, 221 Md. 471, 157 A.2d 420 (1960). (NAL; county ordinance requiring permit to operate junk yard was unconstitutional for lack of standards designed to guide the commission’s decision).

Stevens v. City of Salisbury, 240 Md. 556, 214 A.2d 775 (1965). (NAL; upheld zoning ordinance requiring the height of fences and shrubs on corner lots as valid but struck down the portion requiring removal of excess land).

Stubbs v. Scott, 127 Md. 86, 95 A. 1060 (1915). (LAL; denial of building permit for failure to conform to character of other buildings was insufficient justification).

Town of Bladensburg v. Berg, 139 A.2d 703 (Md. 1958). (NAL; under the facts, denial of permit for junk yard was not a proper exercise of police power).

Zellinger v. CRC Development Corp., 380 A.2d 1064 (Md. 1977). (NAL; upheld ability of city to issue conditional use permit, though few standards existed by which to make the decision).

MASSACHUSETTS

Aver v. Cram, 242 Mass. 30, 136 N.E. 338 (1922). (LAL; aesthetics alone were insufficient basis for height restriction but may be auxiliary consideration).

Barney & Casey Co. v. Town of Milton, 324 Mass. 440, 87 N.E.2d 15 (1949). (LAL; aesthetics alone are insufficient to base an ordinance on though they may be auxiliary considerations).

Board of Appeal of Hanover v. Housing Appeals Committee, 294 N.E.2d 424 (Mass. 1973). (NAL; legislature could constitutionally create an agency for low-income housing which had the authority to override other zoning agencies).

Board of Selectmen of Wrentham v. Monson, 247 N.E.2d 365 (Mass. 1969). (NAL; non-conforming use does not cease to exist just because the owner fails to get a permit).


Caputo v. Board of Appeals of Somerville, 120 N.E.2d 754 (Mass. 1954). (NAL; overturned zoning amendment which reclassified one block as residential in the middle of an industrial area).

Commonwealth v. Boston Advertising Co., 188 Mass. 348, 74 N.E. 601 (1905). (LAL; statute requiring signs within view of parks to be removed was unconstitutional).

Gumley v. Board of Selectmen of Nantucket, 358 N.E.2d 1013 (Mass. 1977). (NAL; where historic district commission has authority to review "exterior architectural features" a decision based on "open space" of the island was inappropriate).

Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 405 N.E.2d 151 (Mass. 1980). (NAL; procedural regarding application for a permit)

Merit Oil Co. v. Director of Division of Necessaries of Life, 65 N.E.2d 531 (Mass. 1946). (NAL; upheld ordinance prohibiting advertisement of gas prices as constitutional because of relation to public welfare).

Moss v. Town of Winchester, 311 N.E.2d 557 (Mass. 1974). (NAL; upheld zoning decision which placed a portion of the owner’s land in a different zone from the rest).

Opinion of the Justices, 234 Mass. 604, 127 N.E. 528 (1920). (LAL; aesthetics alone are insufficient bases for regulation but may be auxiliary consideration).

Sleeper v. Old King’s Highway Regional Historic District Commission, 417 N.E.2d 989 (Mass. 1981). (NAL; applicant to erect radio tower failed to meet requirements of hardship to warrant change in historic district commission’s decision).


Tranfaqlia v. Building Commissioner of Winchester, 306 Mass. 495, 28 N.E.2d 539 (1940). (NAL; zoning decision based on projection of noise level was valid).


MICHIGAN

1426 Woodward Avenue Corp. v. Wolff, 312 Mich. 352, 20 N.W.2d 217 (1945). (NAL; court upheld ability of city to declare certain signs nuisances and revoke permits for them).


Binkowski v. Township of Shelby, 46 Mich. App. 451, 208 N.W.2d 243 (Ct. App. 1973). (NAL; court upheld plaintiff’s burden to demonstrate that zoning requirements for mobile home park were arbitrary and capricious).

Central Advertising Co. v. City of Novi, 91 Mich. App. 303, 283 N.W.2d 736 (Ct. App. 1979). (NAL; plaintiff could not bring suit against city for damages after a zoning ordinance was declared invalid).


Ed Zaagman, Inc. v. City of Kentwood, 406 Mich. 137, 277 N.W.2d 475 (1979). (NAL; zoning classification as applied was arbitrary, capricious and unreasonable).
Elizabeth Lake Estates v. Waterford Township, 317 Mich. 359, 26 N.W.2d 788 (1947). (NAL; conservation of property values alone is not a proper singular objective of a zoning ordinance).


Puritan-Greefield Improvement Association v. Leo, 7 Mich. App. 659, 153 N.W.2d 162 (Ct. App. 1967). (NAL; because owner could not sell house as a residence at same price as commercial use it did not create a hardship).

Sabo v. Township of Monroe, 394 Mich. 531, 232 N.W.2d 584 (1975). (NAL under the circumstances the use of land as a mobile home park was not unreasonable).

Schwartz v. Flint, 426 Mich. 295, 395 N.W.2d 678 (1986). (NAL; involved whether zoning board may rezone once a classification is shown to be unconstitutional (no)).

Senefsky v. Lawler, 307 Mich. 728, 12 N.W.2d 390 (1943). (NAL; court struck down an ordinance requiring a minimum number of square feet per house).

Simmons v. City of Royal Oak, 38 Mich. App. 496, 196 N.W.2d 811 (Ct. App. 1972). (NAL; held ordinance which zoned plaintiff’s land as single-family lots to be unconstitutional as applied because of the financial loss).


MINNESOTA

Almquist v. Town of Marshan, 245 N.W.2d 819 (Minn. 1976) (NAL; upheld town’s ability to uphold a short-term building moratorium).

Blocher Outdoor Advertising Co. v. Minnesota Department of Transportation, 347 N.W.2d 88 (Minn. Ct. App. 1984). (NAL; upheld denial of permit to build billboards as reasonable).

County of Freeborn v. Claussen, 203 N.W.2d 327 (Minn. 1972). (NAL; landowners action constituted an expansion of a non-conforming use).
County of Ramsey v. Stevens, 283 N.W.2d 918 (Minn. 1979). (NAL; upheld many issues regarding a flood plain zoning).

County of Wright v. Kennedy, 415 N.W.2d 728 (Minn. Ct. App. 1987). (NAL; upheld city’s injunction to compel removal of mobile home from premises after temporary permit expired).

Higgins v. Lacroix, 119 Minn. 145, 137 N.W. 417 (1912). (NAL; upheld fee for permit for a movie house).

Olsen v. City of Hopkins, 149 N.W.2d 394 (Minn. 1967). (NAL; upheld city’s ability to rezone land under certain circumstances).

Olsen v. City of Minneapolis, 263 Minn. 1, 115 N.W.2d 734 (1962). (LAL; granted application for gas station construction because city failed to show negative effects on safety).

Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962). (LAL; classification of land as commercial was unreasonable, capricious and arbitrary since it was rendered valueless for many years).


State v. Larson, 195 N.W.2d 180 (Minn. 1972). (NAL; upheld zoning ordinance limiting mobile homes to trailer parks to facilitate health and safety).

State v. Wong Hing, 176 Minn. 151, 222 N.W. 639 (1929). (NAL; upheld sign ordinance which required removal of signs over certain streets and sidewalks).

State by Powderly v. Erickson, 285 N.W.2d 84 (Minn. 1979). (NAL).

State ex rel. Beery v. Houghton, 164 Minn. 146, 204 N.W. 570 (1925). (NAL; upholding zoning generally).

State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N.W. 1020 (1916). (NAL; city could not prohibit a store in a residential district).

State ex rel. McKusick v. Houghton, 213 N.W. 908 (Minn. 1927). (NAL; upheld setback lines of zoning ordinance and plan).

State ex rel. Twin City Building and Investment Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920). (NAL; upheld use of eminent domain power to condemn apartment house in residential zone).

MISSISSIPPI

City of Jackson v. McPherson, 162 Miss. 164, 138 So. 604 (1931). (NAL; upholding zoning generally).

Martinson v. City of Jackson, 215 So. 2d 414 (Miss. 1968). (NAL; procedural on grounds for a change in the original zoning).
Quintini v. Board of Altermen City of Bay St. Louis, 64 Miss. 483, 1 So. 625 (1887). (NAL; city cannot declare private property to be a nuisance just because the neighbors’ view is obstructed or because it will depreciate property values).

MISSOURI

Bellerive Investment Co. v. Kansas City, 321 Mo. 969, 13 S.W.2d 628 (1929). (NAL; upheld constitutionality of zoning ordinance limiting the number of cars that could be stored in a building which also held sleeping quarters).


City of St. Louis v. Evraiff, 301 Mo. 231, 256 S.W. 492 (1923). (LAL; upheld ordinance regulating dealers of rags, etc. and location of their businesses).

City of St. Louis v. Hill, 116 Mo. 527, 22 S.W. 861 (1893). (NAL; setback requirements constituted a taking of land).

City of St. Louis v. St. Louis Theatre Co., 202 Mo. 690, 100 S.W. 627 (1907). (NAL; court upheld ordinance prohibiting illuminated signs from projecting a certain distance over street since no evidence of unreasonableness was presented).

Dahman v. City of Ballwin, 483 S.W.2d 605 (Mo. Ct. App. 1972). (NAL; invalidated change in zoning classification where plaintiff relied on extant classification when purchasing).

Dempsey v. Boys’ Club of City of St. Louis, Inc., 558 S.W.2d 262 (Mo. Ct. App. 1977). (NAL; generalized conclusions on condition and expense of historic buildings were insufficient to sustain a finding that rehabilitation was impracticable).

Hoffman v. Kinealy, 389 S.W.2d 745 (Mo. 1965). (NAL; held that amortization of non-conforming uses still constituted a taking requiring just compensation).

Landau v. Levin, 213 S.W.2d 483 (Mo. 1948). (NAL; upheld zoning classification which precluded a doctor’s office in residential area).

State ex rel. Casey’s General Stores, Inc. v. City Counsel of Salem, 699 S.W.2d 775 (Mo. Ct. App. 1985). (NAL; struck down ordinance regarding issuance of liquor license as dependent on location of business as vague).

State ex rel. Noland v. St. Louis County, 478 S.W.2d 363 (Mo. 1972). (NAL; county could not constitutionally condition approval of subdivision on the owner’s relocation of present road).

State ex rel. Oliver Cadillac Co. v. Christopher, 217 Mo. 1179, 298 S.W. 720 (1927). (NAL; upholding zoning provisions generally).

State ex rel. Penrose Investment Co. v. McKelvey, 301 Mo. 1, 256 S.W. 474 (1923). (NAL; struck down general zoning provisions as an unlawful taking).
Taylor v. Schlemmer, 183 S.W.2d 917 (Mo. 1944). (NAL; upheld 14-year-old zoning ordinance as challenged by landowners).

University City v. Diversey Auto Body Co., 417 S.W.2d 107 (Mo. 1967). (NAL; noting distinctions between general zoning ordinance and billboard ordinance, court determined it had jurisdiction to hear the constitutional issues raised by the defendant).

MONTANA


State ex rel. Department of Health and Environmental Sciences v. Green, 227 Mont. 299, 239 P.2d 469 (1987). (NAL; landowner did not have inalienable right to accumulate junked cars on his property without shielding them from public view).

NEBRASKA

Cassel Realty Co. v. City of Omaha, 14 N.W.2d 604 (Neb. 1944). (NAL; upholding zoning generally).

Dundee Realty Co. v. City of Omaha, 13 N.W.2d 640 (Neb. 1944). (NAL; upheld ordinance which allowed churches, but not businesses, in residential zone).


Pettis v. Alpha Alpha Chi of Phi Beta Pi, 213 N.W. 838 (Neb. 1927). (NAL; upholding zoning generally).

Schaffer v. City of Omaha, 197 Neb. 328, 248 N.W.2d 767 (1977). (NAL; upheld city’s authority to regulate mobile signs under state statute; the ordinance gave no appearances of being unreasonable).

Simpson v. City of North Platte, 206 Neb. 240, 292 N.W.2d 297 (1980). (NAL; city could not condition approval of building permit upon owner’s acquiescence to an easement for a street where the street was unrelated to the owner’s construction).

Stahla v. Board of Zoning Adjustment, 186 Neb. 219, 182 N.W.2d 209 (1970). (NAL; upheld city’s denial of permit for mobile home park as a determination within the board’s discretion).

Standard Oil Co. v. City of Kearney, 106 Neb. 558, 184 N.W. 109 (1921). (NAL; city ordinance was void as arbitrary and unreasonable; prohibiting a gas station at a particular intersection).

Wolf v. City of Omaha, 129 N.W.2d 501 (Neb. 1964). (NAL; court upheld ordinance making dog kennel a non-conforming use after an amortization period; legislature has discretion to determine what serves the public good).

NEVADA
No cases.

NEW HAMPSHIRE


Chung Mee Restaurant Co. v. Healy, 86 N.H. 483, 171 A. 263 (1934). (NAL; required relation between ordinance and object to be attained by enactment).


Storms v. Town of Eaton, 549 A.2d 1210 (N.H. 1988). (NAL; jurisdiction issue; also determined what is a "building").


Town of New Boston v. Coombs, 284 A.2d 920 (N.H. 1971). (NAL; sustained ordinance prohibiting mobile homes to protect attractiveness and general welfare of the town; citing Robie, and Deering).


NEW JERSEY

Bell v. Township of Stafford, 110 N.J. 384, 541 A.2d 692 (1988). (NAL; township failed to support a compelling governmental interest with ordinance which prohibited billboards entirely from all zoned districts).


Bill Posting Sign Co. v. Atlantic City, 71 N.J.L 72, 58 A. 342 (1904). (NAL; ordinance forbidding erection of sign on private property without regard to safety is invalid as an attempt to appropriate without compensation).

Brookdale Homes, Inc. v. Johnson, 123 N.J.L. 602, 10 A.2d 477 (1940), aff’d, 126 N.J.L. 516, 19 A.2d 868 (1941). (NAL; struck down ordinance regulating height of roof ridge in residential zone as not promoting HSW).

Cooper Lumber Co. v. Dammers, 2 N.J. Misc. 289, 125 A. 325 (1924). (LAL; followed Passaic to strike down zoning change from industrial to residential along a riverbank for aesthetic reasons).

Duffcon Concrete Products v. Borough of Cresskill, 137 N.J.L. 81, 58 A.2d 104 (Sup. Ct. 1948). (held zoning ordinance which was designed to preserve residential character of community as unconstitutional because it exceeded the police power).


Fred v. Old Tappan Mayor and Council, 10 N.J. 515, 92 A.2d 473 (1952). (NAL; upheld ordinance prohibiting removal of soil for sale unless related to construction on the premises as valid exercise of police power).

Hendlin v. Fairmount Construction Co., 8 N.J. Super. 310, 72 A.2d 541 (Super. Ct. Ch. Div. 1950). (LAL; aesthetic impact was not a valid objection to a zoning change permitting apartments in a residential area; follows Passaic).

Home Builders League v. Township of Berlin, 81 N.J. 127, 405 A.2d 381 (1979). (LAL; court held that, in this case, an ordinance which required a minimum floor space was unrelated to legitimate zoning purposes).

Ingersoll v. Village of South Orange, 126 A. 213 (N.J. Sup. Ct. 1924). (NAL; ordinance which precluded apartment houses invalidated because it was beyond powers given by zoning act).

J.D. Construction v. Freehold Township Board of Adjustment, 119 N.J. Super 140, 230 A.2d 452 (Super. Ct. Law Div. 1972). (LAL; must look to character of area when testing validity of ordinance; controlling density of population is proper zoning objective).


Levy v. Mravlag, 96 N.J.L. 367, 115 A. 350 (1921). (LAL; ordinance which would allow commercial permit upon vote of adjoining neighbors was an illegal delegation of police power).
Lionshead Lakes, Inc. v. Wayne Township, 89 A.2d 693 (N.J. 1952). (LAL; upheld zoning ordinance requiring a minimum floor space area because it was related to general health and welfare; concurring opinion notes modern trend in aesthetics).


Nash v. Board of Adjustment of Township of Morris, 96 N.J. 97, 474 A.2d 241 (1984). (NAL; upheld grant of full market value as if variance had been granted to landowner).


O'Mealia Outdoor Advertising Co. v. Rutherford, 128 N.J.L. 587, 27 A.2d 863 (Sup. Ct. 1942). (LAL; struck down ordinance prohibiting off-site advertising signs; follows Passaic).

Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (Super. Ct. Law Div. 1971), aff'd as modified under Mt. Laurel, 72 N.J. 481, 371 A.2d 1192 (1977). (city did not bring sufficient evidence to uphold ordinance restricting number and size of homes in development therefore the ordinance was invalid).


Pfister v. Municipal Council of City of Clifton, 133 N.J.L. 148, 43 A.2d 275 (Sup. Ct. 1945). (LAL; follows Passaic to reverse city council denial of permission for automobile junk yard under an ordinance requiring a state license first).


Romar Realty Co. v. Board of Commissioners of Borough of Haddonfield, 96 N.J.L. 117, 114 A. 248 (Sup. Ct. 1921). (LAL; follows Passaic; struck down ordinance regulating location of one-story buildings because aesthetic considerations did not justify the use of police power).

Schmidt v. Newark Board of Adjustment, 9 N.J. 405, 88 A.2d 607 (1952). (NAL; upheld zoning ordinance which prohibited use of plaintiff’s land as a gas station).

Southern Burlington County v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975). (NAL; while township must consider environmental concerns, cannot zone so as to preclude some residences on basis of economics).

State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979). (LAL; struck down zoning ordinance which prohibited more than four unrelated people from living together).


Vassallo v. Board of Commissioners of City of Orange, 125 N.J.L. 419, 15 A.2d 603 (1940). (NAL; struck down junk yard fencing ordinance as an exercise of police power in excess of that necessary to public health and safety).


NEW MEXICO


City of Santa Fe v. Armijo, 96 N.M. 663, 634 P.2d 685 (1981). (NAL; city could not apply historic preservation ordinance to state land to prevent a certain use).

Miller v. City of Albuquerque, 89 N.M. 507, 554 P.2d 667 (1976). (NAL; upheld zoning reclassification as not depriving owner of all beneficial use of land but found violation of due process because the commission failed to follow procedures).

Mutz v. Municipal Boundary Commission, 101 N.M 694, 688 P.2d 12 (1984). (NAL; annexation of land was allowed since no showing was made that the land’s character would be destructive of homogeneity and unity of the whole).

New Mexico Municipal League, Inc. v. New Mexico Environmental Improvement Board, 88 N.M. 201, 539 P.2d 229 (1975). (LAL; upheld regulations regarding storage and collection of solid waste as within the statutory authority of the board; it applied to municipalities).

Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M 312, 600 P.2d 258 (1979), appeal dismissed, 446 U.S. 930, 100 S.Ct. 2145, 64 L.Ed. 2d 783 (1980). (NAL; upheld the Highway Beautification Act as not violating just compensation, due process, or free speech requirements of the constitution).

NEW YORK


Berenson v. Town of New Castle, 38 N.Y.2d 102, 378 N.Y.S.2d 672 (1975). (LAL; court held that ordinance precluding multi-family development was not unconstitutional so long as related to planning of town; here it was unconstitutional), aff'd as modified, 67 A.D.2d 506, 415 N.Y.S.2d 669 (1979).

Boxer v. Town of Harrison, 175 Misc. 249, 22 N.Y.S.2d 501 (1940). (NAL; court could not find any connection between ordinance requiring license to store trailer on land and HSMW).

City of New York v. New York Telephone Co., 278 N.Y. 9, 14 N.E.2d 831 (1938). (city could not order company to relocate wires underground at their own cost because it was not necessary to the highway project).


Chusud Realty Corp. v. Village of Kensington, 40 Misc. 2d 259, 243 N.Y.S.2d 149 (Sup. Ct. 1963), aff'd, 22 A.D.2d 895, 255 N.Y.S.2d 411 (App. Div. 1964). (NAL; decided on other grounds, but held that failure to admit testimony as to land values before and after zoning was an error).

Dr. Bloom Dentist v. Cruise, 259 N.Y. 358, 182 N.E. 16 (1932). (owner had no clear legal right to a permit allowing the construction of a sign in contravention of properly promulgated rules).


Fulling v. Palumbo, 21 N.Y.2d 30, 286 N.Y.S.2d 249 (1967). (NAL; court held that variance for home of less square footage than ordinance allowed should have been allowed since surrounding homes were substantial and no showing was made of damage to the character of the area).

Golden v. Planning Board of Town of Ramapo, 37 A.D.2d 236, 324 N.Y.S.2d 178 (App. Div. 1971). (NAL; held that amendment to zoning ordinance delaying development until services made available by the city in 18 years was invalid), rev'd, 30 N.Y.2d 359, 334 N.Y.S.2d 138 (1972). (the regulations were constitutional and not confiscatory).


Holmes v. Planning Board of New Castle, 78 A.D.2d 1, 433 N.Y.S.2d 587 (App. Div. 1980). (board is allowed to approve site plan conditionally but condition was based on incomplete site plan therefore was stricken).
King Service, Inc. v. Town Board of Malta, 149 A.D.2d 806, 539 N.Y.S.2d 594 (App. Div. 1989). (NAL; allowing expansion of non-conforming use on condition of removing sign was not a violation of the constitution).

Lincoln Trust Co. v. Williams Building Corp., 229 N.Y. 313, 128 N.E. 209 (1920). (regulation of height and size of building and location of industries is valid exercise of police power).

Little Joseph Realty, Inc v. Town of Babylon, 41 N.Y.2d 738, 363 N.E.2d 1168 (1977). (lessee still had to comply with zoning laws, exceptions to ordinance granting use under certain circumstances was inappropriate).


Manley v. Draper, 44 Misc. 2d 613, 254 N.Y.S.2d 739 (1963). (NAL; court held that mobile home did not violate restrictive covenant of "no trailers" on land because it was in a fixed place and had water and electricity connected).

Marcus Associates, Inc. v. Town of Huntington, 57 A.D.2d 116, 393 N.Y.S.2d 727 (App. Div. 1977). (where industrial area had developed a particular character, ordinance to maintain it was reasonable).

McDonough v. Apton, 48 A.D.2d 195, 368 N.Y.S.2d 603 (App. Div. 1975). (LAL; city may zone to restrict placement of objects for sale in yards on aesthetic grounds or the appearance of the community).

New York Telephone Co. v. Hempstead, 41 N.Y.2d 691, 363 N.E.2d 694, 395 N.Y.S.2d 143 (1977). (city could not erect street lights on telephone poles that were not their property).


People v. Finch, 33 Misc. 2d 581, 388 N.Y.S.2d 820 (1976). (aesthetics can justify regulating public consumption of alcohol in streets as a valid exercise of the police power; citing Dowsey).


People v. Lou Bern Broadway, Inc., 68 Misc. 2d 112, 325 N.Y.S.2d 806 (1971). (LAL; court allowed state to regulate display of nudity, sex, etc. under aesthetics regulation power but case was decided on other grounds (not a violation of the first amendment)).

People v. Middlemark, 100 Misc.2d 760, 420 N.Y.S. 151 (1979). (ordinance banning all free-standing signs was violation of the first and fourteenth amendments).

People v. Rubenfeld, 254 N.Y. 245, 172 N.E. 485 (1930). (building where weddings and other entertainment were held from night until dawn held a public nuisance when a whole neighborhood was disturbed by it).

People v. Scott, 26 N.Y.2d 286, 309 N.Y.S.2d 919 (1970). (LAL; relying on Cromwell and Stover, court mentions that aesthetics may be rationally regulated by municipalities; rally because police power can be used to regulate billboard posing a traffic safety problem; amortization period was reasonable).

People ex rel. Durham Realty Corp. v. LaFetra, 230 N.Y. 429, 130 N.E. 601 (1921). (legislature could regulate rental of homes).

People ex rel. Publicity Leasing Co. v. Ludwig, 218 N.Y. 540, 113 N.E. 432 (1916). (where owner built sign, ordinance was then passed which made sign a non-conforming one, owner had no vested right in a sign larger than the ordinance allowed; following Wineburgh).

Presnell v. Leslie, 3 N.Y.2d 384, 144 N.E.2d 381, 165 N.Y.S.2d 488 (1957). (would not allow aesthetics alone to support an ordinance though they may be a consideration).


Saat's, Inc. v. City of White Plains, 68 A.D.2d 905, 414 N.Y.S.2d 209 (App. Div. 1979). (issue as to whether the application of the ordinance to a sign affected the city’s aesthetic goals and whether amortization period was reasonable).

Sagolf Corp. v. Lawrence, 82 Misc. 2d 100, 367 N.Y.S.2d 683 (Sup. Ct. 1975). (NAL; issue as to Adirondack Park Agency’s authority to classify land upheld).

Schnapp v. Lefkowitz, 101 Misc. 2d 1075, 422 N.Y.S.2d 798 (1979). (pooper-scooper law was reasonable and proper exercise of police power and not otherwise unconstitutional).


Suffolk Housing Services v. Town of Brookhaven, 91 Misc. 2d 80, 397 N.Y.S.2d 307 (1977). (aesthetic ordinances such as apartment restrictions and minimum lot sizes are reasonably related to public welfare as long as they do not impose too great of a hardship on individual property owners; decided on other grounds).

Tandem Holding Corp. v. Board of Zoning Appeals Town of Hempstead, 43 N.Y.2d 801, 373 N.E.2d 282, 402 N.Y.S.2d 388 (1977). (exception for parking lot permit was properly denied).

Triborough Bridge v. Crystal & Son, 2 A.D.2d 37, 153 N.Y.S.2d 387, aff'd, 2 N.Y.2d 961, 142 N.E.2d 426, 162 N.Y.S.2d 362 (App. Div. 1957). (ordinance proscribing signs near a bridge did not apply to the tunnel because statute authorizing the bridge’s construction was repealed and the tunnel built instead without the restrictive provision).

Town of Huntingdon v. Estate of Schwartz, 63 Misc. 2d 836, 313 N.Y.S.2d 918 (1970). (decided on other grounds; municipality may consider aesthetics in using police power to regulate the display of political signs).

Town of Pompev v. Parker, 53 A.D.2d 125, 385 N.Y.S.2d 959 (App. Div. 1976). (ordinance requiring mobile home dwellers to acquire a permit every year was constitutional).

Village of Carthage v. Fredrick, 122 N.Y. 268, 25 N.E. 480, 10 L.R.A. 178 (1890). (ordinance requiring removal of snow, etc. is a legitimate exercise of the police power).


Whitmier v. New York, 20 N.Y.2d 413, 230 N.E.2d 904, 284 N.Y.S.2d 313 (1967). (held that change in statute regulating the distance required from road to sign was not unconstitutional or a taking even if signs were destroyed; NAL).


Wulfson v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925). (expanding general welfare to include public convenience or general prosperity and upheld an ordinance prohibiting apartment houses in residential areas).

NORTH CAROLINA

Barger v. Smith, 156 N.C. 323, 72 S.E. 376 (1911). (NAL; ordinance prohibiting construction of mills must be reasonable and apply impartially to all to be a valid exercise of police power).


Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970). (LAL; under circumstances of the case the city could not declare the home unfit for habitation and demolish and attach lien for costs without giving owner a chance to fix the home).

In re application to dredge/fill Broad and Gales Creek Community Association, 44 N.C. App. 552, 261 S.E.2d 510 (Ct. App. 1980). (LAL; statutes to protect natural resources is a constitutional exercise of police power).

In re O'Neal, 243 N.C. 714, 92 S.E.2d 189 (1956). (NAL; addressed validity of variance permit to continue a non-conforming use under the zoning ordinance).

Responsible Citizens in Opposition to Flood Plains Ordinance v. City of Asheville, 302 S.E.2d 204 (N.C. 1983). (NAL; sustained as constitutional a flood plain ordinance that required new development to be build with minimal flood damage).

State v. Staples, 157 N.C. 637, 73 S.E. 112 (1911). (LAL; city cannot regulate a billboard that is not a nuisance on the basis of aesthetics only).


Town of Clinton v. Ross, 226 N.C. 682, 40 S.E.2d 598 (1946). (NAL; maintenance of non-conforming tobacco warehouse could not be enjoined because it interfered with other businesses nor could city charge costs of road repairs to it).

Turner v. City of New Bern, 187 N.C. 541, 122 S.E. 469 (1924). (NAL; scope of city power may be extended to preserve attractive residential character only under eminent domain).

NORTH DAKOTA

Old Broadway Corp. v. Backes, 450 N.W.2d 734 (N.D. 1990). (NAL; required removal of signs was not a violation of freedom of commercial speech).

Old Broadway Corp. v. Hielle, 411 N.W.2d 81 (N.D. 1987). (NAL; procedural resolution of issues arising under an advertising corporations' class action suit).

OHIO

Allison v. City of Akron, 45 Ohio App. 2d 227, 343 N.E.2d 131 (Ct. App. 1974). (struck down an ordinance prohibiting "for sale" signs in order to promote racial stability as an unconstitutional enactment).


Central Outdoor Advertising Co. v. Evendale, 124 N.E.2d 189 (Ohio 1954). (NAL; court upheld sign restrictions in commercial zone but struck down regulations of signs in light industrial and industrial zones).
City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953). (NAL; court struck down ordinance requiring junk yard operator to cease business within one year amortization period).

City of Akron v. Klein, 171 Ohio St. 207, 168 N.E.2d 564 (1960). (NAL; could not enforce zoning restrictions in the amendment against a non-conforming use).

City of Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412, 26 Ohio Op. 116 (1943). (NAL; court makes determination of whether purpose actually conforms to requirements).


City of Newark v. Garfield Development Corp., 25 Ohio Misc. 2d 4, 495 N.E.2d 480 (Muni. Ct. 1986). (ordinance requiring removal of noxious weeds was unconstitutional use of police power; aesthetics is not a proper motivation).


City of Toledo v. Miller, 154 N.E.2d 171 (Ohio Ct. App. 1957). (Could not enforce zoning amendment against pre-existing non-conforming use).

Cleveland Trust Co. v. Village of Brooklyn, 110 N.E.2d 444 (Ohio 1952). (LAL; plaintiff brought insufficient evidence to show classification was arbitrary and unrelated to HSMW).

Clifton Hills Realty Co. v. City of Cincinnati, 60 Ohio App. 443, 21 N.E.2d 993 (Ct. App. 1938). (NAL; clarifying the nature of police power to zone generally).

Criterion Service v. City of East Cleveland, 88 N.E.2d 300 (Ohio 1949). (LAL; permitted secondary consideration of aesthetics in ordinance prohibiting off-site billboards in a retail area).

Curtiss v. City of Cleveland, 170 Ohio St. 127, 163 N.E.2d 682 (1959). (NAL; regarding the rezoning of land).

Peltz v. City of South Euclid, 11 Ohio St. 2d 128, 228 N.E.2d 324 (1967). (court struck down ordinance prohibiting all political signs in the city as a violation of free speech).


Schlagheck v. Winterfield, 161 N.E.2d 504 (Ohio 1958). (NAL; court would not substitute its judgement for the board’s in determining the necessity of zoning regulations).

State ex rel. Killeen Realty Co. v. East Cleveland, 169 Ohio St. 375, 160 N.E.2d 1, 9 Ohio Op. 2d 409 (1959). (LAL; where ordinance allowed for variances and supermarket was in harmony with community needs, denial of variance was an abuse of discretion).
State ex rel. Lieux v. Village of Westlake, 154 Ohio St. 412, 96 N.E.2d 416 (1951). (NAL; requiring exhaustion of administrative remedies before trial).

State ex rel. Schulman v. City of Cleveland, 8 Ohio Misc. 1, 220 N.E.2d 396 (1966). (NAL; court upheld city’s ability to condemn and demolish property).

OKLAHOMA

City of Enid v. Ramer, 556 P.2d 630 (Okla. Ct. App. 1976). (NAL; court held that ordinance regarding junk yards was not a zoning ordinance but came under the city police power to regulate business therefore was constitutional and valid).

OREGON

Dudleys v. City Council of West Lynn, 535 P.2d 583 (Or. Ct. App. 1975). (LAL; issue as to plaintiff’s standing queried whether the right to aesthetic enjoyment of land was sufficient; unresolved by court).

Fifth Avenue Corp. v. Washington County, 282 Or. 591, 581 P.2d 50 (1978). (NAL; court upheld zoning decision not in the form of an ordinance since notice, etc. was met).

Leathers v. City of Burns, 444 P.2d 1015 (Or. 1968). (NAL; court upheld ordinance limiting capacity of vehicles unloading gas but struck down ordinance limiting capacity of gas storing tanks).


Multnomah County v. Howell, 9 Or. App. 374, 496 P.2d 235 (Ct. App. 1972). (NAL; upheld zoning which permitted owner beneficial use of property, though not the kind that he intended).

Perkins v. Marion County, 448 P.2d 337 (Or. 1968). (LAL; court said ordinance which rezoned parts of a zone were spot-zoning, given the evidence).


PENNSYLVANIA


Andress v. Zoning Board of Adjustment of City of Philadelphia, 410 Pa. 77, 188 A.2d 709 (1963). (NAL; held there was insufficient evidence to determine if denial of variance was warranted).

Appeal of Dunlap, 370 Pa. 31, 87 A.2d 299 (1952). (NAL; involved denial of variance for row houses which would have comprised 20% of all houses in town was not an abuse of zoning board’s discretion).

Appeal of Jenning, 198 A. 621 (Pa. 1938). (NAL; municipality may zone as residential an single-family area and preclude use as a fraternity house).

Appeal of Key Realty Co., 408 Pa. 98, 182 A.2d 187 (1962). (NAL; held that amendment to zoning ordinance which prohibited use upon land that was currently in progress (apartments) was valid even though owner possessed the land prior to the zoning change).

Appeal of Kit-mar Builders, Inc, 439 Pa. 466, 268 A.2d 765 (1970). (NAL; zoning ordinance requiring a two acre lot size was unconstitutional as exclusionary).

Appeal of Langmaid Lane Homeowner’s Association, 465 A.2d 72 (Pa. 1983). (nursing home amendment to ordinance was within township supervisor’s authority therefore valid).

Appeal of M.A. Kravitz Co., 460 A.2d 1075 (Pa. 1983). (regarding a township determination that rapid growth was unlikely was sufficient to restrict apartments to less than 10% of the land; Girsh limited by its holding to the facts of that case [failure to provide for apartments]).


Appeal of Volpe, 384 Pa. 374, 121 A.2d 97 (1956). (NAL; square footage requirements in zoning ordinance were not arbitrary, capricious, or discriminatory when related to health and safety).

Appeal of Ward, 289 Pa. 458, 137 A. 630 (1927). (NAL; involved rebuilding a business in residentially zoned area, city allowed to prohibit it because it did not deprive an owner of all beneficial use of property).

Application of Friday, 381 A.2d 504 (Pa. 1978). (failure to provide for apartments, even though borough was in a regional planning program, was unconstitutional).

Application of Good Fellowship Ambulance Club, 406 Pa. 465, 178 A.2d 578 (1962). (NAL; denial of variance was an abuse of discretion where philanthropic uses were permitted and ambulance club met the requirements).


Board of Supervisors of Northampton Township v. Gentseh, 417 A.2d 830 (Pa. 1980). (failure to provide for mid-rise apartments was not unconstitutional).


Boundary Drive Associates v. Shrewsbury Township Board of Supervisors, 491 A.2d 86 (Pa. 1985). (farmland preservation is a legitimate township goal reached by the police power).

Casey v. Zoning Hearing Board of Warwick Township, 8 Pa. Commw. 473, 303 A.2d 535 (Commw. Ct. 1973). (regarding a permit denial for apartments, even though ordinance was amended to allow them).

Daikel er v. Zoning Board of Adjustment of Montgomery Township, 275 A.2d 969 (Pa. Commw. Ct. 1971). (NAL; blanket prohibition of off-site advertising signs was arbitrary and unreasonable and therefore unconstitutional).

Derry Borough v. Shomo, 5 Pa. Commw. 216, 289 A.2d 513 (Commw. Ct. 1972). (blanket prohibition of mobile homes without a showing of its relation to HSW was unconstitutional).

Dublin Properties v. Board of Commissioners of Upper Dublin Township, 342 A.2d 821 (Pa. 1975). (failure to provide for townhouses in ordinance is unconstitutional).

Exton Quarries, Inc. v. Zoning Board of Adjustment of West Whiteland Township, 425 Pa. 43, 228 A.2d 169 (1967). ("The unaesthetic aspects of a quarry pit are insufficient of themselves to support its prohibition"; NAL)

Forks Township Board of Supervisors v. George Calantoni & Sons, Inc., 6 Pa. Commw. 521, 297 A.2d 164 (Commw. Ct. 1972). (where the use is permitted by zoning ordinance, the permit must be issued).

Geiger v. Zoning Hearing Board of Township of North Whitehall, 507 A.2d 361 (Pa. 1986). (prohibition of some mobile homes and not others was based on arbitrary and capricious distinctions and therefore invalid).

Gorski v. Township of Skippack, 339 A.2d 624 (Pa. 1975). (failure of ordinance to provide for apartments was unconstitutional).

Gravatt v. Borough of Latrobe, 404 A.2d 729 (Pa. 1979). (restricting mobile homes to certain areas on the basis of its mode of transportation was constitutional).

H.A.Steen Industries, Inc. v. Cavanaugh, 430 Pa. 10, 241 A.2d 771 (1968). (court reaffirmed that aesthetics alone are insufficient citing Norate, Rogalski, Medinger, and White, but really did not reach the question in this case).

Hopewell Township Board of Supervisors v. Golla, 452 A.2d 1337 (1982).

Jacobi v. Zoning Board of Adjustment of Lower Moreland Township, 413 Pa. 286, 196 A.2d 742 (1964). (NAL; denial of permit for church when that use was allowed under zoning ordinance was a reversible abuse of discretion).

Judd v. Zoning Hearing Board of Middleton Township, 460 A.2d 404 (Pa. 1983). (ordinance limiting number of free-standing signs per business was not shown to be unconstitutionally restrictive, therefore was valid).

Landau Advertising v. Zoning Board of Adjustment, 387 Pa. 552, 128 A.2d 559 (1957). (NAL; court recognizes legislature’s ability to regulate billboards due to their peculiar nature).

Mobile Oil Co. v. Township of Westtown, 345 A.2d 313 (Pa. 1975). (500 foot spacing requirement between gas stations was not unconstitutional).


Nagorny v. Zoning Hearing Board of Springfield Township, 4 Pa. Commw. 133, 286 A.2d 493 (Commw. Ct. 1972). (citing O’Hara, court held that dirt, hazards, etc. of development, alone, were insufficient to refuse owner the right to use his land).

Pincus v. Power, 376 Pa. 175, 101 A.2d 914 (1954). (NAL; only substantial hardship justifies a variance).

Robert Louis Corp. v. Board of Adjustment of Radnor Township, 1 Pa. Commw. 292, 274 A.2d 551 (Commw. Ct. 1971). (zoning requirement of 20,000 sq. ft. lot sizes was not unconstitutional because "homogeneity is a proper aim of the zoning process").

Schiller-Pfeiffer v. Upper, 1 Pa. Commw. 588, 276 A.2d 334 (Commw. Ct. 1971). (NAL; held that zoning ordinance limiting additions to 50% of present square footage was valid and constitutional).


Schubach v. Silver, 336 A.2d 328 (Pa. 1975). (NAL; rezoning of land next to commercially zoned land was proper).

Silver v. Zoning Board of Adjustment, 381 Pa. 41, 112 A.2d 84 (1955). (NAL; regulation of billboards is an acceptable exercise of police power).


Tidewater Oil Co. v. Poore, 385 Pa. 89, 149 A.2d 636 (1959). (NAL; held that even if industrial development trend exists, township can decide to stop it, court cannot reverse).

Township of Neville v. Exxon Corp., 322 A.2d 144 (Pa. 1974). (where developers fail to show that they can develop within the zoning requirements, a permit may be denied).

Township of Willistown v. Chesterdale Farms, Inc., 7 Pa. Commw. 453, 300 A.2d 107 (Commw. Ct. 1973). (city can’t so stringently limit apartment development as to be discriminatory or allow it only on unsuitable land).

Walnut & Quince Streets Corp. v. Mills, 303 Pa. 25, 154 A. 29 (1931). (legislature and municipality have power to regulate aesthetics over public property; citing Civello).

RHODE ISLAND

Blackstone Park Improvement Association v. State Board of Standards and Appeals, 448 A.2d 1233 (R.I. 1982). (NAL; under the circumstances, state was immune to city zoning ordinance).

Horton v. Old Colony Bill Posting Co., 36 R.I. 507, 90 A. 822 (1914). (NAL; upheld restrictions on billboards because of HSM goals met by the ordinance).

SOUTH CAROLINA

No cases.

SOUTH DAKOTA

Chokecherry Hills Estates, Inc. v. Deuel County, 294 N.W.2d 657 (S.D. 1980). (NAL; upheld denial of zoning change request to protect shoreland since change would only benefit landowner by pecuniary gain).

State Theatre Co. v. Smith, 276 N.W.2d 259 (S.D. 1979). (NAL; upholding zoning generally).

TENNESSEE

Mobile Home City of Chattanooga v. Hamilton County, 552 S.W.2d 86 (Tenn. 1976). (NAL; sustained ordinance requiring mobile homes not in a trailer park to be located on 5-acre plots of land).

Spencer-Sturla Co. v. City of Memphis, 155 Tenn. 70, 290 S.W. 608 (1927). (NAL; upholding zoning generally).

TEXAS

City of Corpus Cristi v. Jones, 144 S.W.2d 401 (Tex. Civ. App. 1940). (NAL; upholding validity of amendments to zoning ordinance but invalid as applied to landowner).

City of University Park v. Benners, 485 S.W.2d 773 (Tex. 1972). (NAL; upheld municipality’s ability to declare a non-conforming use and terminate it after a certain time period).

Ex parte Savage, 63 Tex. Crim. 285, 141 S.W. 244 (Crim. App. 1911). (NAL; upheld municipal authority (as authorized by statute) to use police power to regulate billboards, etc.).

Fidelity and Guaranty Insurance Underwriters v. McManus, 633 S.W.2d 790 (Tex. 1982). (NAL; upheld municipality’s ability to exercise police power in regulating mobile homes).

Gullo v. City of West University Place, 214 S.W.2d 851 (Tex. Civ. App. 1948). (NAL; upheld subdivision section of ordinance).

Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 483 (1934). (NAL; upholding zoning generally).

Lubbock Poster Co. v. City of Lubbock, 569 S.W.2d 935 (Tex. Civ. App. 1978). (NAL; upheld local regulation of billboards and signs as part of comprehensive zoning plan).

Murmur Corp. v. Board of Adjustment of City of Dallas, 718 S.W.2d 790 (Tex. Civ. App. 1986). (NAL; upheld non-conforming use restrictions after landowners had opportunity to recoup investments).

Pharr v. Tippit, 616 S.W.2d 173 (Tex. 1981). (NAL; city can review design of proposed development because of zoning change which allowed such development).


Thompson v. City of Carrollton, 211 S.W.2d 970 (Tex. Civ. App. 1948). (LAL; upheld minimum floor space requirement since ordinance designed to protect property values; citing Connor).

UTAH


VERMONT

City of Rutland v. Keiffer, 205 A.2d 400 (Vt. 1964). (NAL; upholding municipality’s ability to regulate trailer parks).

City of Rutland v. McDonald’s Corp., 503 A.2d 1138 (Vt. 1985). (NAL; procedural regarding sufficiency of findings for denial; no default grant of permit if findings are deficient).

DeWitt v. Brattleboro Zoning Board of Adjustment, 128 Vt. 313, 262 A.2d 472 (1970). (NAL; regarding a non-conforming use; city did not have power to expand area used for gas station).

Kelbro v. Myrick, 30 A.2d 527 (Vt. 1943). (NAL; involved alleged right to put up billboards, denied by court, no constitutional violation by legislature in statute prohibiting them).

Smith v. Town of St. Johnsbury, 554 A.2d 233 (Vt. 1988). (NAL; procedural regarding submission of selectmen’s decision to populus for vote).
VIRGINIA

Flannery v. City of Norfolk, 216 Va. 362, 218 S.E.2d 730 (1975). (NAL; upheld conviction of landowner under ordinance prohibiting the "keeping of a disorderly house").


WASHINGTON

Cougar Mountain Associates v. King County, 111 Wash. 2d 742, 765 P.2d 264 (1988). (NAL; erroneous standard of review applied therefore county erred procedurally in denying application for subdivision.

Mathewson v. Primeau, 395 P.2d 189 (Wash. 1964). (LAL; unsightliness did not rise to the level of nuisance).

Norco Construction, Inc. v. King County, 649 P.2d 103 (Wash. 1982). (NAL; board could not defer ruling beyond the limit prescribed by law).

Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987). (NAL; connection between public purpose of preserving natural state of bay and legislation was sufficient).

Radach v. Gunderson, 39 Wash. App. 392, 695 P.2d 128 (Ct. App. 1985). (NAL; neighbors were entitled to damages where city failed to enforce setback requirement and new constriction violated the line).


WEST VIRGINIA


Chapman v. Huntington Housing Authority, 121 W. Va. 319, 3 S.E.2d 502 (1939). (slum-clearance and low cost housing legislation is within the police power).


Koblegard v. Hale, 60 W. Va. 37, 53 S.E. 793 (1906). (NAL; neighbor could not claim nuisance against neighbor’s unusually high fence).

Ritz v. Woman’s Club of Charleston, 114 W. Va. 675, 173 S.E. 564, 182 S.E. 92 (1934). (dances at clubhouse constituted a nuisance and were required to end at 9 P.M.).

State ex rel. MacQueen v. City of Dunbar, 278 S.E.2d 636 (W. Va. 1981). (NAL; voters were not entitled to referendum on amendment to zoning ordinance).

WISCONSIN

Boden v. City of Milwaukee, 8 Wis. 2d 318, 99 N.W.2d 156 (1959). (NAL; upheld zoning law requiring minimum maintenance standards for housing in general).

City of Whitewater v. Vivid, Inc., 140 Wis. 2d 612, 412 N.W.2d 519 (1987). (NAL; billboard owner was not entitled to compensation when ordered to remove billboard from city property).

Kamrowski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1966). (LAL; regarding eminent domain, state can condemn scenic easements if compensation is paid).

State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974). (NAL; amending "common enemy" doctrine which creates state’s right as trustee to sue to protect public lands).

State v. Ozaukee County Board of Adjustment, 152 Wis. 2d 552, 449 N.W.2d 47 (1989). (NAL; board was not entitled to grant variances for shopping mall in flood plain).

State v. Trudeau, 139 Wis. 2d 91, 408 N.W.2d 337 (1987). (NAL; county could not grant variance for development on lake bed when prohibited by state).


State ex rel. Miller v. Mandus, 2 Wis. 2d 365, 86 N.W.2d 469 (1957). (NAL; upheld zoning law which ensured promotion of economic interests of the general public).

State ex rel. Wisconsin Lutheran High School Conference v. Sinar, 267 Wis. 91, 65 N.W.2d 43 (1954). (NAL; upheld zoning classification which permitted public but not private high school in residential districts).

WYOMING

Hillmer v. McConnell Bros., 414 P.2d 973 (Wyo. 1966). (NAL; but police power extends as far as legislature determines is necessary to abate public nuisances).