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THE REASONABLENESS OF AESTHETIC ZONING IN FLORIDA: A LOOK BEYOND THE POLICE POWER

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I. INTRODUCTION

Even before the Supreme Court gave the green light to local governments to use their police power[1] to zone land and control development,[2] a legal battle was beginning over the proper expanse of this power. This battle has continued because, unlike other types of delegated power, the scope of a local government's police power is not marked by definite bounds. Nor is "the line which 'separates the legitimate from the illegitimate assumption of power . . . *capable* of precise delimitation.' "[3]

The problem of defining the scope of the police power appears to have arisen from the standard used to evaluate the constitutionality of ordinances enacted under that power. It is now well established that such ordinances will be held invalid if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[4] As one commentator[5] has noted, "health" and "safety" are fairly easy to define and the promotion of morals has rarely been relied on to justify land use controls.[6] That has left local governments and the courts to wrestle with the formidable problem of just what can be done under the undefinable "general welfare," a problem which has been the focus of much litigation over attempted land use regulation.

The problem courts have in dealing with the breadth[7] of the

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1. "Police power is the inherent power which lies within the state and which enables the legislature to enact laws regulating or prohibiting anything harmful to the welfare of the people." 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 2.01, at 2-2 (4th ed. 1982).

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

3. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 3.09, at 91 (2d ed. 1976), *quoting*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (emphasis added).

4. Village of Euclid v. Ambler Realty Co., 272 U.S. at 395.

5. Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 VAND. L. REV. 603, 604 (1981).

6. *But see* C. WEAVER & R. BABCOCK, CITY ZONING 98 (1979) (regulation of commercial sex through zoning "has become a cause celebre in our cities").

7. *See* Berman v. Parker, 348 U.S. 26 (1954). In a comment often cited for its sheer eloquence as well as its implications for the police power, Justice Douglas remarked:

> 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.

Id. at 33 (citation omitted).

general welfare is compounded by its ability to change in response to varying social and economic conditions, political trends and cultural patterns.[8] One area of regulation which demonstrates both the potential breadth of the police power and the ability of the general welfare to respond to perceived social, political, economic, and cultural needs is that of zoning for aesthetic purposes.[9] While it is sometimes said that all zoning is concerned with aesthetics to a certain extent,[10] this article will deal only with those regulations in which the aesthetic concern is expressly recognized—either in the ordinance or by the courts.[11]

While the validity of zoning for aesthetics has been debated by the courts in many states since the early 1900's and in Florida since 1917,[12] questions regarding the propriety of such zoning continue to surface with regularity. Two recent cases from Florida, *City of Lake Wales v. Lamar Advertising Association*[13] and *Lamar-Orlando Outdoor Advertising v. City of Ormond Beach*,[14] and one from the United States Supreme Court, *Metromedia, Inc. v. City of San Diego*,[15] disposed of some issues, but indicated that some very serious questions remain to be answered.[16]

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8. State v. Houghton, 204 N.W. 569, 570 (Minn. 1925) (the police power, when exercised for the "common" welfare, is quickly responsive to social and economic changes), *aff'd*, 273 U.S. 671 (1927); Cromwell v. Ferrier, 279 N.Y.S.2d 22, 26 (1967) (zoning which enhances the economic and cultural setting of the community is not necessarily invalid and the reasonableness of such zoning varies in response to changed social attitudes, new knowledge, and surrounding conditions); Salamar Builders Corp. v. Tuttle, 325 N.Y.S.2d 933, 938 (1971) (validity of police power regulation dependent on responsiveness to prevailing morality and public opinion). These descriptions of the police power help explain the frequency with which different rules regarding the exercise of the police power evolve in different jurisdictions.

9. The terms "aesthetic zoning" and "zoning for aesthetics" are used comprehensively in this article to refer generally to local government regulations affecting aesthetics or enacted primarily for aesthetic purposes, regardless of whether the regulation is actually a part of the local government's zoning ordinance. Some state statutes are discussed as well. Of course, the unifying thread running throughout all of the cases and regulations discussed herein is the use of the police power to regulate for aesthetic purposes.

10. *See* A. RATHKOPF, *supra* note 1, § 14.01, at 14-6.

11. A commonly cited colloquial definition of "aesthetic regulation" is a regulation directed at some use which "is offensive to persons with sight but not offensive to a blind man in a similar position." Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBS. 218, 223 (1955).

12. Anderson v. Shackelford, 76 So. 343 (Fla. 1917).

13. 414 So. 2d 1030 (Fla. 1982).

14. 415 So. 2d 1312 (Fla. 5th DCA 1982).

15. 453 U.S. 490 (1981).

16. The decision in *Metromedia* was decided by a plurality and left several critical questions unanswered including the issue of whether a total ban on billboards would be permissible. The decision in *Ormond Beach* left unaddressed the issue of whether that city's ordi-

All three of these recent cases dealt with local attempts to promote aesthetics through the regulation and control of billboards inside city limits. While the range of activities, objects and uses which local governments have attempted to regulate in the name of aesthetics is itself broad, a cursory review of court decisions on aesthetic zoning reveals that the most maligned objects during the past seventy-five years have been billboards and signs.[17] But these have not been the only subjects of aesthetic regulation. A non-exhaustive list of such subjects would include junkyards,[18] architecture,[19] fences,[20] clotheslines[21] and trailers and recreational vehicles.[22] Aesthetics have also been involved in more traditional

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nance infringed on first amendment free speech rights.

17. *See generally* R. ANDERSON, *supra* note 3, § 7.16, at 564; A. RATHKOPF, *supra* note 1, § 14.04, at 14-32. One of the first volleys in the aesthetic attack upon billboards was at issue in Commonwealth v. Boston Advertising Co., 74 N.E. 601 (Mass. 1905), where a city park commission promulgated a rule forbidding the erection of any sign within such distance of a park that its message was plainly visible from the park. In striking down the rule, the court left little doubt that use of the police power had not yet extended to such frivolous entities as beauty and good taste. Other cases struck down similar attempts to regulate billboards, some of which imposed even more modest limitations upon the location of these structures than the rule at issue in *Commonwealth*. *See, e.g.*, Anderson v. Shackelford, 76 So. 343; State v. Whitlock, 63 S.E. 123 (N.C. 1908).

The early aesthetic attacks on billboards were not without some success, however. As R. ANDERSON, *supra* note 3, § 7.16, at 565, has noted, the decision in St. Louis Gunning Advertising Co. v. St. Louis, 137 S.W. 929 (Mo. 1911), *appeal dismissed per stipulation*, 231 U.S. 761 (1913), is credited with creating a doctrinal shift of sorts in the courts' view towards regulations which had aesthetic implications. Relying upon the Supreme Court's two-year-old decision in Welch v. Swasey, 214 U.S. 91 (1909), the court in *St. Louis Gunning* linked the regulation at issue to a more traditional aspect of the police power (safety) and then rationalized that the presence of aesthetic concerns would not invalidate an otherwise legitimate exercise of the police power. After *St. Louis Gunning*, judicial decisions which linked aesthetic regulations to some accepted police power objective became a regular occurrence and a popular way to uphold such regulations in the face of constitutional challenges. Even today, "most courts upholding ostensibly aesthetic regulation link aesthetics to another permissible police power purpose." Rowlett, *supra* note 5, at 611.

18. Rotenberg v. City of Ft. Pierce, 202 So. 2d 782 (Fla. 1967) (upholding junkyard ordinance on aesthetic grounds); State v. Brown, 108 S.E.2d 74 (N.C. 1959) (striking down fencing requirement for junkyards because it was enacted for aesthetic purposes).

19. City of West Palm Beach v. State *ex rel.* Duffey, 30 So. 2d 491 (Fla. 1947) (ordinance requiring architectural similarity did not promote health, safety, morals or general welfare); Gates *ex rel.* Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217 (Wis.) (ordinance establishing a board to review architectural appeal and functional plan of structures upheld), *cert. denied*, 350 U.S. 841 (1955).

20. City of Smyrna v. Parks, 242 S.E.2d 73 (Ga. 1978) (ordinance prohibiting chain link fences while allowing other types was not clearly unreasonable).

21. People v. Stover, 240 N.Y.S.2d 734 (ordinance requiring a permit to hang a clothesline upheld on safety and aesthetic grounds), *appeal dismissed*, 375 U.S. 42 (1963).

22. City of Euclid v. Fitzthum, 357 N.E.2d 402 (Ohio Ct. App. 1976) (ordinance prohibiting the unenclosed parking of any trailer or boat struck down as not sufficiently related to health, safety, or general welfare), *cert. denied*, 429 U.S. 1094 (1977).

zoning concerns such as the separation of land uses[23] and height and density restrictions.[24]

While the range of subjects which have become the focus of aesthetic regulation has grown over the years, so, too, has the variety of views adopted by the courts regarding the validity of such regulations. The initial, but now out-dated, view that aesthetics has no part to play in the utilization of the police power no longer is followed closely. In its place, the various state courts have subscribed to basically three different positions on aesthetics, all of which allow local governments to address aesthetics to a varying degree through the police power. These views include: (1) acceptance of aesthetics as an auxiliary or incidental objective; (2) acceptance of aesthetics as a primary objective, provided that the promotion of aesthetics also promotes some non-aesthetic end which is a legitimate concern of the police power; and (3) acceptance of aesthetics as a legitimate objective of the police power. Section II of this article will elaborate on the nature and constitutional implications of each of these three judicial attitudes toward aesthetic zoning. In Section III, Florida's evolution to its present position on aesthetic zoning will be traced, beginning with the Florida Supreme Court's 1917 decision in *Anderson v. Shackelford*[25] and culminating with that same court's 1982 decision in *City of Lake Wales*.[26]

The bulk of this article, and its major focus, is contained in Section IV. In that section an examination will be made of the various limitations and restrictions which remain in regulating land use for aesthetic purposes in Florida and many other jurisdictions even after the initial constitutional problem of finding a legitimate police power objective has been overcome. As mentioned above, it appears that some degree of aesthetic regulation is possible under each of the three major views currently endorsed by the various courts. Nonetheless, aesthetic zoning ordinances are still subject to the same limitations and restrictions as other zoning ordinances and may not arbitrarily or capriciously disregard the rights of private property owners in pursuit of their aesthetic objectives. In

23. City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941) (upholding ordinance which prohibited commercial uses along certain oceanfront property to preserve the city's aesthetic appeal); Trust Co. of Chicago v. City of Chicago, 96 N.E.2d 499 (Ill. 1951) (zoning amendment designed to preserve a small area of single family use held invalid as zoning for aesthetic purposes).

24. Commonwealth v. Boston Advertising Co., 74 N.E. 601 (Mass. 1905).

25. 76 So. 343.

26. 414 So. 2d 1030 (1982).

short, Section IV will examine the courts' analysis of what constitutes a *reasonable* aesthetic zoning ordinance, an area which has been cited as much in need of legal commentary.[27] It is on this question of reasonableness, and not on the legitimacy of using the police power for aesthetic regulation, that future court decisions are likely to focus—particularly in states such as Florida where zoning *solely* for aesthetics is recognized as a legitimate objective of the police power.

II. Aesthetics as a Legitimate End of the Police Power: A Matter of Degree

The legitimacy of using the police power to achieve aesthetic ends has generated a substantial amount of litigation in nearly every state. As would be expected, this litigation has produced a variety of views on the propriety of such regulation. However, it now appears fairly certain in nearly all the states[28] that aesthetic concerns can be addressed through police power restrictions *in some manner*. If state courts will not allow regulation expressly or primarily for aesthetic purposes, it is still possible to address aesthetic concerns in an incidental manner, tying them to regulations which also address more traditional objectives of the police power. In fact, no cases appear to hold a zoning ordinance invalid simply because it *incidentally* addresses aesthetic concerns.[29] Thus, "the initial constitutional hurdle, the requirement of a permissible police power purpose, is usually overcome"[30]—although the height of that hurdle will vary from state to state.

In general, it appears that the range of views adopted in the various states can be divided into three broad categories.[31] The most narrow view allows a regulation to address aesthetic concerns only when such concerns are incidental to a more traditional objective of the police power.[32] Under this view, it is the fact that the ordi-

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27. Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. Rev. 125, 130 (1980).

28. "[T]en states have no reported case on aesthetic regulation at all." *Id.* at 127. Therefore, it is impossible to say with certainty how these states would react once the issue is presented. Nonetheless, it seems likely that one of the three major positions discussed in this section of the article would be adopted.

29. Annot., 21 A.L.R.3d 1222, 1241 (1968).

30. Rowlett, *supra* note 5, at 607.

31. This article presents only one of several possible ways of categorizing the views on aesthetic regulations expressed by the various states. For other examples, *see* Bufford, *supra* note 27; Rowlett, *supra* note 5; Annot., *supra* note 29.

32. Under this approach, a zoning ordinance regulating billboards could address aes-

nance promotes the health, safety, morals or welfare of the community that makes it constitutional and the fact that aesthetic concerns are also incidentally addressed does not render the ordinance invalid. Needless to say, aesthetic concerns alone are not considered sufficient under this analysis to justify an exercise of the police power.

Under the second approach, promoting aesthetics is seen as a legitimate goal of the police power only to the extent that the promotion of aesthetics also promotes some non-aesthetic end which is a recognized concern of the public health and safety or general welfare. Thus, a city's aesthetic zoning regulation may be upheld, not because it promotes beauty, but because in promoting beauty it protects certain economic interests of the community such as property values[33] or tourism,[34] both of which are considered legitimate interests of the general welfare. While the aesthetic considerations of such ordinances are primary and not auxiliary, it is the impact of aesthetic zoning on these more traditional objectives of the police power that preserves their constitutionality.

The third general view recognized by the courts, and recently adopted in Florida,[35] is that zoning for aesthetic ends is legitimate in and of itself. The view is based on a theory that aesthetics and visual pollution are acceptable concerns of the general welfare:

> The modern trend is to recognize that a community's aesthetic well-being can contribute to urban man's psychological and emotional stability. It is true that the question of what is beautiful

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thetic considerations in an auxiliary capacity and only if the ordinance demonstrates a reasonable relation to the health, safety, morals, or welfare of the community. Stoner McCray System v. City of Des Moines, 78 N.W.2d 843 (Iowa 1956).

33. *See, e.g.*, Duckworth v. City of Bonney Lake, 586 P.2d 860 (Wash. 1978) (aesthetic considerations of ordinance which prohibited mobile homes from areas zoned single-family residential are legitimate in that they protect property values).

34. The early Florida cases provide clear examples of upholding basically aesthetic ordinances on the grounds that they promote tourism. *See* City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941); Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960). In a more recent case, the California Supreme Court noted that "[b]ecause this state relies on its scenery to attract tourists and commerce, aesthetic considerations assume economic value" and support the regulation of billboards. Metromedia, Inc. v. City of San Diego, 164 Cal. Rptr. 510, 516 (1980), *rev'd on other grounds*, 453 U.S. 490 (1981).

35. City of Lake Wales v. Lamar Advertising Ass'n, 414 So. 2d 1030. Even prior to the decision in *Lake Wales*, several commentators cited Florida as having adopted the modern view that zoning solely for aesthetics was a proper exercise of the police power. *See* Bufford, *supra* note 27, at 134; Annot., *supra* note 29, at 1236. However, it appears more likely that, prior to *Lake Wales*, Florida's position was probably best characterized as approving of primarily aesthetic regulation provided it accomplished some legitimate non-aesthetic end, such as the enhancement of tourism or protection of property values.

> and pleasing is for each individual to decide. We should begin to realize, however, that a visually satisfying city can stimulate an identity and pride which is the foundation for social responsibility and citizenship. These are proper concerns of the general welfare.[36]

Thus, it appears that some quantum of aesthetic regulation is possible no matter which view a state subscribes to,[37] although the degree of acceptance of aesthetic concerns is certainly variable. Some authors[38] have suggested that it makes little difference which view is adopted as far as justifying the exercise of the police power is concerned, and to a certain extent this appears true.[39] But while it may not matter which view a state adopts in order to relate aesthetics to the police power, such is certainly not the case when courts evaluate the reasonableness of an ordinance in view of its restrictions on private property rights. When a court weighs the competing considerations of an ordinance which promotes certain public benefits while at the same time restricting private property rights, the existence of non-aesthetic concerns promoted by the ordinance obviously will be of some aid in justifying greater restrictions. Thus, a billboard ordinance which compels the *immediate* removal of nonconforming billboards might be more tolerable if it promotes both safety and aesthetic concerns as opposed to just aesthetics. Such a severe infringement on private property might be intolerable for mere aesthetic reasons.[40] Likewise, an ordinance

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36. Sun Oil Co. v. City of Madison Heights, 199 N.W.2d 525, 529 (Mich. Ct. App. 1972).

37. For a brief discussion of each state's position on zoning for aesthetics, *see* Bufford, *supra* note 27.

38. A. RATHKOPF, *supra* note 1, § 14.01[2], at 14-16; Rowlett, *supra* note 5, at 608-09.

39. Whether a regulation is upheld solely on the basis of aesthetics or because it also promotes some non-aesthetic objective may be of little significance because the "court is in fact upholding it indirectly on the basis of *all* the values contributed by it and on the basis of whatever elements of zoning are included in the word 'appearance.'" A. RATHKOPF, *supra* note 1, § 14.01[2], at 14-16 (emphasis added). This appears to be particularly true when a primarily aesthetic ordinance is upheld on the grounds that it promotes some legitimate non-aesthetic goal, even though the relationship between that goal and the ordinance is somewhat tenuous. Since such ordinances are cloaked with a presumption of constitutionality, the party seeking to invalidate the ordinance faces the difficult task of proving that the ordinance is not rationally related to the non-aesthetic goal. The end result is that ordinances which are, in fact, based solely or primarily on aesthetics are found to be enacted for valid police power purposes. Some courts are openly cognizant of this end run around the police power. *See* City of Smyrna v. Parks, 242 S.E.2d 73 (Ga. 1978), in which the court upheld a primarily aesthetic ordinance on the basis of a tenuous relationship to safety and a virtually unprovable relationship to the protection of property values.

40. Modjeska Sign Studios, Inc. v. Berle, 402 N.Y.S.2d 359 (1977), *appeal dismissed*, 439 U.S. 809 (1978).

regulating fences which was enacted primarily for aesthetic reasons might be able to sustain greater restrictions on property rights if some safety concerns are also addressed in the ordinance.[41]

While the thrust of this article deals with the problems which may be encountered even after the concept of aesthetic zoning is determined to be a legitimate exercise of the police power, it is important to recognize the different views on aesthetic zoning held throughout the states. While aesthetics in general may be promoted through the police power, specific ordinances which address aesthetic concerns may fail in less lenient states because they do not have an underlying relation to a more traditional police power objective. The issue of whether a particular aesthetic ordinance is a justifiable exercise of the police power is certainly not beyond challenge. Depending upon the jurisdiction and the intent of the ordinance (both express and implied), it seems clear that some aesthetic regulations may not be viewed as a legitimate exercise of the local police power.

Moreover, the views on aesthetic regulation are constantly changing. As the following discussion of Florida case law indicates, it is not uncommon for state law in this area to experience an evolution of sorts, during which time a state's position on the issue may be somewhat ambiguous. A city seeking to regulate aesthetics, or a property owner seeking to invalidate an ordinance as an impermissible use of the police power, may therefore wish to address all three positions in order to afford the court a basis for upholding, or invalidating, the ordinance no matter which view it eventually subscribes to.

III. AESTHETIC ZONING IN FLORIDA

That the role aesthetics should play in zoning in Florida was ambiguous for most of this century is evident in many of the zoning decisions dealing with aesthetic concerns.[42] This ambiguity probably is indicative of a steady, if slow, evolution from unacceptance of aesthetic considerations to a limited approval of zoning for aesthetics and, finally, to recognition of zoning for aesthetics as "an idea whose time has come."[43]

As noted earlier, the first case to address the issue of aesthetic

41. City of Smyrna v. Parks, 242 S.E.2d 73 (Ga. 1978).

42. *See* Sunad, Inc. v. City of Sarasota, 122 So. 2d 611; Abdo v. City of Daytona Beach, 147 So. 2d 598 (Fla. 1st DCA 1962).

43. City of Lake Wales v. Lamar Advertising Ass'n, 414 So.2d at 1032.

regulation in Florida appears to be *Shackelford*,[44] a case which did more than its share to fuel the controversy surrounding aesthetic zoning in later cases. In *Shackelford*, the court dealt with a Lake City ordinance which declared certain billboards and other advertising surfaces to be nuisances and provided penalties for their erection and maintenance. Defendant Anderson was cited for violating the ordinance for painting a sign on the side of a building advertising the occupant's business. According to the court, "the sign was neither dangerous to persons using the streets nor to adjacent property, nor offensive to their morals, although the words, design, and coloring of the sign might offend the aesthetic tastes of some of its citizens."[45] After reversing the lower court on unrelated grounds, the supreme court turned to the issue of aesthetic regulation under the police power. In remarks that were later characterized as a mere "gratuitous expression"[46] and "obiter dictum,"[47] the court commented:

> In so far as the city undertakes to regulate the erection or construction of billboards that might be dangerous to the public . . . , it has the power; but to attempt to exercise the power of depriving one of the legitimate use of his property merely because such use offends the aesthetic or refined taste of other persons is quite another thing, and cannot be exercised under the Constitution, forbidding the taking of property for a public use without compensation.[48]

This dictum in *Shackelford* did not prevent the Florida courts from taking a more positive view towards aesthetic zoning in later cases. In *City of Miami Beach v. Ocean & Inland Co.*,[49] the court recognized that a community's existing aesthetic appeal could provide a justification for zoning that was designed to protect and perpetuate its attractiveness. The court upheld the city's zoning ordinance prohibiting commercial uses along certain oceanfront property, noting that the ordinance preserved the aesthetic appeal of the community and provided "a distinct lure to the winter traveler."[50] More importantly from a legal standpoint, for the first time

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44. 76 So. 343.
45. *Id.* at 345.
46. Sunad, Inc. v. City of Sarasota, 122 So. 2d at 614.
47. *Id.* at 615 (Thornal, J., dissenting).
48. 76 So. at 345.
49. 3 So. 2d 364.
50. *Id.* at 367.

the court linked aesthetic concerns directly to the promotion of the general welfare. While *Ocean & Inland* did not exactly embrace the use of zoning to promote any aesthetic concern in any manner, it is clear that the decision cracked the door to allowing consideration of such concerns.

Later decisions opened the door even further. Courts used rationale similar to that in *Ocean & Inland* to hold that "aesthetic considerations could be just cause for regulating signs in Sarasota inasmuch as the city was of the same character as Miami Beach,"[51] and that junkyards in the city of Ft. Pierce could be required to erect visual barriers since that city was "no less an attraction to tourists for its aesthetic qualities than the cities of Miami Beach and Sarasota."[52] Other cases added Daytona Beach[53] and Vero Beach[54] to the list of tourist areas where the regulation of aesthetics was justified, prompting one commentator to remark that the judicial designation of the entire state as a tourist area would seem to be the most likely way to accomplish statewide acceptance of aesthetic zoning.[55]

Practically speaking, these decisions indicated that local governments in Florida could enact aesthetic regulations so long as the promotion of aesthetics also promoted tourism or protected the city's economic interest in the tourist industry. At least one later case found that the protection of property values through the promotion of aesthetics could also provide a constitutional basis for exercise of the local police power in Florida.[56] Although at times these cases implied a more primary role for aesthetics in the exercise of the police power, none of the cases expressly upheld an ordinance solely on its ability to promote aesthetics without at least a purported positive impact on some recognized aspect of the general welfare.

While some later cases[57] approved of aesthetic zoning ordinances

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51. Sunad, Inc. v. City of Sarasota, 122 So. 2d at 614.

52. Rotenberg v. City of Fort Pierce, 202 So. 2d at 786.

53. Abdo v. City of Daytona Beach, 147 So. 2d 598.

54. Eskind v. City of Vero Beach, 159 So. 2d 209 (Fla. 1963).

55. Note, *Aesthetic Zoning: A Current Evaluation of the Law*, 18 U. FLA. L. REV. 430, 439 (1965).

56. City of Coral Gables v. Wood, 305 So. 2d 261 (Fla. 3d DCA 1974).

57. *See, e.g.* Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971) (preservation of scenic surroundings sufficient to uphold ordinance requiring gas stations to be located 350 feet apart); International Co. v. City of Miami Beach, 90 So. 2d 906 (Fla. 1956) (preservation of city's attractiveness sufficient to allow enforcement of ordinance regulating signs for accessory uses); Merritt v. Peters, 65 So. 2d 861 (Fla. 1953) (aesthetic grounds sufficient to allow restriction on size of commercial signs); City of Miami Beach v. First Trust Co., 45 So.

with almost routine reliance on these earlier cases, there also have been some queries and setbacks for other aesthetic regulations. A common thread running through these decisions striking down aesthetic regulations appears to be the presence of a discriminatory approach on the face of the regulation. For example, in *Sunad, Inc. v. City of Sarasota,*[58] the supreme court reversed a district court decision upholding a city ordinance which prescribed different size standards for signs erected at the "point of sale" and those erected elsewhere.[59] After noting its support for aesthetic zoning in "proper" situations, the court struck down the ordinance for failing to define "a pattern calculated to protect and preserve the city's beauty."[60]

Subsequent decisions affirmed the holding in *Sunad* to the effect that aesthetic regulations must treat like subjects alike and may not apply different standards based upon location, subject matter, type of business, or other suspect criteria. In *Abdo v. City of Daytona Beach,*[61] the district court of appeal invalidated an ordinance prohibiting signs which advertised rates for motels and other types of lodging houses, but did not similarly restrict restaurants, gas stations and other businesses from exhibiting their prices. Citing the supreme court's decision in *Sunad,* the court found it difficult to believe that the ordinance would promote a pattern calculated to preserve the city's beauty: "For aught that appears, compliance with the ordinance could be effected by the unaesthetic expedient of throwing a bucket of paint over that part of the sign having to do with rates."[62] Likewise, in *City of Naples v. Polk,*[63] enforcement of an ordinance which prohibited all off-site (non-point of sale) advertising signs was enjoined as unconstitutional.

It was within this framework of limited acceptance for aesthetic zoning that the Florida courts approached the most recent battles over the regulation of outdoor advertising in *Lake Wales.* This litigation began after the city amended its sign ordinance in 1978 to effectively prohibit all off-premises signs. Lamar sued for the issuance of a permit to erect a billboard and the trial court held the

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2d 681 (Fla. 1949) (zoning designed to perpetuate city's aesthetic appeal upheld).

58. 122 So. 2d 611, *rev'g,* 114 So. 2d 377 (Fla. 2d DCA 1959).

59. Wall signs erected at point of sale were unrestricted in size; however, for non-point of sale locations, wall signs were limited to 300 square feet and all other signs (*e.g.,* billboards) were limited to 180 square feet.

60. 122 So. 2d at 615.

61. 147 So. 2d 598.

62. *Id.* at 603.

63. 346 So. 2d 1076 (Fla. 2d DCA 1977).

ordinance unconstitutional.[64] The city amended its ordinance again, establishing standards which differentiated between on-site and off-site signs, and the two parties submitted the new ordinance to the trial court by stipulation. Again the trial court found it unconstitutional and this time the city appealed. Solely on the basis of the supreme court's decision in *Sunad,* the appellate court affirmed. However, the appellate court also took note of "the trend toward acceptance of regulatory distinction between billboards and on-site advertising signs"[65] which was occurring in other jurisdictions, and certified to the supreme court the question of whether such distinctions were constitutional. In reversing the decision of the district court of appeal, the supreme court receded from its holding in *Sunad:* "Cities have the authority to take steps to minimize sight pollution and, if in doing so they find it reasonably necessary to make a distinction between on-site and off-site signs, there is no constitutional impediment."[66]

After the decision in *Lake Wales,* the general implication appears to be a whole-hearted endorsement of the use of a city's zoning power to regulate for aesthetic purposes. The court has recognized that "[z]oning solely for aesthetic purposes is an idea whose time has come."[67] The key word here is "solely": No longer must the ordinance directly promote tourism, protect property values or promote some other aspect of the general welfare in order to be considered constitutional. Aesthetics *qua* aesthetics is now a recognized aspect of the general welfare and a legitimate objective of the police power in Florida.

Of course, it would be a mistake to think that every use of the police power for every aesthetic purpose will be viewed with acceptance. In this regard, *Lake Wales* is not helpful. The court implied that there was an aesthetic difference between on- and off-site signs that made the ordinance reasonable, but it did not spec-

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64. The question of whether such an ordinance is actually unconstitutional has not been definitively addressed by the Florida Supreme Court or United States Supreme Court. *But see* Lamar-Orlando Outdoor Advertising v. City of Ormond Beach, 415 So.2d 1312, where an ordinance banning all off-site advertising was upheld. Plaintiff in *Ormond Beach* was a large multi-state advertising company that did less than one percent of its business in Ormond Beach. The court held that plaintiff failed to sustain its burden of showing that the ordinance exceeded the scope of the police power by severely "crippling" its business.

65. 399 So. 2d at 987.

66. 414 So. 2d at 1032.

67. *Id., quoting,* Westfield Motor Sales Co. v. Town of Westfield, 324 A.2d 113, 119 (N.J. Super Ct. Law Div. 1974).

ify what that difference was.[68] Moreover, the very fact that cities must "find it *reasonably necessary* to make a distinction between on-site and off-site signs"[69] implies that some aesthetic regulations may not be valid exercises of the police power.

The reasonableness of aesthetic zoning ordinances is likely to be the focus of future decisions in Florida. However, except for those cases discussed above which debated the reasonableness of the distinction between on-site and off-site signs, the courts in Florida generally have had neither the opportunity nor the impetus to address some of the more likely questions to arise regarding the reasonableness of aesthetic zoning. Can a city effectively prohibit all off-site advertising, as Lake Wales had initially attempted to do? Can a city require the removal of unaesthetic structures within a given time period and, if so, what is a reasonable period of abatement? What standards, if any, need to be specified in the ordinance in order to insulate it from charges of arbitrary and capricious enforcement? It is problems such as these that courts in Florida are likely to be faced with in the future, and it is to these problems that this article now turns. By evaluating applicable Florida law and relevant cases from other jurisdictions, some insight may be gained into what factors are important in evaluating the reasonableness of aesthetic regulation and what arguments are likely to be successful in upholding or invalidating aesthetic ordinances.

IV. REASONABLENESS: THE TALISMAN OF ALL ZONING

Once a zoning ordinance has been "[f]reed of the necessity of discovering a relation to some standard component of the police power,"[70] the focus of the courts often shifts to other problems of constitutional magnitude. Billboard and sign ordinances, for example, are particularly vulnerable to first amendment free speech violations.[71] More commonly, zoning ordinances of all

68. *But see* Metromedia, Inc. v. City of San Diego, 453 U.S. 490; Lamar-Orlando Outdoor Advertising v. City of Ormond Beach, 415 So. 2d 1312. *See also infra* note 83.

69. 414 So. 2d at 1032 (emphasis added).

70. R. ANDERSON, *supra* note 3, § 7.25, at 596.

71. The Supreme Court's recent decision in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), has shown very clearly that first amendment free speech concerns are very much alive in attempts to regulate and prohibit billboards. At issue in *Metromedia* was an ordinance that had the net effect of (1) allowing on-site advertising of goods and services available on the property, (2) prohibiting all off-site advertising, and (3) prohibiting all *noncommercial* advertising unless it fell within one of twelve exceptions to the ordinance. Metromedia challenged the ordinance as an abridgement of free speech, asserting "that the city

types—including aesthetic regulations—are subjected to judicial scrutiny for the reasonableness with which they attain their benefits for the common welfare at the expense of restricting the ways in which private property may be used.[72] This balancing of public benefits against private restraints is, at least in theory, a very difficult test to apply in this area of zoning due to the difficulty of assigning a value or weight to aesthetic considerations. Nonetheless, as courts have come to accept zoning for aesthetics as a legiti-

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may bar neither all off-site commercial signs nor all noncommercial advertisements and that even if it may bar the former, it may not bar the latter." 453 U.S. at 504.

The plurality's discussion of the ordinance basically centered around two issues: (1) whether an ordinance which allows on-site commercial advertising but prohibits off-site commercial advertising is a constitutionally valid restriction on *commercial* speech, and (2) whether an ordinance which provides greater freedoms for commercial speech than for noncommercial speech is a constitutionally valid restriction on *noncommercial* speech. In addressing the impact of the ordinance on commercial speech, the plurality noted that it traditionally has afforded commercial speech a lesser degree of protection than noncommercial speech, and proceeded to uphold the ordinance's restriction on off-site commercial speech. The impact of the city's ordinance on noncommercial speech did not fare quite as well. In effect, the plurality held the ordinance unconstitutional because it afforded greater protection to commercial speech than to noncommercial speech and was, therefore, and inversion of typical first amendment values: "[T]he city may not conclude that the communication of commercial information . . . is of greater value than the communication of noncommercial messages." 453 U.S. at 513 (footnote omitted).

Although billboard banning has been the most fruitful area of aesthetic regulation with regard to free speech claims, other types of aesthetic regulation are not immune to first amendment considerations. For example, several local ordinances adopted in New Jersey which sought to restrict the utilization of "for sale" and "sold" signs in residential areas were found to have run afoul of the first amendment. *See* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Berg Agency v. Township of Maplewood, 395 A.2d 261 (N.J. Super. Ct. Law Div. 1978). Perhaps the most unusual first amendment claim to arise in response to an ordinance enacted for aesthetic purposes occurred in People v. Stover, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963). In that case, Stover had erected a series of clotheslines in his front and side yards which were adorned with old clothing, rags, underwear, and other assorted apparel to express his displeasure with the high taxes imposed by the city. When the city passed an ordinance prohibiting the erection and maintenance of clotheslines in a front or side yard, Stover objected to this curtailment of his nonverbal tax protest. The court upheld the ordinance, noting that a city may proscribe a form of expression that works an injury to property; in this regard, it was obvious to the court "that the value of [the] 'protest' lay not in its message but in its offensiveness," *Id.* at 740, and would undoubtedly serve to injure property values.

For a more detailed discussion of aesthetic regulation and its effect on free speech, *see* Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977); Sager, *The Supreme Court 1980 Term*, 95 HARV. L. REV. 17, 211-21 (1981); Comment, *Constitutional Law: Billboards, Commercial Speech and the First Amendment*, 21 WASHBURN L.J. 672 (1982); Note, *The Media Win the Battle, but Metro Wins the War: Metromedia, Inc. v. City of San Diego*, 15 U.C.D.L. REV. 493 (1981); Note, 10 ECOLOGY L.Q. 125 (1982).

72. R. ANDERSON, *supra* note 3, § 7.25, at 594; A. RATHKOPF *supra* note 1, § 14.01, at 14-16.

mate use of the police power, the focus of their attention has turned to just such an evaluation.

As the following sections of this article illustrate, there are many pitfalls into which an aesthetic zoning ordinance may fall. However, such ordinances are generally given a better than average chance of being upheld by virtue of three widely recognized police power doctrines.[73] First of all, a zoning regulation cannot be declared unconstitutional unless it is clearly arbitrary and capricious.[74] Secondly, such ordinances are entitled to a presumption of validity, a presumption "which shifts the burden to the party attacking an ordinance to show its invalidity."[75] And third, if the validity or reasonableness of a zoning ordinance is fairly debatable, the court should defer to legislative judgment.[76] These principles go a long way towards upholding many otherwise questionable zoning ordinances; however, as the following discussion indicates, they do not render local zoning ordinances immune to attack.

A. Reasonableness Vis-a-Vis the Location and Character of Development

The standard of "reasonableness" is very flexible and can be used to invalidate zoning ordinances in a number of ways, some of which are discussed elsewhere in this article. Of primary concern in this section is the reasonableness of aesthetic regulation as it applies to the character and location of development.

In its simplest definitional form, aesthetic regulation is regulation which seeks to improve or enhance the beauty or appearance of an area. Whether a regulation actually accomplishes this goal is often a function of (1) the location of the restricted structures or uses, (2) the character of existing development at that location, and (3) the character of development proscribed by the regulation. It is, therefore, difficult to divorce a particular aesthetic regulation from its surroundings when evaluating its reasonableness. Such was obviously the case in *People v.Goodman*,[77] a case in which the reasonableness of a very restrictive sign ordinance was at issue.[78]

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73. *See* Bufford, *supra* note 27, at 129.

74. Village of Euclid v. Ambler Realty Co., 272 U.S. at 395.

75. *See* Bufford, *supra* note 27, at 129; *see, e.g.*, Pierro v. Baxendale, 118 A.2d 401 (N.J. 1955).

76. Village of Euclid v. Ambler Realty Co., 272 U.S. at 388; Burritt v. Harris, 172 So. 2d 820 (Fla. 1965).

77. 338 N.Y.S.2d 97 (1972).

78. The ordinance limited commercial signs to four square feet in size and provided a

The ordinance had been enacted by a small village located within a designated national seashore, a location the court was quick to recognize for its uniqueness and sensitivity.

> In assessing the reasonableness of such legislation, we may properly look to the setting of the regulating community . . . Indeed, regulation in the name of aesthetics must bear *substantially* on the economic, social and cultural patterns of the community . . . [and] fit the rather unique cultural character and natural features of the area.[79]

Given the unique character of the area, the court found the sign ordinance to be a reasonable attempt to protect the appearance and character of the community.

In regulating some aspect of development in the name of aesthetics, it appears necessary to place similar burdens on property which is similarly situated.[80] One of the key questions in this regard is whether two parcels are, in fact, situated similarly. This question has been the focus of several cases in Florida and elsewhere in which sign ordinances that made a distinction between on-site and off-site signs[81] were evaluated for their reasonableness. While some earlier cases invalidated ordinances making such a distinction as failing to define "a pattern calculated to protect and preserve the city's beauty,"[82] the more recent cases have tended to uphold the distinction for various reasons.[83] While the distinction

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two-year abatement period for existing nonconforming signs.

79. 338 N.Y.S.2d at 101.

80. Vieux Carre Property Owners & Assocs., Inc. v. City of New Orleans, 167 So. 2d 367 (La. 1964) (city could not regulate one part of an historic district and exempt another part when both sections had structures of similar architectural and historical significance).

81. Also referred to in some decisions as "point of sale" and "non-point of sale" signs, Sunad, Inc. v. City of Sarasota, 122 So. 2d 611, and as "accessory" and "non-accessory" signs, Cromwell v. Ferrier, 279 N.Y.S.2d 22 (1967).

82. Sunad, Inc. v. City of Sarasota, 122 So. 2d at 615.

83. The Supreme Court's recent decision in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, provides some indication of why the distinction between on-site and off-site signs is appropriate:

> In the first place, whether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits on-site advertising. Second, the city may believe that off-site advertising with its periodically changing content, presents a more acute problem than does on-site advertising . . . . Third, . . . the city could reasonably conclude that a commercial enterprise—as well as the interested public—has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of

between off-site and on-site signs has received the most attention from both local governments and the courts concerning potentially unreasonable distinctions, other distinctions regarding both the character and location of signs also are possible and are not immune to judicial scrutiny.[84]

A regulation which attempts to place an aesthetic restriction over an area which already has a large number of nonconforming structures would also appear to be unreasonable. Such was the case in *Hankins v. Borough of Rockleigh*,[85] where the borough passed two ordinances which related to architectural design and review. The first ordinance required new residential dwellings to exhibit an early-American type of design, while the second ordinance effectively prohibited flat-roofed dwellings. Plaintiff sought to build a modern flat-roofed house and challenged the constitutionality of the ordinances on several grounds, most of which went unaddressed by the court.[86] However, the court did order a permit issued since denial would be "clearly and palpably unreasonable in light of the actual physical development of the municipality."[87] In support of its conclusion, the court noted that the most recently built dwellings in the borough were of a modern design, many older structures had additions which had flat roofs and within a

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> advertising commercial enterprises located elsewhere . . . . Thus, off-site commercial billboards may be prohibited while on-site commercial billboards are permitted.

Id. at 511-12. Shortly after *Metromedia* was decided, the Florida Supreme Court receded from its earlier position that the distinction between off-site and on-site signs is unreasonable and held the distinction valid in *Lake Wales*. Soon after that, in *Ormand Beach*, a Florida appellate court elaborated on the differences between off-site and on-site signs which make the distinction a reasonable one. In addition to the differences noted above which were recognized in *Metromedia*, the court in *Ormond Beach* observed that (1) on-site businesses had already been constructed and the addition of a sign would not have as big an impact when compared to an off-site sign; (2) off-site signs were taking advantage of and intruding upon the vision of passersby rather than exercising a right associated with the land; and (3) on-site signs were simply more tolerable because they contributed to the business on the premises. 415 So.2d at 1316-19.

84. For example, an ordinance could provide different standards for commercial, office and institutional uses, or could distinguish between different types of commercial activities. In this regard, see Abdo v. City of Daytona Beach, 147 So. 2d 598, in which an ordinance that regulated outdoor signs advertising room rates for lodging establishments but did not affect other businesses was found unreasonable and discriminatory. *See also* Hiway Ads, Inc. v. State, 356 So. 2d 501 (La. Ct. App. 1977), where the court rejected plaintiff's argument that a distinction between signs erected along federal highways and other signs was arbitrary.

85. 150 A.2d 63 (N.J. Super. Ct. App. Div. 1959).

86. *See infra* notes 99-103 and accompanying text for discussion of plaintiff's claims relating to inadequate standards of review.

87. 150 A.2d at 66.

short distance of plaintiff's property were many modern structures with flat roofs. Thus, the prohibitions on future development mandated by the ordinances were clearly unreasonable in light of the character of existing development.[88]

In a similar vein, an aesthetic regulation which imposes like restrictions on all areas regardless of its aesthetic impact on certain sub-areas may be found to be unreasonably related to the promotion of aesthetics. As the First Circuit Court of Appeals noted in *John Donnelly & Sons v. Campbell,* "the quantum of improvement will obviously vary with the site involved."[89] In this regard, courts sometimes distinguish commercial and industrial districts from other types of areas, rationalizing that a regulation affecting one aspect of aesthetics (*e.g.,* billboards) may be a mere drop in the bucket in a very unaesthetic industrial or commercial district. This was the basis of Justice Brennan's concurring opinion in *Metromedia*[90] in which San Diego's ban on billboards was struck down as violative of free speech. According to Justice Brennan:

> A billboard is not *necessarily* inconsistent with oil storage tanks, blighted areas, or strip development . . . [B]efore deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment. Here, San Diego has failed to demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment.[91]

Justice Brennan also cited at length from a concurring opinion in *John Donnelly* which noted that "signs and billboards are but one of countless types of man-made intrusions"[92] in industrial and commercial areas. The problem, as envisioned in these opinions, is one of underinclusiveness. While a city is definitely not required to address all aesthetic concerns at the same time, these opinions would place a burden on the city to demonstrate a comprehensive commitment to aesthetic improvement and not just an effort to rid the community of a single annoying source of ugliness. If the city

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88. *See also* Fulling v. Palumbo, 286 N.Y.S.2d 249 (1967) (ordinance creating minimum lot size of 12,000 square feet was unreasonable in neighborhood where 75 per cent of all lots were less than 12,000 square feet).

89. 639 F.2d 6, 23 (1st Cir. 1980), *aff'd,* 453 U.S. 916 (1981).

90. 453 U.S. at 521 (1981).

91. 453 U.S. at 531 (Brennan, J., concurring).

92. 639 F.2d at 23 (Pettine, J., concurring).

cannot meet this burden, the ordinance would fail the test of being reasonably related to the promotion of aesthetics.

In addition to the problem of underinclusive efforts to regulate aesthetics, a city must also be aware of the problems of overinclusiveness as regards restrictions on the location or character of development. As the court noted in *J.D. Construction Corp. v. Board of Adjustment*, "[t]he regulation must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not have the offensive character of those which caused the problem"[93] addressed by the regulation. At issue in *J.D. Construction* was a parking ordinance which restricted front-yard parking facilities. After recognizing that the purpose of the ordinance was aesthetic in nature and designed to preserve property values, the court held the ordinance inapplicable to multi-family development: "While the restriction may bear a reasonable relationship to such a purpose as applied to single-family residences in a single-family residential district, it bears no such relationship as applied to garden apartment complexes."[94] As such, the ordinance was overinclusive, restricting more than was necessary to achieve its aesthetic objectives.

In sum, the regulation in question must be reasonably calculated to achieve its aesthetic objectives given both the location and character of development. Not only may a local government find it *useful* to draw regulations which are tailored to the industrial section, the historical section or to the architectural characteristics of an area, it may well find it *necessary* to do so if it is to pass the test of being reasonably related to the promotion of aesthetics in a certain area.

B. Failure to Establish Adequate Standards

Often, police power regulations which require permitting or some other form of case-by-case evaluation necessitate that the evaluation of the proposed development be conducted by a local administrative or legislative body. When this occurs, it is necessary generally for the ordinance to specify clear and reasonable standards by which the local body may conduct its review. This is particularly true in the area of aesthetic regulation since aesthetics are often cited as being subjective and not capable of reduction to ob-

93. 290 A.2d 452, 455 (N.J. Super. Ct. Law Div. 1972).
94. *Id.* at 458.

jective criteria.[95]

When standards for aesthetic concerns are properly prescribed, the ordinance will be better able to withstand a challenge of being arbitrary, unreasonable or capricious. The failure to adopt clear and reasonable standards may pose several problems of constitutional magnitude. One obvious problem that may result from the failure to provide adequate standards is that it leaves the application of the ordinance to the whim and discretion of local officials and, thus, may be found unreasonable.[96] A second problem arises when the standards are so inadequate or vague that the developer does not know whether his plans are in compliance with the ordinance.[97] Finally, there may also be problems when the local legislative branch attempts to delegate some of its zoning powers to an administrative agency such as a planning commission or architectural review board; the failure of the legislative body to establish clear and unambiguous standards which the administrative agency must follow in order to carry out the intent of the ordinance may result in an unconstitutional delegation of legislative power.[98]

The most fertile area of aesthetic regulation for standards problems to arise appears to be the area of architectural review of proposed buildings. For example, in *Hankins v. Borough of Rockleigh,*[99] the borough passed two ordinances which related to architectual design and review, the first[100] of which restricted the

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95. *See, e.g.,* City of Champaign v. Kroger Co., 410 N.E.2d 661, 669 (Ill. App. Ct. 1980)("while public health, safety and morals . . . submit to reasonable definition and delimitation, the realm of the aesthetic varies with the wide variation of taste and cultures"); Forbes v. Hubbard, 180 N.E. 767, 773 (Ill. 1932)(argument that aesthetic regulations could not be reduced to objective criteria was held inapplicable to ordinances restricting the size and location of signs because such ordinances could be "as clear and definite as zoning ordinances lacking an aesthetic purpose").

96. Board of Commissioners v. A.S. Pater Realty Co., 179 A.2d 169, 172 (N.J. Super. Ct. Ch. Div. 1962) (ordinance gave board of commissioners power to grant or refuse billboard permits in an arbitrary manner).

97. Morristown Road Assocs. v. Borough of Bernardsville, 394 A.2d 157, 163 (N.J. Super. Ct. Law Div. 1978) (architectural review standards so vague that builder could not determine if his plans were conforming).

98. State *ex rel.* Magidson v. Henze, 342 S.W.2d 261 (Mo. Ct. App. 1961) (dictum indicating legislative power to zone could not be delegated); State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970) (plaintiff's argument that delegation was unconstitutional was rejected).

99. 150 A.2d 63 (N.J. Super. Ct. App. Div. 1959).

100. The ordinance read in pertinent part:

> Article III
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> Section 7(g): Architectural Design—The architectural design of all new houses and other buildings in the Borough of Rockleigh, or old houses or buildings that may be renovated or reconstructed, shall be subject to the approval of the Planning

style of new houses to an early American design and the second of which effectively prohibited structures with flat roofs. On appeal, plaintiffs claimed that "the ordinance's 'acceptable to' phrase confers an unfettered discretion upon borough officials,"[101] and that the term "early American" was so ambiguous that it "could be construed as authorizing a tepee, adobe, log cabin, Cape Cod, New England, Dutch colonial, or Pennsylvania Dutch architectural design."[102] The court found it unnecessary to rule on either of these assertions, choosing to strike down the ordinance as clearly unreasonable in light of existing development in the borough, much of which already had flat-roofed structures.[103]

Two early cases which appeared to set the polestars for architectural review ordinances are *City of West Palm Beach v. State* ex rel. *Duffey*[104] and *State* ex rel. *Saveland Park Holding Corp. v. Wieland.*[105] At issue in both cases was the validity of ordinances [106] requiring proposed buildings to be substantially similar in architectural design to existing buildings in the neighborhood. However, the Florida Supreme Court in *West Palm Beach* struck down the ordinance as having standards so uncertain as to be subject to the "whim or caprice" of the administrative body, while the Wisconsin Supreme Court in *Saveland Park* upheld the ordinance despite the existence of some discretionary power in the board. Aside from the obvious difference in courts, the chief difference between the ordinance at issue in *West Palm Beach* and that in *Saveland Park* appears to be the existence of a direct tie to property values in the *Saveland Park* ordinance. According to the rationale used by the

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Board and of the Mayor and Council of the Borough of Rockleigh. Such design may be of early American, or of other architectural style conforming with the existing residential architecture and with the rural surroundings in the Borough, and acceptable to the Planning Board and to the Mayor and Council of the Borough of Rockleigh.

150 A.2d at 64.

101. *Id.* at 66.

102. *Id.*

103. *See supra* notes 85-88 and accompanying text.

104. 30 So. 2d 491 (Fla. 1947).

105. 69 N.W.2d 217 (Wis.), *cert. denied,* 350 U.S. 841 (1955).

106. The ordinance at issue in *West Palm Beach* required that the "completed appearance of every new building or structure must substantially equal that of adjacent buildings or structures in said subdivision in appearance, square foot area and height." 30 So. 2d at 492. The ordinance at issue in *Saveland Park* required that "the exterior architectural appeal and functional plan of the proposed structure will . . . not be so at variance with . . . structures already constructed or in the course of construction in the immediate neighborhood . . . as to cause a substantial depreciation in the property values of said neighborhood." 69 N.W.2d at 219.

Wisconsin court, impact on property values appears to be an adequate standard by which the board could base its decision; on the other hand, the West Palm Beach ordinance tied evaluation to such factors as floor area, height, number of rooms, and cost, and these factors were not considered sufficient grounds to evaluate proposed dwellings. Interestingly, these latter factors are easier to document than the effect of a proposed building on property values;[107] nonetheless, the ordinance was upheld in Wisconsin but not in Florida.[108]

In addition to the failure to promulgate aesthetic standards that are adequate and can be applied in a non-arbitrary manner, a question also can arise regarding the ability of a local legislative body to delegate its powers to an administrative agency. Such was the case in *State* ex rel. *Magidson v. Henze,*[109] which also determined the validity of an ordinance requiring architectural review for harmony and compatibility with existing buildings. The court held the ordinance invalid as being exercised primarily for aesthetic purposes, but then went on to indicate in dictum that the statutory grant of power to zone had been made to the legislative arm of the city and could not be delegated to an architectural review board. Only nine years later, the supreme court of Missouri in *State* ex rel. *Stoyanoff v. Berkeley*[110] overlooked the dictum in

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107. *See generally* Rowlett, *supra* note 5, at 622-33.

108. By 1978, architectural review ordinances had become more sophisticated, but the issues regarding standards were about the same and the distinction made above between *West Palm Beach* and *Saveland Park* still appeared to be valid. In Morristown Road Assocs. v. Borough of Bernardsville, 394 A.2d 157 (N.J. Super. Ct. Law Div. 1978), another ordinance requiring site plan review of proposed buildings in order to insure harmony with existing buildings was construed. Plaintiff argued that the standards in the ordinance such as "harmoniously" and "similarity" were so vague that he was unable to determine whether his building design would be conforming. The borough, on the other hand, contended that the standards in the ordinance were "as precise as the subject matter of the regulation permits," *id.* at 160, and, therefore, were not unreasonable. The court distinguished between cases like *West Palm Beach* and those like *Saveland Park*, the latter of which upheld similar standards because of their link to the protection of property values. However, the court felt that the ordinance at issue in *Morristown* was more similar to that in *West Palm Beach*, and could not be upheld:

> The basic criterion for design review under the ordinance is *harmony* with existing structures and terrain. This standard does not adequately circumscribe the process of administrative decision nor does it provide an understandable criterion for judicial review. It vests the design review committee, as well as the planning board, with too broad a discretion, and permits determinations based upon whim, caprice or subjective considerations.

Id. at 163.

109. 342 S.W.2d 261 (Mo. Ct. App. 1961).

110. 458 S.W.2d 305 (Mo. 1970).

Magidson and recognized a broad exception to the general rule preventing the delegation of zoning powers to an administrative body. The court reasoned that the ordinance will be upheld against claims of unlawful delegation

> in situations and circumstances where necessity would require the vesting of discretion in the officer charged with the enforcement of an ordinance, as where it would be either impracticable or impossible to fix a definite rule or standard, or where the discretion vested in the officer relates to the enforcement of a police regulation requiring prompt exercise of judgment.[111]

Although architectural or design review ordinances appear to be the most prolific source of problems regarding the adequacy of aesthetic standards, such problems are not unknown to other types of aesthetic regulation. For example, in *Board of Commissioners v. A.S. Pater Realty Co., Inc.*,[112] plaintiff challenged the validity of an ordinance[113] which required billboards greater than a specified size to meet with the approval of the board of village commissioners. The court noted that the ordinance provided no guidelines or standards by which the board was to evaluate these larger billboards and, thus, delegated to the board the power "to grant or refuse billboard permits in an arbitrary and capricious fashion."[114] Interestingly, the court went on to indicate that the village could have instituted a complete prohibition of signs over the size specified.

Of course, the issue of adequate standards only arises when the regulation reserves a certain amount of discretionary power with

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111. *Id.* at 311, *quoting*, State *ex rel.* Ludlow v. Guffey, 306 S.W.2d 552, 557 (Mo. 1957). The court further distinguished the ordinance at issue here from that in *Magidson* in that it contained safeguarding procedures for public hearings and appeals to city council by an aggrieved party.

112. 179 A.2d 169 (N.J. Super. Ct. Ch. Div. 1962).

113. Section 8(A)(2) of the zoning ordinance provided:

> No sign or billboard over 12 square feet shall be permitted in District "C" nor over 30 square feet in Districts "D" and "E" that is not incidental to the uses of the property on which it is located and that is not a part of or entirely supported by a building, *except upon application to and with the written consent of the Board of Commissioners.*
>
> Such application shall be accompanied by a sketch of the proposed sign or billboard showing its size and structure, and its location with respect to property lines, street junctions or intersections, and distances from adjacent buildings, structures and other signs or billboards. No fees shall be charged for such permit.

Id. at 171 (emphasis added).

114. *Id.* at 172.

the local governmental body to approve or disapprove certain structures or uses. When the ordinance contemplates a total prohibition of a certain activity, the problem of adequate standards becomes moot. Instead, the focus of the court shifts to another problem of at least equal significance: whether the regulation has effected a taking of private property for which the owner must be compensated. One aspect of this problem is discussed in the following section.

C. *Amortization and Compensation*

Once an aesthetic problem such as billboards has been identified, a typical method of providing for the elimination of the problem is to (1) proscribe future engagement in the unaesthetic activity, and (2) set a reasonable period during which existing unaesthetic uses and structures must be removed. This latter requirement, generally referred to as the amortization of nonconforming uses,[115] has been used successfully to require the removal of existing unaesthetic structures such as billboards.[116] However, it is not without its problems. Of primary concern is whether requiring the removal of existing billboards or other structures within a specified period is a taking for which the owner must be compensated.[117]

The basic idea of proscribing the future erection of unaesthetic structures and requiring the removal of existing structures within a specified period of time does not, in itself, appear to constitute a taking. Such restrictions do not mandate that the owner yield his

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115. Ordinances which proscribe unaesthetic structures at certain locations essentially make such structures nonconforming uses at those locations. Therefore, the law pertaining to the amortization and removal of nonconforming uses generally appears applicable to the removal of billboards and other unaesthetic structures under these ordinances. *See* Annot., 22 A.L.R.3d 1134 (1968).

116. While the discussion presented here on amortization of nonconforming uses is illustrated primarily with cases involving billboard and sign ordinances, it could also apply to the amortization of fences, open storage of recreational vehicles, and many other unaesthetic uses.

117. State statutes passed in response to the federal Highway Beautification Act (also referred to as the "Ladybird Act"), 23 U.S.C. § 131 (1976), provide compensation for lawfully erected signs which are removed pursuant to the federal act and state laws passed subsequent thereto. The act requires that states provide for "effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays and devices" and provides for the loss of ten percent of the state's federal-aid highway funds for failure to do so. Compensation for removed billboards is provided on a 75%-25% federal-state split. Of course, the act does not speak to local ordinances requiring the removal of billboards.

property for any particular use, such as a park,[118] which will not allow him to utilize his property in an advantageous manner. On the contrary, providing a reasonable amortization period in which to remove a billboard or other unaesthetic structure allows an owner "an opportunity to recoup his investment and avoid substantial financial loss."[119] As such, it appears to be a legitimate method of accomplishing aesthetic objectives which will benefit the entire community without inflicting a great private loss.

As a general rule, most regulations requiring the removal of nonconforming structures or uses which provide a reasonable amortization period should withstand a constitutional challenge based on the prohibition on taking private property.[120] Thus, the question most often addressed is whether the amortization period is a reasonable one. In this regard, the courts have found it necessary to make a distinction between regulations enacted to remove billboards for safety reasons and those enacted for aesthetic reasons. The public benefit gained from enacting a regulation for aesthetics is not considered nearly so great as a regulation enacted for safety. This difference is so great, in fact, that safety concerns may necessitate the *immediate* removal of an offending billboard, while an ordinance requiring immediate removal for aesthetic reasons would surely require compensation.[121]

When removal is based solely on aesthetic concerns, the length of the amortization period is, of course, a very important factor. Courts have upheld amortization periods ranging in length from

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118. French Investing Co. v. City of New York, 385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976).

119. Modjeska Sign Studios, Inc. v. Berle, 402 N.Y.S.2d 359, 366 (1977), *appeal dismissed*, 439 U.S. 809 (1978).

120. *Id.* at 367.

121. *Id.* at 366. The court observed:

> Certainly, a billboard which serves as a menace to the safety of motorists should be removed without delay. In such a case, the public benefit gained by immediate implementation of an exercise of the police power far outweighs the concomitant financial injury suffered by the affected billboard and property owners. In contrast to a safety-motivated exercise of the police power, a regulation enacted to enhance the aesthetics of a community generally does not provide a compelling reason for immediate implementation with respect to existing structures or uses.

Id. This distinction surfaced clearly in the ordinance at issue in Art Neon Co. v. City & County of Denver, 488 F.2d 118 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974), which provided an amortization period of up to five years for general nonconforming signs but only a period of thirty days for removal of signs posing a safety risk. The court rationalized that, due to "the extreme character of these signs, with the demonstrated relationship to safety, we must hold the method and the time to be reasonable." *Id.* at 123.

one year to ten years.[122] However, this does not mean that any specific amortization period will be reasonable for all signs even within the same jurisdiction. Of note in this regard is *National Advertising Co. v. County of Monterey*,[123] where the county's zoning ordinance rendered forty-two of plaintiff's signs nonconforming and subject to removal within one year. The court noted that thirty-one of these signs had been fully depreciated for federal income tax purposes, but that the remaining eleven signs would not be fully depreciated for several years. Therefore, the court held the one-year amortization period reasonable as to the thirty-one fully depreciated signs, but decided that removal of the other eleven should wait until expiration of a more reasonable period in which to allow plaintiff to recover their original cost.

As *Monterey* seems to indicate, a critical factor in the reasonableness of the length of the amortization period is its relation to the owner's financial investment; the court concluded that "as the financial investment increases in dimension, the length of the amortization period should correspondingly increase."[124] It does not appear as though the owner must be given enough time to recoup his entire investment, but the period "should not be so short as to result in a substantial loss of his investment."[125] In making this evaluation, it is necessary to look at the facts of each particular case.[126] In making the determination of whether the amortization period is reasonable in light of the owner's investment, the courts have found it useful to analyze these factors: (1) the initial cost of the billboard, (2) its present depreciated value, (3) its remaining useful life, (4) the existence of a lease obligation, and (5) the investment realization to date.[127]

Equally important are factors which courts have refused to consider in evaluating the reasonableness of the amortization period.

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122. Art Neon Co. v. City & County of Denver, 488 F.2d 118 (five-year amortization period); Metromedia, Inc. v. City of San Diego, 164 Cal. Rptr. 510 (1-4 years), *rev'd on other grounds*, 453 U.S. 490; National Advertising Co. v. County of Monterey, 83 Cal. Rptr. 577 (one year), *appeal dismissed*, 398 U.S. 946 (1970); Murphy, Inc. v. Board of Zoning Appeals, 161 A.2d 185 (Conn. 1960) (2 years); Lamar-Orlando Outdoor Advertising v. City of Ormond Beach, 415 So.2d 1312 (10 years); Webster Outdoor Advertising Co. v. City of Miami, 256 So. 2d 556 (Fla. 3d Dist. Ct. App. 1972) (5 years); Modjeska Sign Studios, Inc. v. Berle, 402 N.Y.S.2d 359 (6½ years), *appeal dismissed*, 439 U.S. 809 (1978).

123. 83 Cal. Rptr. 577 (1970).

124. 402 N.Y.S.2d at 367. *See also Metromedia*, 164 Cal. Rptr. at 530 (amortization period must be commensurate with owner's investment).

125. 402 N.Y.S.2d at 367.

126. *Id.* at 367; 164 Cal. Rptr. at 531.

127. 164 Cal. Rptr. 510; 402 N.Y.S.2d 359.

For example, in *Monterey,* the court refused to recognize the extended life of the billboard which may result from performing essential maintenance and repairs, noting that "repairs cannot be relied upon to defeat zoning legislation which looks to the future and the eventual liquidation of nonconforming uses."[128] And in *Art Neon,* the court refused to uphold a provision of the ordinance establishing different amortization periods for signs based upon their replacement value.[129] "The replacement cost of the signs is not related to any of the relevant factors in the reasonableness tests, and presents no valid basis for different treatment of different signs ranging from three to five years."[130] Therefore, the court severed this part of the ordinance and held the remaining five year limit to be a valid amortization period.

There also appears to be certain situations in which neither compensation nor a reasonable amortization period is required to enforce the removal of nonconforming billboards. This occurs when (1) the billboard has been unlawfully erected, and (2) the billboard, although erected lawfully, is subject to removal at any time at the owner's expense.

With regard to the former situation, it has been recognized that compensation is not constitutionally mandated for the removal of a sign which was erected unlawfully, as when the billboard was erected after passage of a state law prohibiting such signs.[131] Similarly, when the state's department of commerce was supposed to promulgate regulations to implement that state law but failed to do so, the court held that it was necessary for the owner to obtain a judicial determination of whether the sign was erected in an appropriate area; because the owner failed to obtain such a determination prior to erection of his sign, the sign was found to have been unlawfully erected and no compensation was required upon its

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128. National Advertising Co. v. County of Monterey, 83 Cal. Rptr. at 580.

129. Section 613.5-5(4) of the Denver zoning ordinance provided for amortization periods of 2 to 5 years based upon replacement value of the sign, as follows:

Replacement Value	Amortization Period
$0 to $3,000	2 years
3,001 to 6,000	3 years
6,001 to 15,000	4 years
15,001 or more	5 years

488 F.2d at 120.

130. *Id.* at 122.

131. Hiway Ads, Inc. v. State, 356 So. 2d 501 (La. Ct. App. 1977). *See also* La Pointe Outdoor Advertising v. Florida Dept. of Transportation, 398 So. 2d 1370 (Fla. 1981).

removal.[132]

It also appears that the right to compensation or a reasonable period of abatement can be effectively waived or negated if the billboard permit so specifies. In *National Advertising Co. v. State*,[133] the court held that the state was not required to compensate owners for removal of their billboards because the permit to erect the boards specified that it could be revoked at any time and the billboard removed at owner's expense. A similar holding was made in *Newman Signs, Inc. v. Hjelle*[134] even though a state law had been enacted requiring compensation for the removal of all lawfully erected billboards.

Generally, it appears as though requiring the removal of existing billboards and similar structures can be accomplished without resulting in a taking, provided the forced removal is not characterized as unjust or unreasonable. In this regard, it may be necessary to provide owners with a fairly lengthy amortization period during which they can recoup some of their investment, or else the private loss suffered by the owner may be said to outweigh the benefit gained by the public. However, such attempts to require removal should be buoyed by two legal realities: (1) laws which provide a significant period of amortization will have a presumption of reasonableness and should be able to pass constitutional muster, and (2) it will be up to the plaintiff to show that the amortization period is unreasonable in light of the facts of each case.[135] As the cases have apparently shown, these realities significantly increase the survival rate of ordinances and other regulations requiring the removal of nonconforming unaesthetic structures.

V. CONCLUSION

Several summary observations may be made regarding the present state of zoning for aesthetics. First, it appears that a trend has been developing in recent years whereby states have expressed greater acceptance of aesthetics as a basis for land use regulation. A new majority of states now recognize that an ordinance based primarily on aesthetics is presumptively valid.[136] Second, in lieu of discussing the propriety of using the police power to zone for aes-

132. State v. National Advertising Co., 356 So. 2d 557 (La. Ct. App. 1977).
133. 571 P.2d 1194 (N.M. 1977).
134. 268 N.W.2d 741 (N.D. 1978), *appeal dismissed*, 440 U.S. 901 (1979).
135. *Metromedia*, 164 Cal. Rptr. 510.
136. Bufford, *supra* note 27.

thetics, the focus of the courts appears to be shifting to an evaluation of the impact of aesthetic regulation on private property rights, including the developer's reasonable expectations of investment. Third, this shift in the focus of the courts appears to be an appropriate one, particularly since the validity of land use regulations has traditionally hinged on a balancing of public benefits against private restraints.[137] It is not difficult to see now that the promotion of aesthetics can have a positive impact on the general welfare; the more difficult problem is how to weigh these positive impacts and balance them with the negative restrictions placed on property owners and developers.

The fourth and final observation to be made here is that the recognition of aesthetics as a legitimate concern of the police power, and the subsequent focus on the reasonableness of aesthetic regulations, is a shift that may benefit both private property owners and local governments wanting to regulate in the name of aesthetics. Local governments obviously will benefit from the presumption of validity which will attach to aesthetic regulations. But private property owners also may benefit from recent trends in judicial attitudes towards aesthetic zoning. Recognition of aesthetics as a legitimate end of the police power means that courts, and local governments, may no longer feel obligated to justify aesthetic regulations on the basis of some tenuous or unprovable relationship to a more traditional police power objective. Further, when a court goes on to balance the public benefits and private restraints of an aesthetic regulation without considering these tenuous non-aesthetic benefits, it may find that the aesthetic benefits are not sufficient to allow very substantial restrictions on private property, free speech, or reasonable investment expectations.

137. R. ANDERSON, *supra* note 3, § 7.25, at 596; A. RATHKOPF, *supra* note 1, § 14.01, at 14.16.