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# You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review

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# YOU CAN'T BUILD THAT HERE: THE CONSTITUTIONALITY OF AESTHETIC ZONING AND ARCHITECTURAL REVIEW

## INTRODUCTION

Traditionally, property owners had an unfettered right to use, enjoy and dispose of their property.[1] The advent of zoning laws, however, curtailed this freedom.[2] Zoning regulations routinely legislate possible uses, area requirements, building height, light and air access, open space, and peace and quiet.[3]

Aesthetic zoning attempts to legislate aspects of community beauty.[4] Originally, courts rejected zoning based solely on aesthetics[5] because aesthetics were considered a luxury that should not be permitted to infringe upon an owner's property rights.[6] To circumvent unfavorable judicial treatment, communities enacted regulations that combined aesthetic goals with some health, safety, moral or general welfare objective[7] permitted under the state's police power.[8]

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1. *See* Spann v. City of Dallas, 111 Tex. 350, 355, 235 S.W. 513, 514-15 (1921); R. Cunningham, W. Stoebuck & D. Whitman, The Law of Property § 7.2, at 413 (1984).

2. Courts have approved zoning limitations on the use of land. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (single-family zone excluding more than two unrelated people in one house); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (regulation limiting the industrial use of land).

3. *See* 1 N. Williams & J. Taylor, American Planning Law §§ 9.01-9.25 (1988).

4. Aesthetic zoning is simply zoning for aesthetic purposes. Aesthetic has been defined as "[r]elating to that which is beautiful or in good taste." Black's Law Dictionary 52 (5th ed. 1979); *see also* Sundeen v. Rogers, 83 N.H. 253, 141 A. 142, 144 (1928) ("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.").

5. *See, e.g.*, Spann v. City of Dallas, 111 Tex. 350, 357, 235 S.W. 513, 516 (1921) ("it is not the law . . . 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"); *see also* 1 E. Ziegler, Rathkopf's The Law of Zoning and Planning § 14.02, at 14-11 - 14-14 (1975) (discussion of early views of aesthetic regulation).

6. *See* City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 72 N.J.L. 285, 287, 62 A. 267, 268 (1905) (overruled by State v. Miller, 83 N.J. 402, 416 A.2d 821 (1980)); *see also* Crumplar, *Architectural Controls: Aesthetic Regulation of the Urban Environment*, 6 Urb. Law. 622, 622 (1974) (description of early judicial view of aesthetics as luxury).

7. *See, e.g.*, State v. Kievman, 116 Conn. 458, 464-65, 165 A. 601, 604 (1933) (junkyard regulation upheld as safety and welfare measure); Chicago Park Dist. v. Canfield, 370 Ill. 447, 455, 19 N.E.2d 376, 380-81 (1939) (use of public parks is general welfare concern); Kenyon Peck, Inc. v. Kennedy, 210 Va. 60, 64-65, 168 S.E.2d 117, 121 (1969) (advertising sign regulation upheld on safety justification).

This Note does not address ordinances designed to promote or preserve a community interest in tourism or the historic value of the community. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978) (preservation of historic structures and areas); Bachman v. State, 235 Ark. 339, 341, 359 S.W.2d 815, 817 (1962) (tourism); South of Second Assocs. v. Georgetown, 196 Colo. 89, 94, 580 P.2d 807, 811 (1978) (en banc) (historic value); Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 195 Colo. 44, 51, 575 P.2d 835, 841 (en banc) (tourism), *appeal dismissed*, 439 U.S. 809

In 1954, the United States Supreme Court decided *Berman v. Parker*.[9] In dictum,[10] *Berman* indicated that the concept of general welfare could include aesthetic values. Courts have used this dictum to uphold zoning based solely on aesthetic considerations.[11]

After *Berman*, several views developed concerning the propriety of zoning based on aesthetics alone. Currently, twelve states do not permit zoning based solely on aesthetics[12] while eleven states allow zoning based

(1978); Figarsky v. Historic Dist. Comm'n, 171 Conn. 198, 210, 368 A.2d 163, 169-70 (1976) (historic value).

8. For a discussion of police power, see *infra* notes 19-28 and accompanying text.

9. 348 U.S. 26 (1954). For further discussion of *Berman*, see *infra* notes 81-82, 90-96 and accompanying text.

10. *Berman* dealt with health, safety and aesthetic factors of slum clearance and was an eminent domain action under the fifth amendment of the Constitution. *See* Berman v. Parker, 348 U.S. 26, 31 (1954). For the text of the dictum, see *infra* note 82 and accompanying text.

11. *See, e.g., In re* Franklin Builders, 58 Del. 173, 201-02, 207 A.2d 12, 26-27 (1964) (aesthetics alone a valid purpose of billboard regulation); John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 369 Mass. 206, 218, 339 N.E.2d 709, 717 (1975) (aesthetics alone will support sign regulation); Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 143-44, 646 P.2d 565, 570-71 (1982) (same); Oregon City v. Hartke, 240 Or. 35, 47-50, 400 P.2d 255, 261-63 (1965) (en banc) (aesthetics alone validly supports junkyard regulation).

Many state courts have also seized upon dicta in *Berman* to uphold zoning regulations in which aesthetics is only a factor. *See, e.g.*, Dawson Enter. Inc. v. Blaine County, 98 Idaho 506, 517-18, 567 P.2d 1257, 1269 (1977); Houston v. Board of City Comm'rs, 218 Kan. 323, 329, 543 P.2d 1010, 1016 (1975); Sun Oil Co. v. City of Madison Heights, 41 Mich. App. 47, 53, 199 N.W.2d 525, 529 (1972); State Highway Comm'n v. Roberts Enter., Inc., 304 So. 2d 637, 639-40 (Miss. 1974); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741, 757 (N.D. 1978), *appeal dismissed*, 440 U.S. 901 (1979), *aff'd on other grounds*, 317 N.W.2d 810 (N.D. 1982); Department of Ecology v. Pacesetter Constr. Co., 89 Wash. 2d 203, 211, 571 P.2d 196, 200 (1977) (en banc); Farley v. Graney, 146 W. Va. 22, 41-42, 119 S.E.2d 833, 845 (1960).

12. *See* Bachman v. State, 235 Ark. 339, 341, 359 S.W.2d 815, 816-17 (1962); DeMaria v. Enfield Planning & Zoning Comm'n, 159 Conn. 534, 541, 271 A.2d 105, 108 (1970); State Bank and Trust Co. v. Village of Wilmette, 358 Ill. 311, 319, 193 N.E. 131, 134 (1934); Mayor of Baltimore v. Mano Swartz, Inc., 268 Md. 79, 86, 299 A.2d 828, 832 (1973); Hitchman v. Township of Oakland, 329 Mich. 331, 338, 45 N.W.2d 306, 310 (1951); Pearce v. Village of Edina, 263 Minn. 553, 569, 118 N.W.2d 659, 670 (1962); City of Jackson v. Bridges, 243 Miss. 646, 656, 139 So. 2d 660, 664 (1962); Baker v. Somerville, 138 Neb. 466, 471, 293 N.W. 326, 328-29 (1940); State *ex rel.* Dep't of Transp. v. Pile, 603 P.2d 337, 342-43 (Okla. 1979), *cert. denied*, 453 U.S. 922 (1981); Rogalski v. Upper Chichester Township, 406 Pa. 550, 555, 178 A.2d 712, 714 (1962); Spann v. City of Dallas, 111 Tex. 350, 360, 235 S.W. 513, 516 (1921); Board of Supervisors v. Rowe, 216 Va. 128, 145, 216 S.E.2d 199, 213 (1975).

In addition, courts in fourteen states have noted in dicta that zoning based on aesthetics alone may be improper. *See* South of Second Assocs. v. Georgetown, 196 Colo. 89, 94, 580 P.2d 807, 811 (1978) (en banc); Dawson Enter., Inc. v. Blaine County, 98 Idaho 506, 517-18, 567 P.2d 1257, 1269 (1977); General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 94, 172 N.E. 309, 312 (1930); Stoner McCray Sys. v. City of Des Moines, 247 Iowa 1313, 1319, 78 N.W.2d 843, 848 (1956); City of New Orleans v. Levy, 223 La. 14, 30-31, 64 So. 2d 798, 802 (1953); Warren v. Municipal Officers, 431 A.2d 624, 629 n.6 (Me. 1981); Board of County Comm'rs v. CMC of Nevada, Inc., 99 Nev. 739, 743, 670 P.2d 102, 105 (1983); Piper v. Meredith, 110 N.H. 291, 297-98, 266 A.2d 103, 106 (1970); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741, 757 (N.D. 1978),

on aesthetic factors alone.[13]

Architectural review is one example of zoning based on aesthetics.[14] Many communities have established architectural review boards solely to evaluate the visual design of new structures.[15] These boards regulate aes-

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*appeal dismissed*, 440 U.S. 901 (1979), *aff'd on other grounds*, 317 N.W.2d 810 (N.D. 1982); Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 73, 458 N.E.2d 852, 856-57, *appeal dismissed*, 467 U.S. 1237 (1984); Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 69, 192 N.E.2d 74, 78 (1963); City of Providence v. Stephens, 47 R.I. 387, 393, 133 A. 614, 617 (1926); Vermont Salvage Corp. v. Village of St. Johnsbury, 113 Vt. 341, 351, 34 A.2d 188, 195 (1943); Duckworth v. City of Bonney Lake, 91 Wash. 2d 19, 30, 586 P.2d 860, 868 (1978) (en banc); Farley v. Graney, 146 W. Va. 22, 39-40, 119 S.E.2d 833, 848 (1960).

13. *See* Novi v. City of Pacifica, 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439, 441 (1985); *In re* Franklin Builders, 58 Del. 173, 200-01, 207 A.2d 12, 27 (Super. Ct. 1964); City of Lake Wales v. Lamar Advertising Ass'n, 414 So. 2d 1030, 1032 (Fla. 1982); Moore v. Ward, 377 S.W.2d 881, 886-87 (Ky. 1964); Jasper v. Commonwealth, 375 S.W.2d 709, 711 (Ky. 1964); John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 369 Mass. 206, 219-21, 339 N.E.2d 709, 717-18 (1975); State v. Bernhard, 173 Mont. 464, 468, 568 P.2d 136, 138 (1977); Westfield Motor Sales Co. v. Town of Westfield, 129 N.J. Super. 528, 535, 324 A.2d 113, 117 (Law Div. 1974); People v. Stover, 12 N.Y.2d 462, 468, 191 N.E.2d 272, 275-76, 240 N.Y.S.2d 734, 738-39 (1963), *appeal dismissed*, 375 U.S. 42 (1963); Oregon City v. Hartke, 240 Or. 35, 49, 400 P.2d 255, 262-63 (1965) (en banc); Buhler v. Stone, 533 P.2d 292, 294 (Utah 1975); *cf.* State v. Jones, 305 N.C. 520, 530, 290 S.E.2d 675, 681 (1982) (regulation based on aesthetics may be valid depending upon balance of private and public interest); Goodman Toyota, Inc. v. City of Raleigh, 63 N.C. App. 660, 663-4, 306 S.E.2d 192, 194 (N.C. Ct. App. 1983) (reasonable aesthetic regulation valid in advertising sign case).

In addition, nine jurisdictions have stated in dicta that regulation based solely on aesthetics is proper. *See* City of Scottsdale v. Arizona Sign Ass'n, 115 Ariz. 233, 234-35, 564 P.2d 922, 923-24 (Ct. App. 1977); Berman v. Parker, 348 U.S. 26, 33 (1954); Corey Outdoor Advertising, Inc. v. Board of Zoning Adjustment, 254 Ga. 221, 224, 327 S.E.2d 178, 182, *appeal dismissed*, 474 U.S. 802 (1985); State v. Diamond Motors, Inc., 50 Hawaii 33, 36, 429 P.2d 825, 827 (1967); Houston v. Board of City Comm'rs, 218 Kan. 323, 328-29, 543 P.2d 1010, 1016 (1975); State *ex rel.* Wilkerson v. Murray, 471 S.W.2d 460, 462 (Mo.), *cert. denied*, 404 U.S. 851 (1971); Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 144, 646 P.2d 565, 571 (1982); State v. Smith, 618 S.W.2d 474, 477 (Tenn. 1981); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 270, 69 N.W.2d 217, 222, *cert. denied*, 350 U.S. 841 (1955).

When weighing the validity of an aesthetic zoning regulation, courts that approve aesthetics as a sole factor also consider whether the ordinance is reasonable. *See, e.g.*, Westfield Motor Sales Co. v. Town of Westfield, 129 N.J. Super. 528, 543-45, 324 A.2d 113, 122 (Law Div. 1974) (assessing reasonableness of ordinance based solely on aesthetics); Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 73, 458 N.E.2d 852, 857, *appeal dismissed*, 467 U.S. 1237 (1984) (finding appropriate standards for architectural review decision).

14. *See* E. Ziegler, *supra* note 5, § 14.04, at 14-34. *See also infra* notes 33-34 and accompanying text (discussing effect of architectural review).

15. *See, e.g.*, Mamaroneck Local Law No. 1, §§ 3-4 (N.Y. 1973) (establishing review board to judge effects of any new building, structure, or sign on surrounding areas); East Aurora Local Law No. 5, §§ 2-3 (N.Y. 1972) (review board established to prevent excessive similarity, dissimilarity, or inappropriateness); Clarkstown Local Law No. 4, §§ 3.3 (N.Y. 1971) (board created may disapprove of structures); *see also* Anderson, *Architectural Controls*, 12 Syracuse L. Rev. 26, 29 (1960) (describing role of architectural review boards). Boards also usually have jurisdiction over proposed additions to existing structures. *See* Mamaroneck Local Law No. 1, § 5 (N.Y. 1973).

According to one study, over 500 municipalities now have architectural review boards.

thetics by refusing to approve building permits for unacceptable structures.[16] Because they function under an ordinance as arbiters of "proper" architectural appearance, the purpose of these boards is solely aesthetic.[17]

This Note examines the validity of zoning regulation based on aesthetics alone and focuses on the validity of architectural review ordinances. Part I discusses the extension of zoning into aesthetic regulation and architectural review. Part II examines decisions holding that zoning based solely on aesthetics is improper. Part III explains the rationales of cases permitting zoning based on aesthetics alone. Part IV concludes that zoning regulation, and especially architectural review, based on aesthetics, infringes on an owner's liberty and property rights and is antithetical to our constitutional scheme. Part IV also suggests an alternative to public regulation of aesthetics that will protect the rights of individual property owners.

## I. BACKGROUND: THE EXTENSION OF ZONING INTO AESTHETICS AND ARCHITECTURAL REVIEW

### A. *Zoning*

In *Village of Euclid v. Ambler Realty Co.*,[18] the United States Supreme Court decided that regulating building height, area and use through zon-

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*See* Crumplar, *supra* note 6, at 622 (citing Resource Management Corp., Design Review Board Survey, 1969 (unpublished study prepared for American Institute of Architects)); *see also* Kolis, *Architectural Expression: Police Power and the First Amendment*, 16 Urb. Law Ann. 273, 275-76 (1979) (discussing proliferation of design review ordinances).

16. *See* Mamaroneck Local Law No. 1, § 6 (N.Y. 1973); East Aurora Local Law No. 5, §§ 2-3 (N.Y. 1972); Clarkstown Local Law No. 4, §§ 3.3 (N.Y. 1971); *see also* State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 311 (Mo. 1970) (architectural review board has power to deny permit); Anderson, *supra* note 15, at 29 (same).

17. Guidelines for the board vary among ordinances. In one ordinance, disapproval could result from:

> Inappropriateness of a structure or land development in relation to any other structure or land development existing within five hundred feet . . . in respect to one or more of the following features:
>
> (1) cubical contents;
>
> (2) gross floor area;
>
> (3) height of building or height of roof;
>
> (4) other significant design features such as material or quality of architectural design . . .

Putnam Valley Local Law No. 6, § 5(b) (N.Y. 1972). Another ordinance set out the following guidelines:

> (1) whether the proposed house meets the customary architectural requirements in appearance and design for a house of the particular type which is proposed (whether it be Colonial, Tudor English, French Provincial, or Modern), (2) whether the proposed house is in general conformity with the style and design of surrounding structures, and (3) whether the proposed house lends itself to the proper architectural development of the City . . . .

*Stoyanoff*, 458 S.W.2d at 308 (Mo. 1970). For further description of the scope of permissible review by architectural review boards, see *infra* notes 37-42 and accompanying text.

18. 272 U.S. 365 (1926).

ing was a proper legislative function.[19] In *Euclid*, Justice Sutherland found authorization for zoning in the police power of a state.[20] He outlined the standards for declaring provisions unconstitutional under the police power: "[B]efore the ordinance can be declared unconstitutional, [it must be shown] that such provisions are clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare."[21]

State courts construing *Euclid* have required zoning regulations to have some basis in the health,[22] safety,[23] morals[24] or general welfare[25] aspect of the police power. Although general welfare is an important police power objective, it remains an amorphous term.[26] The *Euclid* decision underscored the elastic nature of the general welfare in the area of

19. *See id.* at 396-97. *Euclid* remains the single most influential zoning case. As one commentator noted, "Sixty years after the Court's approval of zoning, *Euclid* endures as substance and symbol, despite waves of demographic, economic and political change." *See* C. Haar & M. Wolf, Land Use Planning 372 (4th ed. 1989). The type of zoning that was approved in the *Euclid* case became the basis for almost all subsequent zoning in the United States. *See id.* In fact, zoning according to a common plan is called "Euclidean" zoning. *See id.*

20. *See Euclid*, 272 U.S. at 387. The police power is "that power required to be exercised in order to effectually discharge within the scope of the constitutional limitations [a state's] paramount obligation to promote and protect the public health, safety, morals, comfort and general welfare of the people." Sinclair Ref. Co. v. City of Chicago, 178 F.2d 214, 216 (7th Cir. 1949); *see also Euclid*, 272 U.S. at 395 (exercise of police power supported by considerations of health, safety, morals or general welfare). The police power derives from the sovereign powers of each state, verified by the tenth amendment of the United States Constitution. *See* R. Cunningham, W. Stoebuck & D. Whitman, *supra* note 1, § 9.2, at 516. The police power is effectively used to control growth in local areas. *See Euclid*, 272 U.S. at 394; *see also* R. Epstein, Takings 107-08 (explaining benefits derived from exercise of police power).

21. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

22. When zoning is rationally related to health considerations, the regulation will be upheld. *See Euclid*, 272 U.S. at 391; N. Williams & J. Taylor, *supra* note 3, § 8.02.

23. *See* Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82 (1946). In *Euclid*, safety concerns validly helped support the exercise of the police power. The Court upheld the ordinance partly because the plan afforded easier fire protection, tended to prevent traffic accidents, and preserved a better environment for safe child-rearing. *See Euclid*, 272 U.S. at 394.

24. Moral objectives rarely support the exercise of the police power in zoning cases. *See* N. Williams & J. Taylor, *supra* note 3, at § 8.03.

25. *See, e.g.*, Anderson v. City of Cedar Rapids, 168 N.W.2d 739, 742 (Iowa 1969) (ordinance must be related to either health, safety, morals or general welfare); Warren v. Municipal Officers, 431 A.2d 624, 627 (Me. 1981) (ordinance valid because related to general welfare); Baker v. Somerville, 138 Neb. 466, 472, 293 N.W. 326, 328 (1940) (ordinance must be related to health, safety, morals or general welfare).

General welfare has been considered to include factors such as protection of property values, general convenience and spiritual or spacial relationships of a community. *See* State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 265, 69 N.W.2d 217, 220 (preserve property values), *cert. denied*, 350 U.S. 841 (1955); R. Cunningham, W. Stoebuck & D. Whitman, *supra* note 1, § 9.2 n.1 (public convenience); Berman v. Parker, 348 U.S. 26, 30-32 (1954) (spiritual and spacial relationships). Some commentators claim general welfare provides an umbrella which covers health, safety and morals beneath it. *See* N. Williams & J. Taylor, *supra* note 3, § 13.02.

26. *See infra* notes 51-52 and accompanying text.

zoning: general welfare can stretch or shrink to embrace the situation.[27] In this spirit, some courts have expanded the general welfare concept to include the power to uphold zoning based solely on aesthetics.[28]

### B. *Aesthetic Regulation*

While the *Euclid* case upheld area, use and height restrictions implemented according to a comprehensive community plan, the case did not address aesthetic zoning.[29] Over the years, municipalities have developed three main types[30] of aesthetic regulation: controls on billboard and sign advertising,[31] regulation of junkyards,[32] and architectural review regulation.[33]

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27. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926). In *Euclid*, Justice Sutherland declared: "The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." *Id.*

28. *See supra* note 11 and accompanying text.

29. *See Euclid*, 272 U.S. 365.

30. In addition to these three types, municipalities have also regulated various other areas based on aesthetics. *See, e.g.*, Gionfriddo v. Town of Windsor, 137 Conn. 701, 702, 81 A.2d 266, 267 (1951) (regulation of used car sales lot); City of Coral Gables v. Wood, 305 So. 2d 261, 262-63 (Fla. Dist. Ct. App. 1974) (regulation mandating enclosures for camper vehicles); Gouge v. City of Snellville, 249 Ga. 91, 92, 287 S.E.2d 539, 541 (1982) (regulation of satellite antenna placement); Warren v. Municipal Officers, 431 A.2d 624, 629-30 (regulation of factory-built housing); Wright v. Michaud, 160 Me. 164, 173, 200 A.2d 543, 548 (1964) (mobile home regulation); Ottawa County Farms, Inc. v. Polkton Township, 131 Mich. App. 222, 225, 345 N.W.2d 672, 674 (1983) (regulation of landfill placement); People v. Stover, 12 N.Y.2d 462, 464, 191 N.E.2d 272, 274, 240 N.Y.S.2d 734, 736 (regulation of clotheslines), *appeal dismissed*, 375 U.S. 42 (1963); Presnell v. Leslie, 3 N.Y.2d 384, 387, 144 N.E.2d 381, 384, 165 N.Y.S.2d 488, 492 (1957) (regulation of radio tower); Redevelopment Auth. v. Woodring, 60 Pa. Commw. 234, 236, 430 A.2d 1243, 1244 (1981) (regulation of redevelopment and underground power lines), *aff'd*, 498 Pa. 180, 445 A.2d 724 (1982).

31. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981) (part of billboard regulation upheld by plurality); International Co. v. City of Miami Beach, 90 So. 2d 906, 907 (Fla. 1956) (upheld commercial sign regulation); Stoner McCray Sys. v. City of Des Moines, 247 Iowa 1313, 1315, 78 N.W.2d 843, 845 (1956) (found billboard regulation unconstitutional); John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 369 Mass. 206, 207, 339 N.E.2d 709, 711 (1975) (upheld regulation reasonably excluding certain billboards).

32. *See, e.g.*, Bachman v. State, 235 Ark. 339, 340, 359 S.W.2d 815, 817 (1962) (invalidated junkyard ordinance); Jasper v. Commonwealth, 375 S.W.2d 709, 711 (Ky. 1964) (same); State v. Bernhard, 173 Mont. 464, 471, 568 P.2d 136, 140 (1977) (regulation of automobile junkyard upheld); Oregon City v. Hartke, 240 Or. 35, 38-41, 400 P.2d 255, 260-61 (1965) (en banc) (upheld junkyard regulation).

33. *See, e.g.*, City of Scottsdale v. Arizona Sign Ass'n, Inc., 115 Ariz. 233, 234, 564 P.2d 922, 923 (Ct. App. 1977) (would uphold design regulation); Novi v. City of Pacifica, 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439, 441 (1985) (anti-similarity ordinance upheld); City of West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 863-64, 30 So. 2d 491, 492 (1947) (architectural ordinance invalid because not grounded in health, safety, morals or welfare); State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 312 (Mo. 1970) (architectural ordinance upheld on general welfare grounds); Morris County Fair Housing Council v. Boonton Township, 230 N.J. Super. 345, 357, 553 A.2d 814, 821 (App. Div. 1989) (county with no architectural review ordinance cannot impose architectural requirements); Morristown Rd. Assoc. v. Mayor of Bernardsville, 163 N.J. Super. 58, 59-

Typical architectural review regulations seek to control the appearance of structures within a given area or community.[34] In anticipation of litigation, ordinances often list evils that they seek to eradicate.[35] Predictably, these ordinances also routinely claim to protect the health, safety, morals and general welfare of the community's inhabitants.[36]

There are several variations of architectural design regulations. Some ordinances contain anti-similarity provisions permitting an architectural board to disapprove a permit for excessive similarity to any other standing or approved structure within a specified distance.[37] These provisions are designed to avoid block after block of homogeneous housing. In contrast, other communities have established regulations prohibiting excessive differences between structures.[38] These provisions seek to encourage some amount of homogeneity. Another type of ordinance prohibits building of structures that are "inappropriate" in design.[39] Finally, some communities enact statutes which, oddly enough, simultaneously prohibit excessive similarity, dissimilarity, and inappropriateness to the area.[40] All of these architectural review ordinances generally give the board of review[41] power to approve or deny an owner's building permit

62, 394 A.2d 157, 158-60 (Law Div. 1978) (architectural ordinance failed due to vague standards); Hankins v. Borough of Rockleigh, 55 N.J. Super. 132, 137, 150 A.2d 63, 66 (Super. Ct. App. Div. 1959) (arbitrary and unreasonable architectural review ordinance struck down); Old Farm Rd., Inc. v. Town of New Castle, 26 N.Y.2d 462, 465, 259 N.E.2d 920, 921, 311 N.Y.S.2d 500, 502 (1970) (dictum stating that aesthetic considerations in architectural review not unlawful per se); Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 70, 458 N.E.2d 852, 854 (architectural review ordinance upheld on aesthetic and property valuation factors), *appeal dismissed*, 467 U.S. 1237 (1984).

34. *See* Anderson, *supra* note 15, at 26.

35. For example, ordinances cite the avoidance of the following as goals: excessive building incongruity, degeneration of property, instability of property values and imbalances between tax revenue and cost of services. *See, e.g.*, Mamaroneck Local Law No. 1, § 2 (N.Y. 1973) (excessive building incongruity and instability of property values); East Aurora Local Law No. 5, § 1 (N.Y. 1972) (degeneration of property and instability of property values); Putnam Valley Local Law No. 6, § 1 (N.Y. 1972) (inappropriate or poor quality of design, property devaluation, property degeneration and tax-services imbalance); *Village of Hudson*, 9 Ohio St. 3d at 70-71, 458 N.E.2d at 854 (property devaluation); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 265, 69 N.W.2d 217, 219 (same), *cert. denied*, 350 U.S. 841 (1955).

36. *See* Putnam Valley Local Law No. 6, § 1 (N.Y. 1972); East Aurora Local Law No. 5, § 1 (N.Y. 1972); *Stoyanoff*, 458 S.W.2d at 306-07; *Village of Hudson*, 9 Ohio St. 3d at 70, 458 N.E.2d at 854.

This explicit statement of health, safety, moral and general welfare purpose is simply a drafting tool designed as a hedge against possible invalidation in court. *See* Bachman v. State, 235 Ark. 339, 341, 359 S.W.2d 815, 816 (1962).

37. *See* East Aurora Local Law No. 5, § 3(a) (N.Y. 1972); *see also* N. Williams & J. Taylor, *supra* note 3, § 71C.01, at 57-58 (concise discussion of "look different" provisions).

38. *See* State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 307-08 (Mo. 1970); *see also* N. Williams & J. Taylor, *supra* note 3, § 71C.01 (concise discussion of "look alike" provisions).

39. *See* Putnam Valley Local Law No. 6, § 5(b) (N.Y. 1972).

40. *See* Mamaroneck Local Law No. 1, § 6 (N.Y. 1973).

41. Board composition can vary. Some ordinances mandate architect participation

application based on these aesthetic standards.[42]

## II. PROHIBITION OF ZONING BASED ON AESTHETICS ALONE

States have relied on several rationales to prohibit zoning based solely on aesthetic considerations. For example, some of these courts find that purely aesthetic regulation is not a valid assertion of the police power[43] and that it exceeds the proper role of government.[44] Other courts have held that aesthetic zoning is based on subjective factors[45] that defy attempts to find reasonable standards.[46] Abuse of discretion and corruption are dangerous byproducts of such regulation.[47] Finally, some courts have suggested that zoning based on aesthetics alone infringes on personal freedom.[48]

Regulation based on aesthetics alone does not fall under the traditional police power categories of health, safety or morals.[49] Many states also find that protection of aesthetic value alone is not a valid general welfare purpose.[50] "General welfare" is a very broad, unclear term.[51] Courts can use general welfare as a catchall to constitutionalize otherwise invalid purposes.[52] Not surprisingly, architectural review ordinances often claim to have a valid general welfare purpose.[53] However, a preamble's mere statement of a "general welfare" purpose cannot guarantee the true

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on the board. *See* State *ex rel.* Saveland Holding Corp. v. Wieland, 269 Wis. 262, 265, 69 N.W.2d 217, 219, *cert. denied*, 350 U.S. 841 (1955); Kolis, *supra* note 15, at 303. Other ordinances require either architect participation or participation of persons with some other expertise in the building field. *See* East Aurora Local Law No. 5, § 2 (N.Y. 1972).

42. *See supra* note 16 and accompanying text.

43. *See infra* notes 49-55 and accompanying text.

44. *See infra* notes 56-59 and accompanying text.

45. *See infra* notes 61-65 and accompanying text.

46. *See infra* notes 66-71 and accompanying text.

47. *See infra* notes 71-76 and accompanying text.

48. *See infra* notes 59-80 and accompanying text.

49. *See* Forbes v. Hubbard, 348 Ill. 166, 181, 180 N.E. 767, 773 (1932); Anderson v. City of Cedar Rapids, 168 N.W.2d 739, 742 (Iowa 1969); Warren v. Municipal Officers, 431 A.2d 624, 629, n.6 (Me. 1981) (citing Wright v. Michaud, 160 Me. 164, 200 A.2d 543 (1964)); Mayor of Baltimore v. Mano Swartz, Inc., 268 Md. 79, 87, 299 A.2d 828, 832 (1973); Pearce v. Village of Edina, 263 Minn. 553, 569, 118 N.W.2d 659, 670 (1962); Baker v. Somerville, 138 Neb. 466, 472, 293 N.W. 326, 328 (1940); City of Providence v. Stephens, 47 R.I. 387, 393, 133 A. 614, 617 (1926).

50. *See* State v. Kievman, 116 Conn. 458, 465, 165 A. 601, 604 (1933); State Bank & Trust Co. v. Village of Wilmette, 358 Ill. 311, 319, 193 N.E. 131, 134 (1934); Byrne v. Maryland Realty Co., 129 Md. 202, 211, 98 A. 547, 549 (1916); Mayor of Baltimore v. Mano Swartz, Inc., 268 Md. 79, 87, 299 A.2d 828, 832 (1973); Montgomery County v. Citizens Bldg. & Loan Ass'n, Inc., 20 Md. App. 484, 490, 316 A.2d 322, 324 (1974); Hitchman v. Oakland Township, 329 Mich. 331, 338, 45 N.W.2d 306, 310 (1951); Pearce v. Village of Edina, 263 Minn. 553, 569, 118 N.W.2d 659, 670 (1962); Baker v. Somerville, 138 Neb. 466, 471, 293 N.W. 326, 328 (1940); Board of Supervisors v. Rowe, 216 Va. 128, 145, 216 S.E.2d 199, 213 (1975).

51. *See* Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 Vand. L. Rev. 603, 604 (1981).

52. *See* N. Williams & J. Taylor, *supra* note 3, § 13.01.

53. *See supra* note 36 and accompanying text.

purpose.[54] Therefore, regulations should not be automatically upheld for paying lip service to a general welfare purpose. Courts should avoid the extension of the general welfare to support aesthetics alone. Such action would curtail citizens' property rights, a result that should be avoided.[55]

By regulating aesthetics, government exceeds its proper function.[56] While some aesthetic regulations appropriately protect property value, government legislation of beauty threatens an individual's liberty by depriving a citizen of the right to decide how their property will look.[57] One court noted the importance of property rights:

> To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. . . . Like every other fundamental liberty, it is a right to which the police power is subordinate.[58]

The expansion of the police power to legitimize governmental regulation of aesthetics provides dangerous precedent for other infringements on natural rights.[59] To avoid this result, the police power should be restricted to measures traditionally related to health, safety, and general welfare.[60]

Courts have indicated that zoning is inherently subjective and influ-

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54. *See* Bachman v. State, 235 Ark. 339, 341, 359 S.W.2d 815, 816 (1962).

55. *See* Spann v. City of Dallas, 111 Tex. 350, 357, 235 S.W. 513, 516 (1921); Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 76, 192 N.E.2d 74, 81 (1963) (Corrigan, J., dissenting); Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 75, 458 N.E.2d 852, 858 (Brown, J., dissenting), *appeal dismissed*, 467 U.S. 1237 (1984).

56. *See Spann*, 111 Tex. at 357, 235 S.W. at 515.

57. *See id.* at 357, 235 S.W. at 516; *Reid*, 119 Ohio App. at 76, 192 N.E.2d at 80-81 (Corrigan, J., dissenting); *Village of Hudson*, 9 Ohio St. 3d at 76, 458 N.E.2d at 858 (Brown, J., dissenting); *see also infra* notes 61-65 and accompanying text (discussion of legislation of subjective aspects of taste).

58. *Spann*, 111 Tex. at 356, 235 S.W. at 515; *see also* J. Locke, Two Treatises of Government § 131 (P. Laslett ed. 1967) (origin of government in protection of property).

59. *See* J. Locke, *supra* note 58, § 131; Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 76, 458 N.E.2d 852, 859 (Brown, J., dissenting), *appeal dismissed*, 467 U.S. 1237 (1984). In the balance between citizen and government, increasing the police power necessarily infringes on the liberties and property rights of individual citizens. *See* Spann v. City of Dallas, 111 Tex. 350, 357, 235 S.W. 513, 515 (1921). The court stated:

> "Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned by the Constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and the labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions."

*Spann*, 111 Tex. at 359, 235 S.W. at 516-17 (quoting *In re* Jacobs, 98 N.Y. 98, 114-15 (1885)).

60. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Sinclair Ref. Co. v. City of Chicago, 178 F.2d 214, 216-17 (7th Cir. 1949); Anderson v. City of Cedar Rapids, 168 N.W.2d 739, 742 (Iowa 1969); Warren v. Municipal Officers, 431

enced by shifting notions of taste. Such factors can lead to arbitrary and unreasonable governmental actions.[61] The United States Supreme Court has also recognized that aesthetic "judgments are necessarily subjective, defying objective evaluation . . . ."[62] Indeed, aesthetic values by their very nature vary from person to person.[63] Legislation of aesthetics risks the replacement of a property owner's views of beauty with the views of a public official.[64] Thus, subjective zoning regulations should not circumscribe individual views on aesthetic matters.[65]

Proper standards are necessary for reasonable implementation of aes-

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A.2d 624, 628-29 (Me. 1981); Baker v. Somerville, 138 Neb. 466, 472, 293 N.W. 326, 328-29 (1940).

Health purposes include, among other objectives, prevention of slum conditions and protection of residential homeowners from the environmental dangers of industrial districts. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 30-31 (1954) (eradication of slum housing); *Euclid*, 272 U.S. at 391 (protection of health in residential areas). Courts have found various examples of valid safety regulations. *See, e.g.*, Reinman v. City of Little Rock, 237 U.S. 171, 178 (1915) (upholding regulation of livery stables on safety grounds); Corrigan v. City of Scottsdale, 149 Ariz. 553, 556, 720 P.2d 528, 531 (Ct. App. 1985) (prevention of rock slides as legitimate regulatory concern), *aff'd in part, vacated in part*, 149 Ariz. 538, 720 P.2d 513 (en banc), *cert. denied*, 479 U.S. 986 (1986); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82-83 (1946) (prevention of fire hazards in buildings); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 214 (1885) (regulation of boats for harbor safety). For general welfare examples, see *supra* note 25.

61. *See* Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 76, 458 N.E.2d 852, 859 (Brown, J., dissenting), *appeal dismissed*, 467 U.S. 1237 (1984); Kolis, *supra* note 15, at 303-04.

62. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981); *see also* White Advertising Metro, Inc. v. Zoning Hearing Bd., 70 Pa. Commw. 308, 321, 453 A.2d 29, 35 (1982) ("purely aesthetic judgments are far too subjective to alone carry the burden of showing detriment to the public interest").

The philosopher Immanuel Kant said, " 'The judgment of taste . . . is not a cognitive judgment, and so not logical, but is aesthetic—which means that it is one whose determining ground *cannot be other than subjective.*' " I. Kant, The Critique of Judgment 41 (Judge J.C. Meredith trans. 1952), *quoted in* Palmetto Dunes Resort v. Brown, 287 S.C. 1, 7 n.2, 336 S.E.2d 15, 19 n.2 (Ct. App. 1985).

63. *See Village of Hudson*, 9 Ohio St. 3d at 75, 458 N.E.2d at 858 (Brown, J., dissenting).

64. *See* Sun Oil Co. v. City of Madison Heights, 41 Mich. App. 47, 57, 199 N.W.2d 525, 531 (1972) (Targonski, J., concurring). Legislation of taste also exemplifies an ominous trend toward conformity which threatens to sap the vitality and efficiency of the country. *See* 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).

65. *See* Spann v. City of Dallas, 111 Tex. 350, 357, 235 S.W. 513, 516 (1921); Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 76, 192 N.E.2d 74, 81 (1963) (Corrigan, J., dissenting); Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 75, 458 N.E.2d 852, 858 (Brown, J., dissenting), *appeal dismissed*, 467 U.S. 1237 (1984).

One commentator quoted a case highlighting the problems of both subjectivity and shifting tastes:

> "Certain Legislatures might consider that it was more important to cultivate a taste for jazz than Beethoven, for posters than for Rembrandt, and for limericks than for Keats. 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 standpoint for use restriction upon property."

E. Ziegler, *supra* note 5, § 14.02, at 14-12 (quoting City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925).

thetic zoning[66] because they help avoid the abuse of discretion inherent in decisions on beauty.[67] Most ordinances, however, lack objective standards necessary to apply aesthetic regulation with certainty.[68] Ordinances usually contain loopholes[69] that vest the architectural review board with unreasonable discretion.[70] Phrasing such as "excessive similarity" and "striking dissimilarity, visual discord or inappropriateness" are inherently malleable. Since objective standards have been so difficult to formulate, courts that uphold regulation based on aesthetics alone risk encouraging abuse of discretion by public officials.[71]

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66. *See* City of W. Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 864, 30 So. 2d 491, 492 (1947) (en banc). The *Duffey* court stressed that "it is necessary that exactions be fixed in the ordinance with such certainty that they not be left to the whim or caprice of the administrative agency . . . ." *Id.*

67. *See, e.g.*, C. R. Investments, Inc. v. Village of Shoreview, 304 N.W.2d 320, 328 (Minn. 1981) (rejecting vague and subjective requirements); Morristown Rd. Assocs. v. Mayor of Bernardsville, 163 N.J. Super. 58, 67-68, 394 A.2d 157, 163 (Law Div. 1978) (invalidating ordinance with standards that did not "adequately circumscribe the process of administrative decision); Hankins v. Borough of Rockleigh, 55 N.J. Super. 132, 138, 150 A.2d 63, 66 (App. Div. 1959) (standards of rejected ordinance were "clearly unreasonable and arbitrary"); *see also infra* notes 71-76 and accompanying text.

68. *See* Anderson, *supra* note 15, at 44. Anderson finds standards to be "[t]he most troublesome problem encountered in municipal attempts to control architectural design . . . ." *Id.*; *see also* Hershman, *Beauty as the Subject of Legislative Control*, 15 Prac. Law. 20, 25 (1969) ("objective standards are difficult if not impossible to formulate in matters of taste, attractiveness, and structural beauty").

Courts will often strike down ordinances that lack adequate standards and grant excessive discretion to the public official. *See, e.g.*, Pacesetter Homes, Inc. v. Village of Olympia Fields, 104 Ill. App. 2d 218, 225-26, 244 N.E.2d 369, 372-73 (1968) (vague architectural review ordinance struck down); *Morristown Rd. Assocs.*, 163 N.J. Super. at 67, 394 A.2d at 163 (struck down an ordinance which contained a standard of "*harmony* with existing structures and terrain" (emphasis in original)); *Hankins*, 55 N.J. Super. at 136, 150 A.2d at 66 (struck down requirement of early American design because it "could be construed as authorizing a tepee, adobe, log cabin, Cape Cod, New England, Dutch colonial, or Pennsylvania Dutch architectural design."); *Village of Shoreview*, 304 N.W.2d at 328 (unreasonably vague or subjective standards cause invalidation of ordinance); Morris County Fair Hous. Council v. Boonton Township, 230 N.J. Super. 345, 357, 553 A.2d 814, 821 (App. Div. 1989) (invalidated decision with no architectural review ordinance at all).

To strengthen standards, municipalities have drafted architectural regulations requiring evaluation of specific parts of the structure. *See, e.g.*, *Village of Hudson*, 9 Ohio St. 3d at 71, 458 N.E.2d at 855 (evaluation of doors, windows, shutters, chimneys and other specific design features); Bellerose Local Law No. 1, §§ 5(F)(2)(a)-(4)(a) (N.Y. 1970) (evaluation of the facade, the size and arrangement of doors, windows, and porticos, the cubical content and gross floor area, roof structures, exposed mechanical equipment, retaining walls, landscaping, signs, lightposts, parking areas, and fences).

69. *See* Mamaroneck Local Law No. 1, § 6 (N.Y. 1973) (allowing disapproval for inappropriateness of architectural quality, nature of materials, harmony of colors, and compatibility of design with the surrounding terrain). Other loopholes exist in the drafter's choice of language for many architectural review ordinances. *See, e.g.*, *id.* (disapproval for excessive similarity or dissimilarity); Bellerose Local Law No. 1, § 5(F)(2) (N.Y. 1970) ("[s]triking dissimilarity, visual discord or inappropriatness [sic]").

70. *See* 3A N. Williams & J. Taylor, *supra* note 3, § 71C.02, at 58.

71. Judicial approval of these unsatisfactory standards will lead to grossly unreasonable results. "Where the courts are willing to approve vague standards . . . the only reasonable expectation is that local administration will produce results which are both

Corruption is the greatest danger in public decisionmaking processes devoid of objective standards.[72] Thus, bribery may become standard practice when zoning is based solely on aesthetics.[73] Already, land use accounts for a large majority of local corruption.[74] Zoning and subdivision control are already the most corrupt areas of municipal government;[75] decisions based on subjective, discretionary aesthetic criteria will only worsen corruption.[76]

Courts have recognized that the dangers presented by government control of aesthetic decisions are especially apparent in the area of architectural review. Architectural design is a form of artistic expression[77] and should be protected by the first amendment.[78] Government control of architecture will suppress originality and creativity,[79] which, it has

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bizarre and arbitrary . . . ." *Id.* Unfortunately, changes in board composition requiring architectural or building professionals will not solve the problems of abuse of discretion and legislation of taste. *See* Kolis, *supra* note 15, at 302-03.

72. *See* Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 77, 458 N.E.2d 852, 859 (Brown, J., dissenting), *appeal dismissed*, 467 U.S. 1237 (1984).

73. *See id.* Judge Brown argued in dissent that:

> The allowance of such standards of review vests in the [architectural] board of review absolute power to impose its will on the private property interests of citizens. . . . Under such a system, *bribery will become the only way* landowners of the future will be able to effect any reasonable and proper change with regard to the use of their properties.

*Id.* (emphasis added).

74. *See* F. Popper, Politics of Land Use Reform 52 (1981).

75. *See id.*; *see also* R. Ellickson & A. Tarlock, Land Use Controls 244 (1981) (highlights the link between land use and corruption in the mind of the public).

"Zoning personnel rarely constitute even 2 percent of a city government's work force, but zoning scandals seem to account for nearly half the convictions of local officials." F. Popper, *supra* note 74, at 52. Corruption in zoning ranges from acceptance of free dinners, to conflict of interest situations, to direct payment for zoning changes. *See* Wyman v. Popham, 252 Ga. 247, 312 S.E.2d 795 (1984); State v. Agan, 259 Ga. 541, 384 S.E.2d 863 (1989); La Rue v. Township of E. Brunswick, 68 N.J. Super. 435, 172 A.2d 691 (App. Div. 1961).

76. *See* Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 76-77, 458 N.E.2d 852, 858-59 (Brown, J., dissenting), *appeal dismissed*, 467 U.S. 1237 (1984).

77. *See Village of Hudson*, 9 Ohio St. 3d at 76, 458 N.E.2d at 858 (Brown, J., dissenting); Poole, *Architectural Appearance Review Regulations and the First Amendment: the Good, the Bad and the Consensus Ugly*, 19 Urb. Law. 287, 291 (1987).

78. *See Village of Hudson*, 9 Ohio St. 3d at 76, 458 N.E.2d at 858 (Brown, J., dissenting); Poole, *supra* note 77, at 291; Kolis, *supra* note 15, at 340.

79. *See* Poole, *supra* note 77, at 288. Professor Poole noted, "regulations granting such [design review] powers to appearance review boards may not only generate substantial uncertainty for builders and developers, but may also have a chilling effect on designers." *Id.*

Commentators have underscored the problems of aesthetic regulation in the form of architectural review. *See* Anderson, *supra* note 15, at 48. Professor Anderson claims that the structure of the board and the usual nature of the ordinances will assure that a community becomes no more beautiful. *See id.* at 48. Architectural review ordinances are by nature conservative because they seek to prevent changes in building designs. *See id.* Government control favoring existing styles therefore discourages the architectural improvement of the community. *See id.* As one commentator correctly surmised, the legislation of tastes is dangerous. The "most sensible recommendation is that local governments get out of the role of imposing majoritarian notions of tastefulness on the com-

been argued, could lead to an era of Orwell's "Big Brother".[80]

## III. ALLOWANCE OF ZONING BASED SOLELY ON AESTHETICS

States that allow zoning based solely on aesthetic factors have primarily relied on the Supreme Court dictum in *Berman v. Parker*.[81] In *Berman*, Justice Douglas wrote,

> [t]he 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.[82]

Protection of property values is another rationale used to support zoning based solely on aesthetics.[83] Aesthetic regulation to protect property values is a valid general welfare purpose under the police power.[84]

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munity at large. Tastefulness by a committee assures nothing more or less than mediocrity." Poole, *supra* note 77, at 340.

80. *See Village of Hudson*, 9 Ohio St. 3d at 76, 458 N.E.2d at 858 (Brown, J., dissenting). Judge Brown warned, "[t]his zoning [architectural review] case has now placed us in the era of Orwell's '1984' where Big Brother tells us what to do and think in a realm that is protected by the constitutional right of privacy under the First Amendment to the United States Constitution." *Id.* See *infra* note 61 for discussion of the dangers of power in the hands of the architectural review board.

81. 348 U.S. 26 (1954); *see In re* Franklin Builders, Inc., 58 Del. 173, 201-02, 207 A.2d 12, 26-27 (Super. Ct. 1964); John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 369 Mass. 206, 218, 339 N.E.2d 709, 717 (1975); Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 143-44, 646 P.2d 565, 570-71 (1982); State v. Jones, 305 N.C. 520, 524-25, 290 S.E.2d 675, 678 (1982); Oregon City v. Hartke, 240 Or. 35, 47-48, 400 P.2d 255, 261-62 (1965) (en banc); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 272-73, 69 N.W.2d 217, 222, *cert. denied*, 350 U.S. 841 (1955); *cf.* Buhler v. Stone, 533 P.2d 292, 294 (Utah 1975) (general welfare includes aesthetics but did not mention *Berman*).

Courts that approve aesthetic zoning recognize the subjective nature of aesthetics, yet these courts seek some objective standard to uphold the ordinance. *See, e.g.*, Morristown Rd. Assocs. v. Mayor of Bernardsville, 163 N.J. Super. 58, 67, 394 A.2d 157, 163 (Law Div. 1978) (basic criterion of harming existing structures and terrain does not meet test of certainty required in zoning regulations); Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 69, 192 N.E.2d 74, 76-77 (1963) (standards sufficient for use by experts on architectural review board); *see also* 1 E. Ziegler, *supra* note 5, § 14.02, at 14-28 to 14-29 (outlining a newer approach to aesthetics). Some courts have upheld ordinances requiring similarity to existing structural styles. *See* State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 310 (1970). Courts upholding solely aesthetic zoning have stressed that some amount of discretion is necessarily permissible. *See Wieland*, 269 Wis. at 274, 69 N.W.2d at 224.

82. *Berman*, 348 U.S. at 33 (citations omitted) (emphasis added).

83. *See* Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 73, 458 N.E.2d 852, 857, *appeal dismissed*, 467 U.S. 1237 (1984); State v. Jones, 305 N.C. 520, 530, 290 S.E.2d 675, 681 (1982); *Stoyanoff*, 458 S.W.2d at 312; United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964); *Wieland*, 269 Wis. at 270, 69 N.W.2d at 221.

Although ordinances based on aesthetics may cite property values as justification, some courts recognize that this is still solely aesthetic zoning. *See* Board of Supervisors v. Rowe, 216 Va. 128, 146, 216 S.E.2d 199, 213 (1975).

84. *See, e.g.*, State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 309-10 (Mo. 1970)

Under the general welfare, a community also has the right to determine its own visual environment.[85]

Some courts also claim that aesthetic zoning symbolizes a culturally advanced society[86] and that increased judicial recognition of aesthetics is the result of a general refinement of tastes in a maturing society.[87] Furthermore, they claim aesthetic regulation promotes the comfort and general well-being of the population.[88] The happiness of citizens is said to be tied to the appearance of their surroundings.[89] These metaphysical concerns have provided additional support for solely aesthetic zoning. The *Berman* dictum and these lesser rationales, however, do not withstand close scrutiny.

## IV. ZONING SHOULD NOT BE BASED ON AESTHETICS ALONE

Although courts have advanced several justifications for upholding solely aesthetic zoning, their rationales are improper. Reliance on *Berman v. Parker* or the protection of property values misconstrues the actual issue: the validity of zoning based exclusively on aesthetics. Such zoning improperly vests excessive discretion in a governmental body, encouraging encroachment on both individual liberty and property rights.

A proper reading of *Berman v. Parker* does not support zoning based solely on aesthetics.[90] First, *Berman* was not decided on aesthetics alone.[91] The *Berman* Court cited important health and safety problems that would support government interference with property rights.[92] Sec-

(architectural review ordinance upheld); *United Advertising Corp.*, 42 N.J. at 5-6, 198 A.2d at 449 (outdoor advertising prohibition upheld); *Jones*, 305 N.C. at 530-31, 290 S.E.2d at 681 (upholding a junkyard regulation); *Village of Hudson*, 9 Ohio St. 3d at 73, 458 N.E.2d at 857 (authorizing an architectural review ordinance); *Wieland*, 269 Wis. at 270, 69 N.W.2d at 220 (1955) (architectural review ordinance upheld); *cf.* Vickers v. Township Comm., 37 N.J. 232, 247, 181 A.2d 129, 137 (upheld aesthetic regulation based on protection of property values without categorizing it as general welfare), *cert. denied, appeal dismissed*, 371 U.S. 233 (1963).

85. *See* Note, *Aesthetic Zoning*, 11 Urb. Law Ann. 295, 307 (1976).

86. *See* Oregon City v. Hartke, 240 Or. 35, 47, 400 P.2d 255, 261 (1965) (en banc); John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 369 Mass. 206, 218, 339 N.E.2d 709, 717 (1975); State v. Diamond Motors, Inc., 50 Hawaii 33, 37-38, 429 P.2d 825, 828 (1967).

87. *See Hartke*, 240 Or. at 47, 400 P.2d at 261.

88. *See* Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 73, 458 N.E.2d 852, 856, *appeal dismissed*, 467 U.S. 1237 (1984).

89. *See id.*; *see also* Westfield Motor Sales Co. v. Town of Westfield, 129 N.J. Super. 528, 544, 324 A.2d 113, 120 (Law Div. 1974) (aesthetics are part of psychological and emotional stability).

90. *See* Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. Rev. 125, 165-66 (1980); Note, *supra* note 85, at 302.

91. *See* Berman v. Parker, 348 U.S. 26, 30, 33 (1954).

92. *See id.* at 30.

In the neighborhood in question, 57.8 percent of the houses had no indoor bathrooms (health), 64.3 percent of the buildings were irreparable and another 18.4 percent needed major repairs (health and safety), 29.3 percent of the buildings had no electricity (health

ond, the Court decided *Berman* on eminent domain grounds.[93] For these reasons, Justice Douglas' statement regarding the police power and aesthetics is only dictum and should not be used to support solely aesthetic zoning. *Berman*'s scope should be limited to eminent domain actions in which some aspect of health, safety, morals or general welfare supports the police power.[94] Moreover, the Supreme Court had opportunities to extend *Berman* to aesthetic *zoning*[95] in general and architectural review in particular but has not done so.[96]

Preservation of property values should never support purely aesthetic zoning.[97] Property valuation will only rise or fall as a result of some other factor.[98] Courts should look to the *cause* of the value change, not the change in value itself.[99] If the primary cause of the depreciation is an appropriate subject for regulation under the police power, courts should uphold the ordinance.[100] As one judge noted, "bootstrapping" a solely aesthetic regulation to lawful status by using property values will allow any "absurd" provision to become lawful.[101] Courts should not allow property value protection to rescue an ordinance that has no health, safety, moral, or general welfare purpose.[102]

Expansion of the police power to include solely aesthetic considerations provides dangerous precedent for governmental encroachments on

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and safety), 82.2 percent had no wash basins or laundry tubs (health), 83.8 percent lacked central heating (health and safety). *Id.*

93. *See id.* at 36. The power involved in takings of property is distinct from the power to zone; zoning usually triggers a due process analysis. *See* D. Mandelker, Land Use Law § 2.17, at 34 (2d ed. 1988); *see also* R. Cunningham, W. Stoebuck & D. Whitman, *supra* note 1, § 9.2, at 517 (delineating due process and takings analyses).

94. *See supra* notes 49-51 and accompanying text.

95. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). In *Metromedia*, the one recent case with a full opinion, the Court struck down part of a billboard ordinance on first amendment grounds, but allowed a combination of traffic safety and aesthetic factors to support the part of the ordinance that was not ruled unconstitutional. *Id.* at 507-08. Other cases with more cursory treatment also illustrate the Court's reluctance to deal with the issue. *See* Corey Outdoor Advertising, Inc. v. Board of Zoning Adjustment, 254 Ga. 221, 327 S.E.2d 178, *appeal dismissed*, 474 U.S. 802 (1985); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978), *appeal dismissed*, 440 U.S. 901 (1979); Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835 (en banc), *appeal dismissed*, 439 U.S. 809 (1978); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963), *appeal dismissed*, 375 U.S. 42 (1963).

96. *See* Village of Hudson v. Albrecht, Inc., 467 U.S. 1237 (1984); *supra* note 95.

97. *See* Board of Supervisors v. Rowe, 216 Va. 128, 146, 216 S.E.2d 199, 213 (1975).

98. *See* N. Williams & J. Taylor, *supra* note 3, § 15.03, at 424.

99. *See id.* at 425.

100. *See id.* at 424-25. For discussion of a suggested scope of the police power, see *supra* notes 49-54 and accompanying text.

101. *See* Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 76, 458 N.E.2d 852, 859 (Brown, J., dissenting), *appeal dismissed*, 467 U.S. 1237 (1984).

102. *See* Board of Supervisors v. Rowe, 216 Va. 128, 146, 216 S.E.2d 199, 213 (1975); Mignatti Constr. Co. v. Buck's County, 3 Pa. Commw. 242, 251, 281 A.2d 355, 360-61 (1971).

liberty and property rights.[103] As John Locke aptly noted, government was formed to protect the liberty and property of an individual.[104] When government enacts zoning based on inherently subjective aesthetic considerations, some measure of property rights are lost.[105] Courts should recognize Lockean theory on protection of individual rights of property and liberty.[106] Application of this ideal to zoning mandates a return to a less intrusive police power that does not authorize solely aesthetic zoning.[107]

The lack of adequate standards for review of architecture also creates difficulty and uncertainty for property owners.[108] Creating standards for aesthetic zoning requires subjective judgments.[109] While the United States Supreme Court has sanctioned zoning regulations that promote historic preservation,[110] it has not considered architectural review.[111] Vague standards in a historic preservation situation can be used in a reasonable manner,[112] because they are applied to a certain area with precise historic characteristics.[113] Ordinary architectural standards do not possess the same objective qualities.[114] Architectural ordinances lack the automatic reference to an established historic style.[115] Unfortunately,

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103. *See* Spann v. City of Dallas, 111 Tex. 350, 356, 235 S.W. 513, 515 (1921); *see also supra* notes 57-59 and accompanying text.

104. *See* J. Locke, *supra* note 58, § 131. Locke wrote:

> But though Men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require; yet it being only with an intention in every one the better to preserve himself his Liberty and Property . . . *the power of the Society . . . is obliged to secure every ones Property* . . . .

*Id.* (emphasis added).

105. *See Spann*, 111 Tex. at 356, 235 S.W. at 516. For a discussion of the subjectivity of aesthetics, see *supra* notes 61-65 and accompanying text .

106. *See Spann*, 111 Tex. at 356, 235 S.W. at 516 (court applies a natural rights theory to issue of the scope of the police power).

107. *See generally* J. Locke, *supra* note 58, §§ 131-149 (giving basis of Locke's view on government, citizen and property rights). Architectural review, in particular, threatens the property owner's freedom of expression and freedom of choice. Architects and owners should have freedom to choose aesthetic styles. *See* Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 76, 192 N.E.2d 74, 81 (1963) (Corrigan, J., dissenting); Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 75, 458 N.E.2d 852, 858 (Brown, J., dissenting), *appeal dismissed*, 467 U.S. 1237 (1984).

108. *See supra* notes 66, 71 and accompanying text.

109. *See supra* notes 61-63 and accompanying text.

110. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978).

111. *See supra* notes 95-96 and accompanying text.

112. *See* Anderson, *supra* note 15, at 46.

113. *See, e.g.*, City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 415-16, 389 P.2d 13, 18 (1964) (standards for historic preservation ordinance properly broad if capable of reasonable application); Salvatore v. City of Schenectady, 139 A.D.2d 87, 90, 530 N.Y.S.2d 863, 864-65 (1988) (standards for historic ordinance valid if person of ordinary intelligence is not forced to guess at meaning); *see also* Anderson, *supra* note 15, at 46 (comparing standards for architectural review and historic preservation).

114. *See* Anderson, *supra* note 15, at 46-47.

115. *See id.* "Ordinances which impose community-wide standards of design com-

the lack of objective standards plagues any architectural review ordinance. These subjective standards then create a breeding ground for corruption.[116]

Architectural review ordinances are also suspect because they do not contain an important safeguard found in the great majority of zoning regulations: the comprehensive community plan.[117] A comprehensive plan helps to ensure that zoning considers the needs of the whole community.[118] Community-wide development was a central factor in the *Euclid* decision,[119] which has provided land planners with an acceptable model that is still used today.[120] The public nature of the plan provides the additional benefit of promoting honest dealings between owners and members of government.[121] Planning specific aesthetic aspects of a community, however, presents a danger to creative freedom that outweighs any benefit derived from the plan.[122]

Likewise, promotion of the emotional well-being and cultural maturity of society through aesthetic zoning should be accorded little weight. Zoning for solely aesthetic reasons is not a symbol of cultural maturity, but rather a symbol of over-intrusive government.[123]

### A. *Covenants: A Possible Solution*

Land development in this country is highly regulated.[124] Given this context of extreme regulation, one alternative to public regulation of aes-

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monly lack the easy reference to an established aesthetic pattern which aided the courts in approving standards used in the historic preservation measures." *Id.*

116. *See supra* notes 72-76 and accompanying text.

117. *See* Anderson, *supra* note 15, at 29.

118. *See* Udell v. Haas, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 900-01, 288 N.Y.S.2d 888, 893-94 (1968). The court in *Haas* noted that the plan is "insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll." *Id.*

119. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 379-80, 389-90 (1926).

120. *See* C. Haar & M. Wolf, *supra* note 19, at 372. In the *Euclid* model, zoning is defined as "legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan." Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 110, 141 A.2d 606, 609 (1958).

121. *Cf.* Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 77, 458 N.E.2d 852, 859 (Brown, J., dissenting) (outlining dangers of corruption in arbitrary architectural review process), *appeal dismissed*, 467 U.S. 1237 (1984).

122. *See Village of Hudson*, 9 Ohio St. 3d at 76, 458 N.E.2d at 858 (Brown, J., dissenting); Kolis, *supra* note 15, at 278-81.

123. *See Village of Hudson*, 9 Ohio St. 3d at 75, 458 N.E.2d at 858 (Brown, J., dissenting). As one judge inquired, "should [the property owner's] aesthetic sensibilities in connection with her selection of design for her proposed home be stifled because of the apparent belief in this community of the group as the source of creativity?" Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 76, 192 N.E.2d 74, 81 (1963) (Corrigan, J., dissenting).

124. *See* C. Donahue, T. Kauper & P. Martin, Cases and Materials on Property 1221 (2d ed. 1983); *see also* Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 682 (1973) (noting urban regulatory excess).

thetics is the expanded use of restrictive covenants.[125] Restrictive covenants are land use controls that derive from private agreement to restrict the use of land.[126] Covenants protect the landowner's expectancy by assuring that the conditions surrounding the property will not change drastically.[127]

Currently, many states allow aesthetic control through restrictive covenant.[128] In fact, the majority of courts approve these covenants if they are exercised reasonably and in good faith.[129] Covenants provide a good solution to the aesthetic zoning dilemma because they are private, voluntary,[130] and less centralized than zoning.[131] Furthermore, courts have been less stringent in scrutinizing aesthetic standards in covenants, thus providing a flexible, yet private answer to the problem of aesthetics.[132]

Covenants have been successful tools through which communities have effectively controlled architecture.[133] In private, consensual transactions, there are necessarily fewer worries about forcing tastes upon

125. *See* Ellickson, *supra* note 124, at 682-83; *see also* Town & Country Estates Ass'n v. Slater, 227 Mont. 489, 740 P.2d 668, 671 (1987) (aesthetic considerations have place in prior approval covenants).

126. *See* Seabreak Homeowners Ass'n, Inc. v. Gresser, 517 A.2d 263, 268 (Del. Ch. 1986), *aff'd*, 538 A.2d 1113 (1988); Lake St. Louis Community Ass'n v. Ravenwood Properties, Ltd., 746 S.W.2d 642, 644 (Mo. Ct. App. 1988); N. Williams & J. Taylor, *supra* note 3, § 16.01.

127. *See* 1 R. Anderson, American Law of Zoning § 3.04 (3d ed. 1986).

Unfortunately, the usefulness of restrictive covenants diminishes when used in areas that have been substantially overbuilt. *See* Ellickson, *supra* note 124, at 718. In these situations, covenants would not provide a viable alternative to public regulation. However, as one newspaper noted, the existence of subdivisions, where covenants would be effective, has increased. *See* Lueck, *Do Housing Covenants Intrude on Rights?*, New York Times, Nov. 5, 1989, § 10, at 15, col. 1. In these situations, the extensive use of restrictive covenants remains possible and even popular. *See id.*

128. *See, e.g.*, Rhue v. Cheyenne Homes, Inc., 168 Colo. 6, 8, 449 P.2d 361, 362 (1969) (plans must be submitted to an architectural committee); Kirkley v. Seipelt, 212 Md. 127, 133, 128 A.2d 430, 436 (1957) (upholding aesthetic control by covenant); Palmetto Dunes Resort v. Brown, 287 S.C. 1, 4 n.1, 336 S.E.2d 15, 17 n.1 (Ct. App. 1985) (developer has authority under covenant to disapprove building plans).

129. *See, e.g.*, Seabreak Homeowners Ass'n, Inc. v. Gresser, 517 A.2d 263, 268 (Del. Ch. 1986) (covenant would be upheld if reasonable), *aff'd*, 538 A.2d 1113 (1988); Palmetto Dunes Resort v. Brown, 287 S.C. 1, 9, 336 S.E.2d 15, 20 (Ct. App. 1985) (upheld covenant that was reasonable); *see* Smith v. Butler Mountain Estates Property Owners Ass'n, Inc., 90 N.C. App. 40, 48, 367 S.E.2d 401, 407 (1988), *aff'd*, 324 N.C. 80, 375 S.E.2d 905 (1989).

130. *See* N. Williams & J. Taylor, *supra* note 3, § 16.01; Smith v. Butler Mountain Estates Property Owners Ass'n, Inc., 324 N.C. 80, 375 S.E.2d 905, 908 (1989); Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987); *Palmetto Dunes*, 287 S.C. at 6, 336 S.E.2d at 18.

131. *See* Ellickson, *supra* note 124, at 682.

132. *See, e.g., Butler Mountain Estates*, 324 N.C. at 82-83, 375 S.E.2d at 906-08 (1989); Palmetto Dunes Resort v. Brown, 287 S.C. 1, 4 n.1, 336 S.E.2d 15, 17 n.1 (Ct. App. 1985).

133. *See Butler Mountain Estates*, 90 N.C. App. at 47, 367 S.E.2d at 406 (1988) (quoting Rhue v. Cheyenne Homes, Inc., 168 Colo. 6, 8, 449 P.2d 361, 362 (1969)), *aff'd*, 324 N.C. 80, 375 S.E.2d 905 (1989). The court in *Rhue* stated that, "[m]odern legal authority recognizes . . . that the approval of plans by an architectural control committee is one

other individuals.[134]

## CONCLUSION

Although a state's police power must admittedly encroach on the rights of property ownership, that encroachment should be limited. Police power should not be extended beyond health, safety, moral, or general welfare purposes to encompass solely aesthetic regulation. Aesthetics are inherently subjective and attempts to legislate them infringe upon individual creative freedom.

Aesthetic regulation acquires more draconian overtones in the case of architectural review, when boards can withhold building permits for "improper" designs. Difficulty in formulating proper architectural standards only compounds the problem, because abuse of discretion is more likely with open-ended standards. Such broad discretion provides the breeding ground for corruption.

Although some states have authorized zoning solely on aesthetic considerations, this view is not wise. Freedom of choice and protection of property rights were among the values upon which this country was founded. These individual rights should not be sacrificed in the name of beauty. A more equitable alternative to aesthetic zoning is the implementation of covenants to address aesthetic concerns. Private, voluntary restrictions of property rights are preferable to excessive government regulation. Covenants adequately balance a property owner's interest with the aesthetic interests of the surrounding neighborhood, and should replace zoning based on aesthetics alone.

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method by which guarantees of value and general plan of construction can be accomplished and maintained." *Rhue*, 168 Colo. at 8, 449 P.2d at 362.

134. *See supra* notes 79-80 and accompanying text.