

AESTHETIC ZONING

Zoning restrictions on the private use and enjoyment of property for the benefit of the community are employed virtually everywhere in this country today.¹ But zoning purely for aesthetic purposes² is judicially sanctioned in only a handful, although an increasing handful, of jurisdictions.³ On the one side of the issue lies the individual property owner's freedom to make aesthetic judgments and, on the other side, the community's power to determine its aesthetic environment.⁴ Opponents of aesthetic zoning argue that broad agreement upon standards of beauty is impossible because tastes vary widely from individual to individual,⁵ that sufficiently precise standards are impossible to formulate,⁶ that

1. See generally 1 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 1.02, 1.11 (1968) [hereinafter cited as ANDERSON]; 8 E. MCQUILLIN, *LAW OF MUNICIPAL CORPORATIONS* §§ 25.01-.04 (3d ed. 1965) [hereinafter cited as MCQUILLIN].

2. "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." *Sundeen v. Rogers*, 83 N.H. 253, 258, 141 A. 142, 144 (1928). See also Agnor, *Beauty Begins a Comeback: Aesthetic Considerations in Zoning*, 11 J. PUB. L. 260 (1962); Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218, 218-19 (1955) [hereinafter cited as Dukeminier]; Norton, *Police Power, Planning and Aesthetics*, 7 SANTA CLARA LAW. 171, 171-72 (1967); Comment, *Zoning, Aesthetics, and the First Amendment* 64 COLUM. L. REV. 81, 82 n.8 (1964) [hereinafter cited as Comment, *Zoning, Aesthetics, and the First Amendment*].

3. MCQUILLIN, *supra* note 1, § 25.31; Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1441-42 (1973) [hereinafter cited as Note, *Beyond the Eye of the Beholder*].

4. Comment, *Zoning, Aesthetics, and the First Amendment*, *supra* note 2.

5. See, e.g., *Mayor & Council of Wilmington v. Turk*, 14 Del. Ch. 392, 407, 129 A. 512, 518 (Ch. 1925); *Forbes v. Hubbard*, 348 Ill. 166, 181, 180 N.E. 767, 773 (1932); *Stoner McCray Sys. v. City of Des Moines*, 247 Iowa 1313, 1319, 78 N.W.2d 843, 848 (1956); *Mayor & City Council of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 92, 299 A.2d 828, 835 (1973); *City of Passaic v. Patterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 287, 62 A. 267, 268 (Cl. Err. & App. 1905); *People v. Stover*, 12 N.Y.2d 462, 471-73, 191 N.E.2d 272, 277-78, 240 N.Y.S.2d 734, 741-43 (1963) (Van Voorhis, J., dissenting); *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 76, 192 N.E.2d 74, 81 (1963) (Corrigan, J., dissenting); *Appeal of Medinger*, 377 Pa. 217, 226, 104 A.2d 118, 122 (1954); Comment, *The Aesthetic Factor in Zoning*, 11 DUQUESNE L. REV. 204, 206-07 (1972) [hereinafter cited as Comment, *The Aesthetic Factor in Zoning*]; Comment, *Aesthetics as a Zoning Consideration*, 13 HASTINGS L.J. 374, 375, 377 (1962); Note, *Beyond the Eye of the Beholder*, *supra* note 3, at 1442.

6. Comment, *Zoning, Aesthetics, and the First Amendment*, *supra* note 2, at 84. But see Note, *Beyond the Eye of the Beholder*, *supra* note 3, at 1448-56.

aesthetic zoning is liable to discriminatory use and enforcement,⁷ and that it has a tendency to stifle imagination and create monotony.⁸ Proponents, on the other hand, argue that without aesthetic zoning, interesting and unusual neighborhoods,⁹ historical sites,¹⁰ scenic areas,¹¹ and tourist attractions¹² will be destroyed, that property values and the tax base will be eroded,¹³ and in general, that the community

7. *State ex rel. State Selected Properties, Inc. v. Gottfried*, 163 Ohio St. 469, 471, 127 N.E.2d 371, 373 (1955); Comment, *Zoning, Aesthetics, and the First Amendment*, *supra* note 2, at 84; 27 WASH. & LEE L. REV. 303, 308-09 (1970).

8. *See, e.g.*, *People v. Stover*, 12 N.Y.2d 462, 472, 191 N.E.2d 272, 278, 240 N.Y.S.2d 734, 742 (1963) (Van Voorhis, J., dissenting); *Presnell v. Leslie*, 3 N.Y.2d 384, 394, 144 N.E.2d 381, 387, 165 N.Y.S.2d 488, 497 (1957) (Van Voorhis, J., dissenting); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 76, 192 N.E.2d 74, 81 (1963) (Corrigan, J., dissenting); Note, *Beyond the Eye of the Beholder*, *supra* note 3, at 1461. Some municipalities have employed aesthetic zoning to prevent excessive similarity in subdivision areas. *See* Anderson, *Architectural Controls*, 12 SYRACUSE L. REV. 26, 30 (1960).

9. *See, e.g.*, *Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917); *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W.2d 206 (1968); *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970); *Village of Larchmont v. Sutton*, 30 Misc. 2d 245, 217 N.Y.S.2d 929 (Sup. Ct. 1961); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963).

10. *See* note 41 *infra*.

11. *See, e.g.*, *Desert Outdoor Advertising, Inc. v. County of San Bernardino*, 255 Cal. App. 2d 765, 63 Cal. Rptr. 543 (Dist. Ct. App. 1968); *County of Santa Barbara v. Purcell, Inc.*, 251 Cal. App. 2d 169, 59 Cal. Rptr. 345 (Dist. Ct. App. 1967); *Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964); *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 187, 193 N.E. 799, 816-17 (1935); *Opinion of the Justices*, 103 N.H. 268, 270, 169 A.2d 762, 764 (1961). *See also* *Mayor & City Council of Baltimore v. Mano Swartz, Inc.* 268 Md. 79, 92, 299 A.2d 828, 835 (1973).

12. *See* note 42 *infra*.

13. *See, e.g.*, *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935); *Vickers v. Township Comm.*, 37 N.J. 232, 248, 181 A.2d 129, 137 (1962); *People v. Stover*, 12 N.Y.2d 462, 466, 191 N.E.2d 272, 275, 240 N.Y.S.2d 734, 737 (1963); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 267-70, 69 N.W.2d 217, 220-22 (1955); McQUILLIN, *supra* note 1, § 25.25; Agnor, *supra* note 2, at 272-73; Anderson, *supra* note 8, at 42-44; Steinbach, *Aesthetic Zoning: Property Values and the Judicial Decision Process*, 35 Mo. L. REV. 176 (1970); Turnbull, *Aesthetic Zoning*, 7 WAKE FOREST L. REV. 230 (1971) [hereinafter cited as Turnbull]; Comment, *Zoning, Aesthetics, and the First Amendment*, *supra* note 2, at 91; Comment, *The Aesthetic Factor in Zoning*, *supra* note 5, at 223-33.

"The beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents, and it sustains in a general way the value of property in the neighborhood. It is therefore as much a matter of general welfare as is any other condition that fosters comfort or happiness, and consequent values generally of the property in the neighborhood." *State ex rel. Civello v. City of New Orleans*, 154 La. 271, 284, 97 So. 440, 444 (1923). This argument, however, is two-sided: zoning can depress property values when it prevents development which is generally beneficial and desired. *See* 27 WASH. & LEE L. REV. 303 (1970).

will be visually polluted.¹⁴

In *Westfield Motor Sales Co. v. Town of Westfield*¹⁵ the Superior Court of New Jersey upheld a zoning ordinance limiting the size, number, and placement of signs in various districts of the town.¹⁶ Plaintiff car dealer had been denied a permit to erect five signs,¹⁷ each of which exceeded in area the ten-square-foot maximum,¹⁸ in place of fifteen old and unsightly signs on the premises.¹⁹ A variance was also denied.²⁰ The proposed signs were not essential to the car dealer's business; rather, their purpose was to make the premises more attractive, to maintain sales volume, and to create uniformity of dealership signs throughout the country.²¹ The plaintiff alleged that the ordinance, as a purely aesthetic regulation unrelated to the preservation of property values, was an arbitrary and discriminatory exercise of the police power in violation of New Jersey law.²² The town insisted that the ordinance

14. See generally National Environmental Policy Act of 1969 § 101(b), 42 U.S.C. § 4331(b) (1970); Federal-Aid Highway Act of 1968, § 18, 23 U.S.C. § 138 (1970); Note, *Aesthetic Considerations in Land Use Regulation*, 2 WILLAMETTE L.J. 420, 431-32 (1963).

15. 129 N.J. Super. 528, 324 A.2d 113 (L. Div. 1974).

16. *Id.* at 530-35, 324 A.2d at 114-17. Plaintiff challenged the regulations on signs in the business area, which permitted: one wall sign, not exceeding the length of the wall or a height of three feet, at each main entrance of the premises; two signs, together not exceeding ten square feet in area, painted on doors or windows; signs painted on windows to give notice of sales or special functions, not exceeding 30% of the window area nor displayed for more than 75 days each year; and one free-standing sign, not exceeding ten square feet in area, at each entrance to the parking lot. Wall signs could not project beyond the top or end of the wall nor more than five inches outward from the surface. After testimony that it was realistically impossible to meet the five-inch projection limitation because industry standards mandated that internally illuminated signs be at least six inches thick, the town admitted that this provision was unreasonable and agreed to revise it. *Id.* at 534, 545, 324 A.2d at 117, 123.

17. *Id.* at 530, 532-33, 324 A.2d at 114, 115-16.

18. *Cf.* *Sunad, Inc. v. City of Sarasota*, 122 So. 2d 611 (Fla. 1960) (court invalidated as unreasonable an ordinance limiting wall signs not located at point of sale to 300 square feet and free-standing, non-point of sale signs to 180 square feet).

19. 129 N.J. Super. at 530, 324 A.2d at 114. Under the ordinance plaintiff was not required to remove nonconforming signs; the ordinance applied only to new signs.

20. *Id.* at 534, 324 A.2d at 116.

21. *Id.*

22. *Id.* at 534, 538-39, 544, 324 A.2d at 116-17, 119, 122. The New Jersey zoning statute provides:

Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, flood, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or

was necessary to preserve its colonial atmosphere.²³ Declaring that “[z]oning solely for aesthetic purposes is an idea whose time has come,”²⁴ the court departed from the state’s long-standing rule against it.

By restricting certain uses to certain areas, zoning regulations are designed to promote health, safety and convenience, to protect the usefulness, value and enjoyment of property, and to ensure orderly community growth.²⁵ Usually, they employ a pyramidal scheme of ascending exclusiveness: areas zoned at the base of the pyramid permit a fairly broad range of residential, commercial and industrial uses, while areas zoned at the apex permit only single-family residential use, sometimes with a minimum lot-size requirement.²⁶ The typical scheme “prefers” residential over commercial uses and commercial over industrial uses. Even at the base of the pyramid there are usually some restrictions on the property owner’s freedom of use.²⁷

Due process and equal protection attacks²⁸ on the *concept* of zoning were laid to rest in *Village of Euclid v. Ambler Realty Co.*²⁹ In upholding the village’s comprehensive zoning scheme, the United States Supreme Court subordinated the interest of the company in obtaining a higher price for the land if it were sold for industrial, rather than for residential use, to the interest of the community in protecting the health and welfare

buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.

N.J. STAT. ANN. § 40:55-32 (1967).

23. 129 N.J. Super. at 534, 324 A.2d at 116.

24. *Id.* at 539, 324 A.2d at 119.

25. See 1 ANDERSON, *supra* note 1, §§ 7.01-.11, 7.23, 7.25-.36; McQUILLIN, *supra* note 1, §§ 25.17, 25.20-.28.

26. See generally 1 & 2 ANDERSON, *supra* note 1, §§ 8.22-.36.

27. See, e.g., McQUILLIN, *supra* note 1, §§ 25.96-.146.

28. See U.S. CONST. amend. XIV, § 1.

29. 272 U.S. 365 (1926). Zoning ordinances carry a heavy presumption of validity. See, e.g., 1 ANDERSON, *supra* note 1, §§ 2.01, 2.14; McQUILLIN, *supra* note 1, §§ 25.05, 25.34. For years, since *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Supreme Court refused to hear a single case challenging the validity of a zoning ordinance. In 1974 the Court decided *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), upholding an ordinance restricting land use to single-family dwellings and defining “family” to mean either one or more persons related by blood, marriage, or adoption or not more than two persons not so related.

of its residents.³⁰ The Court thus enshrined the power to zone within the states' police power,³¹ the power to regulate conduct in order to promote health, safety, morals and the general welfare.³²

Because the state or community interest asserted in *Euclid* was the protection of health and safety, the Court did not address the question of aesthetic zoning. Zoning solely for aesthetics could be justified only, if at all, by the general welfare interest of the community.³³ *Euclid*, therefore, did not alter judicial resistance to aesthetic zoning, perhaps best expressed by the Supreme Court of New Jersey in 1905:

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.³⁴

The New Jersey opinion illustrates the early, extreme position that an ordinance motivated largely by aesthetic considerations is invalid.³⁵ In

30. 272 U.S. at 395-97. See 1 ANDERSON, *supra* note 1, §§ 2.19, 2.21-23; McQUILLIN, *supra* note 1, §§ 25.40-41.

31. "With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions . . . The power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human progress." *City of Aurora v. Burns*, 319 Ill. 84, 93-94, 149 N.E. 784, 788 (1925). See also *Gorieb v. Fox*, 274 U.S. 603, 605 (1927); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88, 395 (1926); *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911).

32. See, e.g., *House v. Mayes*, 219 U.S. 270, 282 (1911); *Barbier v. Connolly*, 113 U.S. 27, 31 (1885); *Munn v. Illinois*, 94 U.S. 113, 124-25 (1876). Compare *Mayor & Council of Wilmington v. Turk*, 14 Del. Ch. 392, 401-02, 129 A. 512, 516 (Ch. 1925), with *Berman v. Parker*, 348 U.S. 26 (1954). See also 1 ANDERSON, *supra* note 1, §§ 7.01-.03, 7.12, 7.25-.36; McQUILLIN, *supra* note 1, §§ 25.17-.28.

33. See 1 & 2 ANDERSON, *supra* note 1, §§ 7.12, 9.01-45.

34. *City of Passaic v. Patterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 287, 62 A. 267, 268 (Ct. Err. & App. 1905).

35. *Id.* at 285, 62 A. at 267. See, e.g., *Varney & Green v. Williams*, 155 Cal. 318, 100 P. 867 (1909); *Curran Bill Posting & Distrib. Co. v. City of Denver*, 47 Colo. 221, 107 P. 261 (1910); *Crawford v. City of Topeka*, 51 Kan. 756, 33 P. 476 (1893); *State ex rel. M. Wineburgh Advertising Co. v. Murphy*, 195 N.Y. 126, 88 N.E. 17 (1909); *National Land & Inv. Co. v.*

time, however, most courts came to accept aesthetics as a valid secondary purpose.³⁶ If the ordinance could be supplied with a plausible non-aesthetic purpose to promote the health, safety, morals or general welfare of the community, it was usually upheld. This remains the majority rule today: An aesthetic purpose alone does not justify a zoning ordinance which imposes restrictions upon private property; the ordinance must serve a non-aesthetic purpose as well.³⁷ Some courts, however, accept a minimal non-aesthetic purpose to uphold an aesthetic ordinance,³⁸ and some even accept a totally fictional non-aesthetic purpose.³⁹ Moreover, some courts have recognized exceptions to the ban on purely aesthetic zoning — in the regulation of signs and billboards⁴⁰

Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965); Comment, *Zoning, Aesthetics, and the First Amendment*, *supra* note 2, at 83-84; Comment, *The Aesthetic Factor in Zoning*, *supra* note 5, at 206-10.

36. "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." *Perlmutter v. Green*, 259 N.Y. 327, 332, 182 N.E. 5, 6 (1932). *McQUILLIN*, *supra* note 1, §§ 25.29-30 and cases cited; see *Dukeminier*, *supra* note 2, at 219-20; Comment, *Zoning, Aesthetics, and the First Amendment*, *supra* note 2, at 83-84; Comment, *The Aesthetic Factor in Zoning*, *supra* note 5, at 206-10; Note, *Beyond the Eye of the Beholder*, *supra* note 3, at 1439, 1441 & n.13, 1456-57; Annot., 21 A.L.R.3d 1222, 1226-35 (1968).

37. See 1 *ANDERSON*, *supra* note 1, §§ 7.12, 7.16-.23; *McQUILLIN*, *supra* note 1, §§ 25.29-30; Annot., 21 A.L.R.3d 1222 (1968).

38. The billboard cases, note 40 *infra*, demonstrate reliance upon minimal non-aesthetic purposes. See 1 *ANDERSON*, *supra* note 1, § 7.15; *McQUILLIN*, *supra* note 1, § 25.31; *Hershman*, *Beauty as the Subject of Legislative Control*, 15 *PRAC. LAW.* 20, 21-22 (Feb. 1969); Comment, *The Aesthetic Factor in Zoning*, *supra* note 5, at 207.

39. When counts have had the opportunity to utilize the aesthetic factor and conceptually clarify its basic essence, they have often avoided the real aesthetic issue by resourcefully providing an expedient alternative to justify the exercise of the police power and to substantiate the result achieved. Consequently, courts have conveniently furnished a genesis of conflicting attitudes which reveal an artfully manipulative sophistry and subtly cavalier indifference. . . .

Comment, *The Aesthetic Factor in Zoning*, *supra* note 5, at 204. "An analysis of the . . . cases indicates that aesthetic zoning has been given judicial approbation only when clothed with other legal raiment which masked its true purpose." *Westfield Motor Sales Co. v. Town of Westfield*, 129 N.J. Super. 528, 539, 324 A.2d 113, 119 (L. Div. 1974). See, e.g., 1 *ANDERSON*, *supra* note 1, §§ 7.12, 7.23; *Dukeminier*, *supra* note 2, at 218; *Landels*, *Zoning: An Analysis of Its Purposes and Its Legal Sanctions*, 17 *A.B.A.J.* 163 (1931); Comment, *Zoning, Aesthetics, and the First Amendment*, *supra* note 2, at 85.

40. See, e.g., *Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917); *In re Wilshire*, 103 F. 620 (S.D. Cal. 1900); *Desert Outdoor Advertising v. County of San Bernardino*, 255 Cal. App. 2d 765, 63 Cal. Rptr. 543 (Dist. Ct. App. 1967); *Cochran v. Preston*, 108 Md. 220, 70 A. 113 (1908); *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935); *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W.2d 206 (1968); *St. Louis Gunning Advertising Co. v. City of St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911); *New York State Thruway Authority v. Ashley Motor Court*,

and in the protection of historical sites⁴¹ and tourist areas.⁴² Indeed, some of the majority rule states give aesthetic zoning the strongest possible approval short of independent status.⁴³ Given the proper fact situation and a well-drawn ordinance, a number of these states might well change the rule and permit aesthetic zoning per se.

Proponents of aesthetic zoning have long urged a more forthright acceptance of its value and function in modern zoning law.⁴⁴ Support for

Inc., 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961); *City of Rochester v. West*, 164 N.Y. 510, 58 N.E. 673 (1900); *Norate Corp. v. Zoning Bd. of Adjustment*, 417 Pa. 397, 207 A.2d 890 (1965). *But see City of Santa Barbara v. Modern Neon Co.*, 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (Dist. Ct. App. 1961); *Mayor & City Council of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 299 A.2d 828 (1973). *See also Highway Beautification Act of 1965*, § 101(b), 23 U.S.C. § 131(b) (1970).

Billboard controls are not actually an exception to the ban on aesthetic zoning, but they have been upheld so often on health, safety, or morals grounds, often questionable and sometimes laughable, that there is seldom serious debate on the issue of regulation. *See Cusack Co. v. City of Chicago*, *supra* at 529; *St. Louis Gunning Advertising Co. v. City of St. Louis*, *supra* at 145, 137 S.W. at 942. "[R]ealistically, the primary objective of any anti-billboard ordinance is an esthetic one." *Cromwell v. Ferrier*, 19 N.Y.2d 263, 269, 225 N.E.2d 749, 753, 279 N.Y.S.2d 22, 27 (1967). No court in recent times has invalidated an ordinance prohibiting billboards in residential areas. *Holme, Billboards & On-Premise Signs: Regulation and Elimination under the Fifth Amendment*, in *INST. ON PLANNING, ZONING & EMINENT DOMAIN PROCEEDINGS* 247, 269 (1974).

41. *See, e.g., City of New Orleans v. Levy*, 223 La. 14, 64 So. 2d 798 (1953); *City of New Orleans v. Pergament*, 198 La. 852, 5 So. 2d 129, (1941); *Opinion of the Justices*, 333 Mass. 783, 128 N.E.2d 563 (1955); *Opinion of the Justices*, 333 Mass. 773, 128 N.E.2d 557 (1955); *Town of Deering ex rel. Bittenbender v. Tibbetts*, 105 N.H. 481, 202 A.2d 232 (1964); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964); *Manhattan Club v. Landmarks Preservation Comm'n*, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Supp. Ct. 1966); 2 ANDERSON, *supra* note 1, §§ 8.53-55; *Turnbull, supra* note 13, at 230; *Note, The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963); 29 FORDHAM L. REV. 729 (1961).

42. *See, e.g., Merritt v. Peters*, 65 So. 2d 861 (Fla. 1953); *City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364 (1941). *See also General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935); *Mayor & City Council of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 299 A.2d 828 (1973); *Turnbull, supra* note 13.

43. *See, e.g., City of Phoenix v. Fehlner*, 90 Ariz. 13, 363 P.2d 607 (1961); *Bachman v. State*, 235 Ark. 339, 359 S.W.2d 815 (1962); *Petition of Franklin Builders, Inc.*, 58 Del. 173, 207 A.2d 12 (1964); *Sunad, Inc. v. City of Sarasota*, 122 So. 611 (Fla. 1960); *Rothenberg v. City of Fort Pierce*, 202 So. 2d 782 (Fla. Dist. Ct. App. 1967); *Jasper v. Commonwealth*, 375 S.W.2d 709 (Ky. Ct. App. 1964); *Sun Oil Co. v. City of Madison Heights*, 41 Mich. App. 47, 199 N.W.2d 525 (1972); *State ex rel. Wilkerson v. Murray*, 471 S.W.2d 460 (Mo. 1971); *Piper v. Meredith*, 110 N.H. 291, 266 A.2d 103 (1970); *Town of Deering ex rel. Bittenbender v. Tibbetts*, 105 N.H. 481, 202 A.2d 232 (1964); *State v. Buckley*, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955). *See generally* Annot., 21 A.L.R.3d 1222 (1968).

44. *See, e.g., Dukeminier, supra* note 2, at 219; *Norton, supra* note 2, at 182, 187; *Steinbach, supra* note 13, at 186.

this view has often been claimed in Justice Douglas' remarks in *Berman v. Parker*.⁴⁵

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.⁴⁶

Justice Douglas was speaking, however, about a compensated taking under the eminent domain power of the federal government and not about an uncompensated taking under the police power of the state.⁴⁷ *Berman* by no means provides a new definition of the general welfare sanctioning aesthetic regulation for any and all occasions.

Nevertheless, some state courts have interpreted *Berman* as the sign to change the rule against aesthetic zoning. The first state to move in this direction was New York, in *People v. Stover*.⁴⁸ The court in *Stover* upheld an ordinance prohibiting clotheslines in front and side yards abutting a street. The test of validity, the court held, was whether the regulation is a reasonable method "of achieving an attractive, efficiently functioning, properous community — and *not* upon whether the objects were primarily aesthetic."⁴⁹ *Stover*, however, did not endorse aesthetics unequivocally as the sole basis of a valid zoning ordinance. The endorsement was tempered by a concern for the effect of the offending use upon property values,⁵⁰ a concern which many courts have voiced in upholding aesthetically based zoning.⁵¹ Four years later, in *Cromwell v. Ferrier*,⁵² the New York court proclaimed aesthetics a fully independent basis for zoning. Upholding a complete prohibition

45. 348 U.S. 26 (1954).

46. *Id.* at 33 (citation omitted). See also McQUILLIN, *supra* note 1, §§ 25.19-20.

47. See 1 ANDERSON, *supra* note 1, § 7.14; McQUILLIN, *supra* note 1, § 25.42; Agnor, *supra* note 2, at 278; Steinbach, *supra* note 13, at 178-79.

48. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963). See generally Anderson, *Regulation of Land Use for Aesthetic Purposes—An Appraisal of People v. Stover*, 15 SYRACUSE L. REV. 26 (1963); Comment, *Zoning, Aesthetics, and the First Amendment*, *supra* note 2.

49. 12 N.Y.2d 462, 467, 191 N.E.2d 272, 275, 240 N.Y.S.2d 734, 738.

50. *Id.* at 466, 191 N.E.2d at 274, 240 N.Y.S.2d at 737.

51. See note 13 *supra*.

52. 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

on off-premise signs and billboards, the court based its decision upon their increasing visual offensiveness and their decreasing effectiveness compared with other advertising media.⁵³ In the last decade, Oregon,⁵⁴ Hawaii,⁵⁵ and most recently, New Jersey⁵⁶ have followed New York's lead and found aesthetic zoning within the general welfare.⁵⁷ As such, aesthetic zoning must satisfy due process and equal protection requirements for police power enactments generally: it must serve a public, and not a private interest;⁵⁸ it must be rationally formulated⁵⁹ and fairly administered;⁶⁰ and the means chosen must be rationally calculated to achieve the desired purpose.⁶¹

At the time of *Westfield* the New Jersey court's approach was to view property values as a matter of general welfare and to uphold zoning regulations designed to preserve them.⁶² On this basis it is of course

53. *Id.* at 271-72, 225 N.E.2d at 754-55, 279 N.Y.S.2d at 29.

54. *Oregon City v. Hartke*, 240 Ore. 35, 400 P.2d 255 (1965) (ordinance excluding wrecking yards from city).

55. *State v. Diamond Motors, Inc.*, 50 Hawaii 33, 429 P.2d 825 (1967) (ordinance limiting size and height of outdoor signs in industrial areas).

56. *Westfield Motor Sales Co. v. Town of Westfield*, 129 N.J. Super. 528, 324 A.2d 113 (L. Div. 1974); *see note 16 supra*.

57. Presumably, Washington, D.C., also permits aesthetic zoning per se under *Berman* although as pointed out, *see note 47* and accompanying text *supra*, the case involved eminent domain and not zoning. *See also note 43* and accompanying text *supra*.

58. *See, e.g.*, *Thompson v. Consolidated Gas Util. Corp.*, 300 U.S. 55, 77-81 (1937); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *Munn v. Illinois*, 94 U.S. 113, 133 (1876); *McQUILLIN, supra note 1*, §§ 25.19, 25.42.

59. *See, e.g.*, *Panhandle E. Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613 (1935); *Nebbia v. New York*, 291 U.S. 502 (1934); *House v. Mayes*, 219 U.S. 270 (1911); *McQUILLIN, supra note 1*, §§ 25.18, 25.42-43.

60. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); I ANDERSON, *supra note 1*, § 5.17; *McQUILLIN, supra note 1*, §§ 25.34, 25.42, 25.61-62.

61. *See, e.g.*, *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915); *McQUILLIN, supra note 1*, §§ 25.18, 25.42.

62. *See note 22 supra*. In *Westfield* the court stated, 129 N.J. Super. at 537-38, 324 A.2d at 118-19, that the *Passaic* rationale, *see note 34* and accompanying text *supra*, was followed until 1952, at which time the court adopted a broad view of the general welfare and upheld an ordinance fixing minimum floor space for various types of housing: "[S]o long as the ordinance was reasonably designed, by whatever means, to further the advancement of a community as a social, economic and political unit, it is in the general welfare and therefore a proper exercise of the zoning power." *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 172, 89 A.2d 693, 697 (1952). "The unique feature of *Lionshead*," said the *Westfield* court, "was that it focused attention upon the interrelationship of aesthetic considerations and property values." 129 N.J. Super. at 538, 324 A.2d at 119. In *United Advertising Corp. v. Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964), the state supreme

possible to justify a great deal of aesthetic zoning, for almost every zoning enactment, from the regulation of yard set-backs to industrial uses, has an impact on both the aesthetics and the economics of the community.⁶³ The Supreme Court of New Jersey, ten years before, had upheld an ordinance banning all off-premise advertising signs in a small, image-conscious, residential community like Westfield, saying: "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."⁶⁴ Justice Hall, the lone dissenter in the case, would have based the decision squarely upon aesthetics alone.⁶⁵ Apparently his argument convinced the *Westfield* court, for it could have upheld the ordinance on the established rationale of protecting property values in the business district, or in adjacent residential areas onto which large signs would project, or in the community as a whole. Instead, the court attributed the ordinance to "aesthetic considerations alone"⁶⁶ and found these a sufficient end in themselves.

The court criticized the bulk of prior decisions on aesthetic zoning as obscure, old-fashioned and timid.⁶⁷ Initially, the court pointed out, zoning ordinances enacted for aesthetic purposes were struck down as a deprivation of property without due process.⁶⁸ Thereafter many courts found they could circumvent the due process obstacle in one of two ways: either by expanding the general welfare concept to permit aesthetic

court declared, surprisingly, in view of the clarity and prominence of *Passaic*: "[T]he issue [of aesthetic zoning] may be said to be unexplored in our State," and then went on to uphold a ban on off-premise signs on the *Lionshead* rationale. *Id.* at 5, 198 A.2d at 449.

63. See, e.g., *Metromedia, Inc. v. City of Pasadena*, 216 Cal. App. 2d 270, 273, 30 Cal. Rptr. 731, 733 (Dist. Ct. App.), *appeal dismissed*, 376 U.S. 186 (1963); *United Advertising Corp. v. Metuchen*, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964); *Westfield Motor Sales Co. v. Town of Westfield*, 129 N.J. Super. 528, 542, 324 A.2d 113, 121 (L. Div. 1974); *People v. Stover*, 12 N.Y.2d 462, 471, 191 N.E.2d 272, 277, 240 N.Y.S.2d 734, 741 (1963) (Van Voorhis, J., dissenting); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955); 1 ANDERSON, *supra* note 1, § 7.12; Anderson, *supra* note 3; Norton, *supra* note 2, at 172; Turnbull, *supra* note 13; Note, *Beyond the Eye of the Beholder*, *supra* note 3, at 1451-52; Comment, *Zoning: Aesthetics: The Chameleon of Zoning*, 4 TULSA L.J. 48, 54 (1967); 59 NW. U.L. REV. 372 (1964).

64. *United Advertising Corp. v. Metuchen*, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964).

65. *Id.* at 10-11, 198 A.2d at 452 (Hall, J., dissenting) (contending that ordinance does not effectually regulate on-premise advertising and hence discriminates unfairly against off-premise advertising).

66. 129 N.J. Super. at 535, 324 A.2d at 117.

67. *Id.* at 538-44, 324 A.2d at 119, 122.

68. *Id.* at 534, 324 A.2d at 117-18; see note 35 *supra*.

zoning directed at the protection of property values or by acquiescing in the disguise of the aesthetic purpose of the ordinance beneath a dubious health or safety justification.⁶⁹ By legitimizing aesthetic zoning per se, the court proposed to end these "subterfuges."⁷⁰ At the same time, the court insisted that the concept of the general welfare had evolved to the point that it could attend directly to the aesthetic well-being of the community.⁷¹

In freeing aesthetic zoning from the requirement of a non-aesthetic justification, the court also freed aesthetic zoning from limitations as to scope and application. Recognizing the significance of this step, the court cautioned that aesthetic zoning must be subject to "proper safeguard."⁷² The court, however, gave no intimation of any such safeguard, except for scrutiny by the courts as to the reasonableness of the ordinance in achieving its goals.⁷³ Such a standard does not address the prior question of the reasonableness of the goals, and it provides little direction for judging, drafting, or challenging aesthetic zoning legislation. Moreover, as a general rule, the court will not interfere with the legislative determination of goals and the means to effect them unless they are clearly arbitrary.⁷⁴ Even so, the victim of unreasonable aesthetic zoning is benefited by the court's decision to the extent that he can concentrate his challenge on the reasonableness of the ordinance without confronting health, safety or economic justifications invented for the sake of the lawsuit.⁷⁵

69. *Id.* at 536-39, 324 A.2d at 118-19; *see* notes 38-39 *supra*.

70. *Id.* at 539, 324 A.2d at 119.

71. *Id.* at 539-41, 324 A.2d at 120-21. *See, e.g.*, *Berman v. Parker*, 348 U.S. 26 (1954); *State v. Diamond Motors, Inc.*, 50 Hawaii 33, 429 P.2d 825 (1967); *State ex rel. Civello v. City of New Orleans*, 154 La. 271, 97 So. 440 (1923); *Opinion of the Justices*, 333 Mass. 773, 128 N.E.2d 557 (1955); *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935); *Baddour v. City of Long Beach*, 279 N.Y. 167, 18 N.E.2d 18 (1938); *People v. Rubinfeld*, 254 N.Y. 245, 172 N.E. 485 (1930); *Wulfsohn v. Burden*, 241 N.Y. 288, 150 N.E. 120 (1925); *Oregon City v. Hartke*, 240 Ore. 35, 400 P.2d 255 (1965); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955).

72. 129 N.J. Super. at 539, 324 A.2d at 119.

73. *Id.* at 544, 324 A.2d at 122. On reasonableness as a measure of zoning validity *see* McQUILLIN, *supra* note 1, § 25.43. *See also* note 29 *supra*.

74. 129 N.J. Super. 544-45, 324 A.2d at 122-23. *See, e.g.*, *Nebbia v. New York*, 291 U.S. 502 (1934); *Gorieb v. Fox*, 274 U.S. 603 (1927); *United Advertising Corp. v. Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964).

75. 129 N.J. Super. at 543-44, 324 A.2d at 122. *See* Anderson, *Regulation of Land Use for Aesthetic Purposes — An Appraisal of People v. Stover*, 15 SYRACUSE L. REV. 26, 33-40 (1963).

The ordinance upheld in *Westfield* would not itself seem unduly restrictive or oppressive. While limiting the size,⁷⁶ number and placement of signs, it leaves the businessman free to put on his signs whatever he chooses. Moreover, the ordinance provides for variances in cases of hardship. Nor is the ordinance entirely without benefit to the businessman; it reduces the costly and self-defeating competition for the biggest and best sign. Perhaps, too, the ordinance will strengthen Westfield's business community by creating an environment especially appreciated by some shoppers. An ordinance which prohibited all signs in the business district, with no provision for variances, would be an entirely different matter.⁷⁷ The difficulty with the court's opinion is that it provides no means of distinguishing between reasonable and unreasonable aesthetic restrictions.

In view of the aesthetic-economic interrelationship of zoning enactments, the judicial tendency to classify them as one or the other and to admit some, but not others, to the general welfare class is at times difficult to understand. Similarly, the *Westfield* court's effort to disentangle aesthetics and property values seems more than the situation requires.⁷⁸ Furthermore, most of the arguments against aesthetic zoning are readily answered. Recent studies indicate that even in the subjective area of aesthetic judgment, it is possible to achieve a fairly high degree of consensus on architectural and scenic beauty.⁷⁹ Some measure of protection against unreasonable and capricious regulations is provided by constitutional due process and equal protection.⁸⁰ The confiscatory effect of aesthetic zoning can be mitigated, at least in part, by a reasonable period of amortization for non-conforming uses.⁸¹ If the

76. See note 16 *supra*. Note that the ordinance, while limiting to three feet the height of a sign mounted to a wall at an entrance, does not limit the length of the sign, and thus, would permit a fairly large sign on a long wall. A model ordinance for regulating signs is proposed in W. EWALD & D. MANDELKER, *STREET GRAPHICS* 85-105 (1971).

77. See Note, *Beyond the Eye of the Beholder*, *supra* note 3, at 1458.

78. Some courts and writers suggest the two should not be disentangled, that effect upon property values operates as a practical measure of and restraint upon aesthetic regulation. See note 13 *supra*.

79. Kaplan, Kaplan & Wendt, *Rated Preference and Complexity for Natural and Urban Visual Material*, 12 *PERCEPTION & PSYCHOPHYSICS* 354 (1972); Shafer, Hamilton & Schmidt, *Natural Landscape Preferences: A Predictive Model*, 1 *J. LEISURE RESEARCH* 1 (1969); Note, *Beyond the Eye of the Beholder*, *supra* note 3, at 1442-48. See also Dukeminier, *supra* note 2, at 226-27.

80. See notes 58-61 and accompanying text *supra*.

81. Note that in the *Westfield* ordinance there was an unlimited period of amortization

individual's right of aesthetic judgment is worth protecting, so too is the community's interest in exercising some control over judgments that affect it.⁸² Much of the problem here, with regard not only to the issue of aesthetic freedom, but also to the issues of consensus, due process, and confiscation, arises from judicial failure to develop criteria for evaluating the reasonableness of aesthetic regulations. This failure results from the uncritical classification of ordinances merely as aesthetic or non-aesthetic in purpose. Not all aesthetic regulations deprive the individual of aesthetic freedom or of the use of his property to the same extent, nor do they all demand an unreasonable and rigid conformity. Greater accommodation is possible, one suspects, between the aesthetic interests of the individual and the community, both in states which do permit aesthetic zoning and in states which do not, than has been achieved or often supposed.

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as the ordinance applied only to new signs. See note 19 *supra*. New York City and Prince George's County, Md., provide abatements on real estate taxes to encourage preservation of historic sites and scenic areas, respectively. Hershman, *supra* note 38, at 30, 33. Hershman cites with dismay *Joseph E. Seagram & Sons, Inc. v. Tax Comm'n*, 18 App. Div. 2d 109, 238 N.Y.S.2d 228, *aff'd*, 14 N.Y.2d 314, 200 N.E.2d 447, 251 N.Y.S.2d 460 (1963), in which the court approved a higher assessment than usual on the Seagram Building, because of its "prestige" value, thereby discouraging architectural excellence. Hershman, *supra* note 38, at 33-34. See Hagman, *Open Space Planning and Property Taxation: Some Suggestions*, 1964 WIS. L. REV. 628; Moore, *The Acquisition and Preservation of Open Lands*, 23 WASH. & LEE L. REV. 274, 280 (1966); 9 URBAN L. ANN. 303 (1975). Of course the community could also purchase property it wanted to protect, but such a course is not possible for most communities. See generally 1 ANDERSON, *supra* note 1, §§ 6.64-.71. Less costly alternatives are purchase of conservation easements and compensatory regulations. See Note, *Aesthetic Considerations in Land Use Planning*, 35 ALBANY L. REV. 126, 143-44 (1970).

82. See, e.g., 1 ANDERSON, *supra* note 1, § 7.24; McQUILLIN, *supra* note 1, §§ 25.40-41.

