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## Zoning: Aesthetics: The Chameleon of Zoning

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ZONING: AESTHETICS:  
THE CHAMELEON OF ZONING

A chameleon is an animal of remarkable talents. Though at first glance a colorless ordinary-looking lizard, the chameleon when alarmed or moodily impelled displays extraordinary legerdemain. He has the uncanny knack of blending in or taking on the characteristics of his surroundings which makes him nigh invisible.<sup>1</sup> The judicial treatment of aesthetics in zoning resembles the chameleon in its ability to blend into its surroundings.

Before beginning the discussion of the problem of aesthetics in zoning, it is necessary to define terms. The inability to place an exact meaning on the word aesthetics has vexed the courts for many years. Its elusive qualities are graphically illustrated by the many and varied meanings attributed to it.<sup>2</sup> An early case attempted to define the term but was

<sup>1</sup>According to Webster's New Intermediate Dictionary 447 (1950), "Chameleons are any one of a group of peacrodont lizards having a laterally compressed body, prehensile tail, and opposed digits. They are remarkable for the change of color of skin, which are governed by nerve stimuli dependent upon the mood of the animal as well as on surrounding conditions. . . ."

" . . . The capacity of changing color, either on irritation or to resemble surrounding objects is due to layers of contractile pigment bearing cells which can be pressed toward the surface of the skin, and to the inflation of air vessels in connection with the lungs . . ." 1 Funk & Wagnalls New Standard Dictionary of the English Language 445 (1952).

" . . . Like the Chameleon, take the hue of the company you are with . . ." Chesterfield, *Letters*, Vol ii, ccxiii. 300 (1958).

<sup>2</sup>The dictionary meanings of aesthetics seem to do no more than add to the imprecision of the term. They uniformly agree, however, that the word is undoubtedly multi-faceted having different meanings for different persons. *E.g.* " . . . Pertaining to beauty, taste, or the fine arts, the philosophy of the beautiful. Appreciating or loving the beautiful, engaged in the culture of the fine arts, as an aesthetic nature." 1 Funk &

perhaps more honest than informative when it concluded that the meaning was after all not entirely clear.<sup>3</sup> Jurists are understandably disquieted when called upon to bestow legal precision upon a word capable of many nuances, and engage in the most subtle dialectics to find something other than aesthetics in an ordinance to uphold it.<sup>4</sup>

Wagnalls *op. cit. supra* note 1, at 854. "The word aesthetics, in the latin form *aesthetica* was first used . . . to designate the science of sensuous knowledge, whose goal is beauty, in contrast with logic, whose goal is truth." Webster's New International Dictionary 519 (1956). It seems to be generally accepted that aesthetic considerations relate only to stimuli received through the sense of sight. *E.g.*, *General Outdoor Advertising Co. v. City of Indianapolis*, 202 Ind. 85, 172 N.E. 309 (1930); *Accord*, *Meighan v. Birmingham Terminal Co.*, 195 Ala. 591, 51 So. 775 (1910); *Hav-A-Tampa Cigar Co. v. Johnson*, 149 Fla. 148, 5 So.2d 433 (1941). The majority of judges and writers accept the word aesthetics at face value. Very often the courts fall back on Webster's second variation of the word: "Of or pertaining to the beautiful or distinguished from the merely pleasing, the moral, and especially the useful . . ." Many writers have ventured opinions and explanations for the plethora of definitions. See, Bergs, *Aesthetics As a Justification For The Exercise Of The Police Power Or Eminent Domain*, 23 GEO. WASH. L. REV. 730 (1955); Dukeminier, *Zoning For Aesthetic Objectives; A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955) Sayre, *Aesthetics And Property Value: Does Zoning Promote The Public Welfare?* 35 A.B.A.J. 471 (1949); Light, *Aesthetics In Zoning*, 14 MINN. L. REV. 109 (1930).

<sup>3</sup> ". . . [J]ust what is meant by the use of the term "aesthetic" is not entirely clear; but apparently it is intended to designate thereby matters which are evident to sight only, as distinguished from those discerned through smell or hearing. . . . Sundeen v. Rogers 83 N.H. 253, 141 Atl. 142, 144 (1928).

<sup>4</sup> *E.g.*, in a decision upheld on other than aesthetic grounds, the court stated ". . . It is commendable and desirable, but not essential to the public need that our aesthetic desires be gratified . . ." *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 148 N.E. 842, 844 (1925); *Accord*, *Stoner McCray System v. City of Des Moines*, 247 Iowa 1313, 78 N.W.2d 843 (1956); *Pearce v. Village of Edina*, 263 Minn. 553, 118 N.W.2d 659 (1962); *City of Norris v. Bradford*, 204 Tenn. 319, 321 S.W. 2d 543 (1959); see *Annots.*, 141 A.L.R. 693 (1942); 117 A.L.R. 1117 (1938); 54 A.L.R. 1037 (1928).

It will be this traditional reticence that this Comment will consider. Why have the courts shied away from decisions in zoning cases based solely upon aesthetics? Why have jurists been so willing to strike down zoning ordinances predicated solely or greatly upon aesthetics and conversely uphold ordinances on the primary basis of the police power but with secondary aesthetic considerations? Have the courts' attitudes in the area of aesthetics been undergoing a transition? Finally, what is the present direction of judicial thinking in this relatively new area? All of these questions may be answered by a judicial awareness of the propriety of aesthetics in zoning; that aesthetics do not warrant the fate of an unwanted orphan, but rather should be embraced by the judicial rationale. Unfortunately, aesthetics for the most part are effectively disguised or blended in, against the background of the police power particularly, or some other more tenuous reason generally.

#### AESTHETICS IN ZONING: BACKGROUND

Aesthetic considerations standing alone have traditionally been rejected by the courts as an attempt to subjectively inject the nebulous concept of taste into the law.<sup>5</sup> An Ohio court<sup>6</sup> demonstrated this attitude in a highly sophisticated, nonetheless logical manner, when it struck down an ordinance creating part of the city into a restricted area as taking property without due process saying: ". . . the public view as to what is necessary for aesthetic progress greatly varies. Certain legislatures might consider that it was more

<sup>5</sup> It has been said that when an aesthetic purpose rather than the public health or safety was sought to be served by a regulation, it constituted a taking without compensation. *Levy v. Mravlag*, 96 N.J. Law 367, 115 A. 350 (1921); *Accord, Olsen v. City of Minneapolis*, 263 Minn. 1, 115 N.W.2d 734 (1962); *Romar Realty Co. v. Bd. of Comm'rs. of Borough of Haddonfield*, 96 N.J. Law 117, 114 Atl. 248 (1921); see generally, Symposium, *Aesthetic Control of Land Use: A House Built Upon the Sand?* 59 Nw. U.L. REV. 344 (1964-1965); Sayre, *op. cit. supra* note 2; Chandler, *The Attitude Of The Law Towards Beauty*, 8 A.B.A.J. 470 (1922).

<sup>6</sup> *City of Youngstown v. Kahn Bros. Bldg. Co. supra* note 4.

important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats . . .”<sup>7</sup> The cases are in agreement that if regulations accomplishing aesthetic purposes are to be justified at all, such justification must be found in the police power. The police power has traditionally been the refuge of the courts when they desired to be a partisan of aesthetics. But what is this police power, that beauty has historically been merely subordinate to?

The Supreme Court of the United States has defined the police power of a state to be the sum total of the state's legislative powers exercised within the constitutional limits of due process of law.<sup>8</sup> Under the court's definition, a municipal ordinance would be valid if it is not “unreasonable, arbitrary, or capricious,” and if the means selected to carry it into effect “have a real and substantial relation to the object sought to be attained.”<sup>9</sup> This interpretation has given rise to much confusion in the field of zoning and played a major part in relegating aesthetics to a greatly inferior role to the police power. In keeping with this rather confused picture, it has long been held that the purposes served by the police power include the safeguarding of the public health, safety and morals and more broadly the promotion of the general welfare.<sup>10</sup> The Supreme Court recognized that zoning is a valid exercise of the police power and by intimation at least hinted that aesthetics might be included as a silent partner, when it held that an ordinance creating a residential district excluding such establishments as apartment houses, business houses and retail stores was a valid exercise of the police power.<sup>11</sup> However, in discussing the ordinance, the court ef-

<sup>7</sup> *Id.* at ———, 148 N.E. at 844.

<sup>8</sup> *Nebbia v. New York*, 291 U.S. 502 (1934); *License Cases*, 46 U.S. (5 How.) 504, 582 (1847).

<sup>9</sup> *Nebbia v. New York*, *supra* note 8, at 525.

<sup>10</sup> *E.g.*, *Eubanks v. City of Richmond*, 226 U.S. 137 (1912); *Chicago B. & Q. Ry. v. Illinois ex rel. Grimwood*, 200 U.S. 561 (1906); *Detweiler v. Welch*, 46 F.2d 75 (9th Cir. 1930); *affirming* 46 F.2d 72 (D.D.C. 1930); *McKay Jewelers Inc. v. Bowron*, 19 Cal. App.2d 595, 122 P.2d 543 (1942).

<sup>11</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

fectively discounted the idea of full recognition of aesthetics when it explained that excluding such places from residential districts was not a declaration that they were nuisances but a part of the general plan by which the city's territory is allotted to different uses in order to reduce congestion and disorder seemingly inherent in unregulated city development.<sup>12</sup>

Although the *Euclid* case legitimized zoning as a proper use of the police power, it appeared to serve as a judicial strait jacket on the discretion of the courts. Zoning decisions thereafter seemingly had to fall within the broad aegis of the police powers or they were doomed to fail.<sup>13</sup>

#### BEAUTY OR PRAGMATISM?

It may be seen that the courts, though interested in justice, would not risk the epithet of "aesthete" in its pursuit. The strongly practical trend that has long existed in the American courts early made itself felt in zoning and related cases. Many courts felt constrained to denounce aesthetics as being out of place in the area of zoning.<sup>14</sup>

The typical result of finding the action valid under the police power but only incidentally related to aesthetics may

<sup>12</sup> *Id.* at 392.

<sup>13</sup> See generally, Agnor, *Beauty Begins A Comeback: Aesthetic Considerations in Zoning*, 11 J. PUB. L. 260 (1962); Haley, *Aesthetic Considerations in Denying A Proposed Use*, 3 VILL. L. REV. 117 (1957); Sayre, *op. cit. supra* note 2.

<sup>14</sup> A closely reasoned case seemed to leave no doubt of the court's extremely doctrinaire approach in zoning. The court held that wholly arbitrary restrictions upon the use of sections of a city for other than residence and allied purposes having no logical relation to the public welfare but resting solely upon aesthetic grounds cannot be sustained under the police power. *Goldman v. Crowther*, 147 Md. 282, 128 Atl. 50 (1925); *Accord*, *State Bank and Trust Co. v. Village of Wilmette*, 358 Ill. 311, 193 N.E. 131 (1934); *Frischkorn Constr. Co. v. Lambert*, 315 Mich. 556, 24 N.W.2d 209 (1946); *Olsen v. City of Minneapolis*, *supra* note 5; *Baker v. Somerville*, 138 Neb. 446, 293 N.W. 326 (1940).

be found in a New York case dealing with the troublesome problem of billboards.<sup>15</sup> The case held that the superintendent of public works was justified in erecting a screen to close off the view of a large advertising sign which was erected by lessees of property near the approach to a bridge. Here there clearly was a desire by the court to eliminate an eyesore, a violator of the sense of beauty. This sign by its very bulk and height offended the eye and the sensitivities. The sign's location was in a singularly beautiful spot with the majestic Hudson River in the background. The reluctance of the court to uphold the ordinance on aesthetic considerations alone was apparent. In fact, to become a supporter of beauty but to do so in a sturdily pragmatic fashion was the problem of the court. This was resolved adroitly:

The Supreme Court of the United States has held that billboards may be prohibited in the interest of the safety, morality, health, and decency of the community . . . and that they may be excluded from residence districts by zoning ordinances . . . . Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency.<sup>16</sup>

Thus the court was able to justify its decision on the basis of the police power but nonetheless recognizing that aesthetics or beauty, if you will, did warrant recognition. This solicitous regard for aesthetics was by no means shared by all the courts of this period, but the *Perlmutter* decision pointed towards a relaxing of the singular role of the police power by a recognition, albeit small, of aesthetics in zoning. The term morality was often used by the courts interchangeably with the word welfare and it is within this context that aesthetics was advanced, although under the pragmatic guise of the police power.<sup>17</sup>

<sup>15</sup> *Perlmutter v. Greene*, 259 N.Y. 327, 182 N.E. 5 (1932).

<sup>16</sup> *Id.* at ———, 182 N.E. at 6.

<sup>17</sup> Typically, the cases usually mention that a court may ponder aesthetic considerations as long as there are other elements of public health, safety or welfare present. The term welfare seems to be the "catch-all" used when aesthetics will fit in handily under no other category of the police power. See generally, *People v. Calvar Corp.*, 69 N.Y.S.2d 272, *aff'd.* 286

It is clear enough in the great majority of zoning decisions that one of the predominant purposes of zoning legislation is the maintenance or improvement of community appearance. But the courts have had to exercise remarkable powers of imagination to find the legislative concern limited to the police powers with welfare being an important adjunct, even though the aesthetic considerations must have been obvious.<sup>18</sup> The passage of time, however, and the wide spread use and acceptance of zoning has led inexorably to a greater willingness of the courts to allow aesthetics to play an even greater role in zoning decisions.<sup>19</sup>

#### AESTHETIC ZONING: PRESERVER OF THE PAST

Probably the closest the courts have come to a declaration that aesthetic considerations in zoning may be paramount and not merely in the shade of the police power is the preservation of historical sites. Here was a very touchy problem. Certain towns or sections of cities in the United States because of great historical significance were desired to be preserved in their original condition. Thus, they would serve as shrines and reflections of America's past. But how to do this? As has been recounted, the courts uniformly struck down zoning ordinances predicated on aesthetics alone.<sup>20</sup> The necessity and popular desire to preserve the historical areas appeared to provide the impetus for the courts to rise to the occasion. Although these regulations and ordinances protecting these areas were superficially grounded on

N.Y. 419 (1949); Appeal of Kerr, 294 Pa. 246, 144 Atl. 81 (1928); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955).

<sup>18</sup> *E.g.*, Haley, *op. cit.*, *supra* note 13; 58 AM. JUR. Zoning § 30 (1948).

<sup>19</sup> It has been held that zoning regulations may extend beyond strict considerations of health and safety, and will include aesthetic considerations. *E.g.*, United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964); Baker v. Elkin, 80 N.Y.S.2d 525 (1948); State *ex rel.* American Oil Co. v. Bessent, 27 Wis.2d 537, 135 N.W.2d 317 (1965); see Bard, *Aesthetics and City Planning*, 1-9 (Citizens Union Research Foundation 1957).

<sup>20</sup> See cases cited note 5 *supra*.



the police power, one would not have to scratch very deeply to find the real consideration—aesthetics!

One of the earliest of the areas protected by zoning regulations was the "Vieux Carre" in New Orleans. The zoning requirements here were focused on the preservation of the exterior architectural design of the section. They concerned and touched on existing buildings as well as new construction. Since this was a highly popular tourist attraction, historical as well as lucrative, a provision of the state constitution was proposed and ratified by popular referendum fixing the boundaries of the area. This zoning plan gave little trouble to the Louisiana court which found it completely valid.<sup>21</sup>

In *City of New Orleans v. Impastato*,<sup>22</sup> the defendant, in enlarging a small lavatory attached to the rear of his building, could surely not be accused of endangering the health, safety or welfare of the community. The court, therefore, met the challenge while commenting on the Vieux Carre's commission power to regulate and control the historic value of the buildings situated in the Vieux Carre section:

to that end the Commission shall be given such power and duties as the Commission Council of the City of New Orleans shall deem fit and necessary. This we think is sufficient to include all reasonable regulations made by the City rejecting changes to be made to the outside of any building situated in the Vieux Carre section which fronts on a public street . . . .<sup>23</sup>

The Louisiana court had more or less blazed the trail for this decision some years before, but in a less direct manner. In upholding an act authorizing regulation of buildings, business styles and construction, the court defended aesthetics in a rather forthright manner for the times.<sup>24</sup> A more recent Louisiana case has recognized the effect of

<sup>21</sup> *City of New Orleans v. Levy*, 223 La. 14, 64 So. 2d 798 (1953); *City of New Orleans v. Impastato*, 198 La. 206, 3 So. 2d 559 (1941); *City of New Orleans v. Pergament*, 198 La. 852, 5 So. 2d 129 (1941).

<sup>22</sup> 198 La. 206, 3 So. 2d 559 (1941).

<sup>23</sup> *Id.* at \_\_\_\_\_, 3 So. 2d at 561.

<sup>24</sup> "The beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents, and it sustains

aesthetic considerations on the value of a neighborhood as a tourist attraction.<sup>25</sup> In the interest of preserving the historical flavor of the community, the defendant was fined for displaying an improperly lighted sign of excessive size and for building a pink plastic enclosure on his property. This restriction upon property use was held not violative of the Fourteenth Amendment. To the argument that the ordinance was unlawfully based upon aesthetics, the court gave a remarkable and illuminating discussion of how aesthetics and the police power may be co-existent.<sup>26</sup>

Zoning for purposes of aesthetics as a valid exercise of the police power has been used in other historic projects around the country.<sup>27</sup> It is interesting to note that in Williamsburgh, Va., the power of zoning was used in a restored area rather than to preserve an area. Here, once the area was restored, and being privately owned land, a considerable portion of the city's comprehensive plan dealt with aesthetic considerations peculiar to this area.<sup>28</sup> It would appear that from the standpoint of candor, the ordinance was upheld on aesthetic grounds, recognizing this to be a valid and necessary exercise of the police power.

The police power has long been used to regulate such things as height, minimum area restrictions, set back requirements and the placement of billboards and frontage in buildings and structures.<sup>29</sup> Since billboard regulations have

in a general way the value of property in the neighborhood. . . .

Why should not the police power avail, as well to suppress or prevent a nuisance committed by offending the sense of sight, as to suppress or prevent a nuisance committed by offending the sense of hearing or the olfactory nerves? . . ." State *ex rel. Civello v. New Orleans*, 154 La. 271, 97 So. 440, 444 (1923).

<sup>25</sup> *City of New Orleans v. Levy*, *supra* note 21.

<sup>26</sup> *Id.* at ———, 64 So. 2d at 802, 803.

<sup>27</sup> *E.g.*, Comment, *Aesthetic Zoning: Preservation of Historic Areas*, 29 *FORDHAM L. REV.* 729 (1961); Rodda, *The Accomplishment Of Aesthetic Purposes Under The Police Power*, 27 *So. CAL. L. REV.* 149 (1953-1954).

<sup>28</sup> Agnor, *op. cit. supra* note 13.

<sup>29</sup> *E.g.*, Haar and Mystelka, *Planning and Zoning*, *Zoning Digest* (1961); Annots., 96 *A.L.R.2d* 1366 (1964); 95 *A.L.R.2d* 717 (1964).

## OTHER CONSIDERATIONS

been briefly touched on previously,<sup>30</sup> the other aforementioned factors will show the close relationship of aesthetics to the police power. The direction of the courts toward a gradual strengthening of an independent position of aesthetics should also be noted.

## A. Height

Generally, long before zoning regulations were used, the height of buildings and structures was restricted through the use of the police power.<sup>31</sup> The realization that disparity in the height of structures could not only create a lack of uniformity but also a great deal of ugliness, burst early upon the courts. Prior to the awakening, however, the attitude of the courts might be summed up in an early case<sup>32</sup> which awarded damages to a petitioner injured by a statute restricting structural height. In speaking of the statute, Chief Justice Holmes said: ". . . Such a law certainly would present grave difficulties even when approached with all the presumptions that exist in favor of a legislative decision, and with the duty to uphold it unless it was impossible to do so . . . ." <sup>33</sup>

It appears evident that the recognition of aesthetics in this area would be painful since the courts traditionally displayed a strong aversion to interference with property rights of any kind. A case which illustrated the chameleon-like qualities of aesthetics and the desire of the courts to recognize aesthetics but only by subtle justification was *Welch v. Swasey*.<sup>34</sup> The case concerned a limitation upon the height of buildings to be erected in Boston. The court found that the regulation was a reasonable effort to promote the public safety by preventing the uncontrollable

<sup>30</sup> *Perlmutter v. Greene*, *supra* note 15.

<sup>31</sup> See 101 C.J.S. *Zoning* § 36 (1958); 58 AM. JUR. *Zoning* § 30 (1948).

<sup>32</sup> *Parker v. Commonwealth*, 178 Mass. 199, 59 N.E. 634 (1901).

<sup>33</sup> *Id.* at ———, 59 N.E. at 635.

<sup>34</sup> 193 Mass. 364, 79 N.E. 745 (1909).

spread of fire among tall buildings and in so doing was a valid exercise of the police power. Interestingly enough, the court sustained the insertion of aesthetics in the case by first condemning the concept.<sup>35</sup> Although appealed, the general rule was enunciated that if the primary purpose of a restriction upon property rights was to protect the public health, safety or welfare, the toleration of a secondary aesthetic aim was permissible. In general, this is the rule today in regards height restriction in zoning. The *Welch* case blazed the trail to attacks upon less than beautiful skylines elsewhere.<sup>36</sup>

### B. Minimum Area Restrictions

Many modern zoning ordinances contain provisions which in one form or another regulate the area size upon which a house may be built.<sup>37</sup> Minimum lot frontage and area provisions are now fairly commonplace. In this field of zoning, aesthetics undoubtedly plays a vital role. Al-

<sup>35</sup> ". . . The inhabitants of a city or town cannot be compelled to give up rights in property or to pay taxes for purely aesthetic objects; but if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in as auxiliary . . ." *Id.* at——, 79 N.E. at 746.

<sup>36</sup> *E.g.*, *Brougher v. Bd. of Pub. Works of San Francisco*, 107 Cal. App. 15, 290 Pac. 140 (1930); *Main Street Corp. v. City of Brockton*, 323 Mass. 646, 84 N.E.2d 13 (1949); *Fey v. Woermann*, 360 Mo. 728, 230 S.W.2d 681 (1950); *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30 (1925); *Annots.*, 93 A.L.R. 2d 1254 (1964); 8 A.L.R.2d 970, 971 (1949).

<sup>37</sup> *E.g.*, *McKusick v. Houghton*, 177 Minn. 231, 213 N.W. 907 (1927); *Lewis v. Board of Comm'rs of Borough of Avon-By-The-Sea*, 7 N.J. Misc. 27, 143 Atl. 865 (1928); *Hayes v. Hoffman*, 192 Wis. 63, 211 N.W. 271 (1927). In one case the ordinance called for the average depth of a house not to exceed 25 feet of front yards of buildings fronting on one side of the street between two cross streets. Compliance with this regulation required the moving back from the street of a building placed within five and one-half feet of the front property line, where the average setback of existing buildings was 21 feet. *City of Bismarck v. Hughes*, 53 N.D. 838, 208 N.W. 711 (1926).

though still undertaken under the exercise of the police power, aesthetics is more readily seen. A great many minimum area restrictions were enacted to make sure that smaller, less expensive homes were not built in a community, thereby lessening the beauty and value of the neighborhood property.<sup>38</sup> Undoubtedly, when there is an extremely low minimum area restriction prescribed, this could well have a direct bearing on the welfare of the community and as such would be an appropriate occasion for the exercise of the police power. However, as the area prescriptions become larger, the need for the use of the police power in the general welfare correspondingly decreases.

It is usually held that aesthetics may be an incident, but cannot be the moving factor in determining the validity of a zoning ordinance prescribing a minimum area for house lots or requiring an area proportionate to the number of families to be housed.<sup>39</sup> It is interesting to observe that in *Billbar Construction Co. v. East-Town Tp. Bd. of Adjustment*,<sup>40</sup> the court made the observation that: ". . . Since, with the passing of time, urban and suburban planning has become an accredited adjunct of municipal government, aesthetic considerations have progressively become more and more persuasive as sustaining reasons for the exercise of the police power."<sup>41</sup> It appears that the learned judge, even at the recent time of this case, feared that the epithet "aesthete" might be hurled at him, and so clothed his decision in the respectable garb of the police power.

One might say regarding minimum area restriction in zoning, that aesthetics takes on less the color of the police

<sup>38</sup> *E.g.*, *Lionshead Lake Inc. v. Wayne Tp.*, 10 N.J. 165, 89 A.2d 693 (1952).

<sup>39</sup> See generally, *Hitchman v. Oakland Tp.*, 329 Mich. 331, 45 N.W.2d 306 (1951); *Billbar Constr. Co. v. East-Town Tp. Bd. of Adjustment*, 393 Pa. 62, 141 A.2d 851 (1958).

<sup>40</sup> 393 Pa. 62, 141 A.2d 851 (1958).

<sup>41</sup> *Id.* at ———, 141 A.2d at 857.

power and more that of economic considerations. This proposition seems apparent in *Chicago City Bank & Trust Co. v. Highland Park*.<sup>42</sup> This case involved the application of a provision of a city ordinance requiring a minimum lot area of 1,500 square feet per family to a building in the central business district having retail stores on the ground floor and apartments on the second and third floors. It was held that whether the merchants would benefit by the increased business patronage of people in the additional fourth-floor apartments proposed to be constructed was a factor to be weighed by the city council rather than the courts. We can see that aesthetic considerations were handily over-shadowed by a concern for the economic. The landmark case of *Lionshead Lake v. Wayne Tp.*,<sup>43</sup> indicated the over-powering role economics plays in minimum area regulations with aesthetics playing "understudy" as it were. Judge Oliphant's dissent in that case vigorously attacks the majority opinion as based on maintenance of the health of the community. The judge mentions that the 768 square feet of space required as the minimum for single family residence by the particular zoning ordinance appeared to be well beyond what is necessary for the health of a community. He suggests what is perhaps the rationale for most of the modern zoning minimum area requirements, *i.e.* economics with aesthetics second. He unequivocally states that the real motive for the ordinance was to keep less financially favored citizens out of the rather exclusive Lionshead Lake area.<sup>44</sup> The excessively large area requirements would preclude all but large houses which could be erected only by the financially fortunate. Thus, in one fell swoop, the ordinance insures that only the "right" people emigrate to the community having the money to erect an aesthetically acceptable dwelling. The majority in this case did stretch the police powers con-

<sup>42</sup> 9 Ill. 2d 364, 137 N.E.2d 835 (1956) *cert. denied*, 353 U.S. 922 (1957).

<sup>43</sup> *Supra* note 38.

<sup>44</sup> The court feels that the average citizen suffers not because of any acts they do or conditions they create, but simply because the income of the family won't permit building a house large enough to conform to the zoning requirements. It concludes

siderably in sustaining the ordinance, however, no further than in most jurisdictions at that time.

### C. Set Back Requirements

The restrictions on set back lines were upheld rather early under the general exercise of the police power.<sup>45</sup> Although ostensibly for the public welfare and thus a proper exercise of the police power, aesthetics most assuredly played a role in the judicial considerations.

Set back requirements were usually a part of a comprehensive zoning plan to beautify a community. Thus while requiring conformity in the name of the police power, aesthetics was truly important; else why beautify a city? Zoning ordinances frequently contain a provision requiring front yards in designated districts to have a minimum depth or the buildings to have a minimum setback from the street or curb line.<sup>46</sup> Sometimes a building line is provided for as established by a specified percentage of the buildings on the block on the same side of the street.<sup>47</sup> The validity of a provision of a zoning ordinance forbidding owners of property in certain zones to construct buildings thereon nearer than a specified distance from the line of the bordering public street<sup>48</sup> or requiring such buildings to be in line with adjacent property with reference to distance from the street has been sustained as a proper exercise of the police power.<sup>49</sup>

In other cases, zoning ordinance provisions for a setback from the street or property line have been regarded as void

that these families will be relegated most likely, to living in large cities or in multiple family dwellings against what they consider to be the welfare of their immediate families. *Id.* at \_\_\_\_\_, 89 A.2d at 701.

<sup>45</sup> See cases cited note 37 *supra*.

<sup>46</sup> *E.g.*, Bjork v. Safford, 333 Ill. 355, 164 N.E. 699 (1928); Wuffsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).

<sup>47</sup> Appeal of White, 287 Pa. 259, 134 Atl. 409 (1926).

<sup>48</sup> See cases cited note 45 *supra*; see Annots, 117 A.L.R. 1117 (1938); 86 A.L.R. 659 (1933); 43 A.L.R. 670 (1926).

<sup>49</sup> Bancroft v. Bldg. Comm'r of City of Boston, 257 Mass. 82, 153 N.E. 319 (1926).

upon such grounds as the absence of authority of the municipality,<sup>50</sup> or violation of the provisions of the zoning enabling act requiring the zoning ordinance to be in accord with a well-considered plan.<sup>51</sup> Provisions have also been voided on constitutional grounds based on the absence of any relation to the public health, safety, morals, or general welfare.<sup>52</sup> In the last of the foregoing grounds we find the seeds of the upholding as well as the destruction of aesthetics in these cases.

*Pritz v. Messer*,<sup>53</sup> laid down the proposition that although aesthetic considerations cannot justly form the basis for the exercise of the police power in establishing set back lines, they may be taken into consideration as ancillary to other purposes within the appropriate sphere of the police power.<sup>54</sup> For the most part, this represents the majority view today and by and large allows the court some flexibility in zoning ordinance interpretation. However, it still leaves much to be desired. If aesthetic reasons may be ancillary, can they ever be paramount? If they can't become paramount, why not? Are not aesthetic reasons per se persuasive enough to permit the exercise of the police power for beauty alone? Must beauty as an aesthetic concept be perpetually forced to seek shelter under the protective shadow of the police power? Disappointingly, a recent Pennsylvania case<sup>55</sup> seems to provide an answer to at least some of the aforementioned queries. In that case, it was argued that a setback ordinance

<sup>50</sup> *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828 (1913).

<sup>51</sup> *Village of Euclid v. Ambler Realty Co.*, *supra* note 11.

<sup>52</sup> *E.g.*, *Galt v. Cook County*, 405 Ill. 396, 91 N.E.2d 395 (1950); *Steward v. City of Trenton*, 9 N.J. Misc. 1100, 156 Atl. 844 (1931); *Van Auken v. Kimmey*, 141 Misc. 105, 252 N.Y.S. 329 (1930); *Schmalz v. Buckingham Tp. Zoning Bd. of Adjustment*, 389 Pa. 295, 132 A.2d 233 (1957).

<sup>53</sup> 112 Ohio St. 628, 149 N.E. 30 (1925).

<sup>54</sup> *Id.* at ———, 149 N.E. at 30.

<sup>55</sup> *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965).



was invalid on the basis that its sole consideration was aesthetic. The court said in upholding this contention:

There is no doubt that many of the residents of this area are highly desirous of keeping it the way it is, preferring, quite naturally, to look out upon land in its natural state rather than on other homes. These desires however, do not rise to the level of public welfare. This is purely a matter of private desire which zoning regulation may not be employed to effectuate . . .<sup>56</sup>

Even though this case seems to restrict rather than expand the beneficent rule enunciated in *Pritz v. Messer*,<sup>57</sup> in regards aesthetics in zoning, there is no doubt that the courts are ever expanding this rule. Hopefully, there will be even greater future expansion in this direction.

#### OKLAHOMA: AESTHETIC ZONING CONSIDERATIONS

It was early held in Oklahoma that for the purpose of promoting the health, safety, morals and general welfare of the community, the legislative body could impose regulations in land use planning.<sup>58</sup> The statutory language is very clear in the delegation of the zoning authority to cities and incorporated villages.<sup>59</sup> This statutory language as broad as it appears giving great powers in the area of zoning to cities and incorporated villages, was upheld by the Oklahoma Supreme Court in *State ex rel. Hunzicker v. Pulliam*.<sup>60</sup> In that case in speaking of zoning ordinances, the court stated that they are police power enactments designed for promotion and perpetuation of people's moral and material wel-

<sup>56</sup> *Id.* at ———, 215 A.2d at 611.

<sup>57</sup> *Supra* note 53.

<sup>58</sup> OKLA. STAT. tit. 11, § 401 (1961).

<sup>59</sup> “. . . the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes . . .” *Ibid.*

<sup>60</sup> 168 Okla. 632, 37 P.2d 417 (1934).

fare which cities are authorized to enact by virtue of the provisions in the Constitution and law of the state.<sup>61</sup>

It appears that the Oklahoma courts have not passed on the validity of aesthetics in zoning considerations. The cases in this area usually are decided solely on the basis of the police power without mention or reference to aesthetics.<sup>62</sup> No cases have been found which even allude to the existence of aesthetics. However, as in all zoning cases, inferences may be made from the nature of cases and from the judicial language used. It seems that in regards certain questions, the ancillary topic of beauty was touched on remotely and probably served as the basis, albeit hidden, for the decision. It is believed that this basis will be more readily seen if one accepts the theory that aesthetic considerations in zoning are nothing more than the legal evolution and growth of the concept of the nuisance.<sup>63</sup> Once accepted, this theory permits aesthetics to be seen in cases involving garages, filling stations, funeral homes, and area and frontage considerations.

The theory was rather apparent in an early Oklahoma case.<sup>64</sup> The case concerned the authority of the city to enforce an ordinance prohibiting the erection of gasoline filling stations in a certain district. In upholding the ordinance, the court ostensibly fell back on the police power but seemingly relied more heavily on a nuisance theory. It quoted with approval from the language of *Magnolia Petroleum Co. v. Wright*,<sup>65</sup> an earlier zoning case in which it was said of nuisances:

<sup>61</sup> *Id.* at ———, 37 P.2d at 425.

<sup>62</sup> *E.g.*, *Cauvel v. City of Tulsa*, 368 P.2d 660 (Okla. 1962); *City of Tulsa v. Swanson*, 366 P. 2d 629 (Okla. 1961); *Beveridge v. Harper & Turner Oil Trust*, 168 Okla. 609, 35 P.2d 435 (1934); *In re Dawson*, 136 Okla. 113, 277 Pac. 226 (1929); *Marland Refining Co. v. City of Hobart*, 113 Okla. 36, 237 Pac. 857 (1925).

<sup>63</sup> See, Kucera, *The Legal Aspects of Aesthetics in Zoning*, 1 *Instit. on Planning and Zoning* 21 (1961).

<sup>64</sup> *City of Muskogee v. Morton*, 128 Okla. 17, 261 Pac. 183 (1927).

<sup>65</sup> 124 Okla. 55, 254 Pac. 41 (1927).

A grant of power to a municipality to declare what shall constitute a nuisance and to remove same while it does not empower the municipality to declare a thing a nuisance which is clearly not one, does empower it to declare anything a nuisance which by reason of its location or use, or local conditions and surroundings may or does, become a serious obstruction to the use of the streets for public purposes, or is a nuisance within the common law or statutory definition. . . .<sup>66</sup>

We may, therefore, see that the Oklahoma court early seemed to have accepted the idea that the declaration of nuisances and the upholding of zoning ordinances often go hand in hand. Since the abolition of nuisances in many cases leads to the beautification of an area, one can readily see the chameleon-like character of aesthetics being formed against a background of these cases. The nuisance theory was relied upon by plaintiffs in *Weaver v. Bishop*,<sup>67</sup> to enjoin construction of a filling station in a mainly residential district. The court appeared to lean heavily towards the plaintiff's theory that the station would detract from the beauty of the mainly residential area. Reluctantly, the court, while acknowledging that the plaintiff's contentions held great weight, found for the defendant. This was done on the grounds that the area in question was zoned commercial earlier and thus the building of the station could not be enjoined. Here, however, we find the court partial towards the idea of maintaining beauty but too timorous to sustain it legally.

The attitude of the Oklahoma courts towards aesthetics may be clearly seen in cases dealing with undertaking establishments. It is clear that in enjoining their building or operation in residential areas, the courts find it most difficult to use the subterfuge of the police power. What can be less offensive from the standpoint of nuisance or even from the view of a zoning ordinance than the operation of a modern funeral home? No offensive odors or even views

<sup>66</sup> *Id.* at ———, 254 Pac. at 43.

<sup>67</sup> 174 Okla. 492, 52 P.2d 853 (1935).

present themselves to the area. The landscaping and well-built appearance of most funeral homes do credit to any community. It is clear that the courts in denying the operation of a funeral home do so regardless of their reasoning mainly with the view of protecting sensibilities. What is the sensibility that is protected? Merely the court's view that the constant reminder of death tends to depress one and lower the spirits. Is this not an aesthetic consideration? Is remedying these ills a proper exercise of the police power? May the courts remedy these and still maintain the fiction that aesthetics may only be a secondary but never a primary consideration? Apparently the Oklahoma courts answer affirmatively. In *Jordan v. Nesmith*,<sup>68</sup> a case decided on a nuisance theory rather than zoning violation seemingly set the trend. In that case it was shown that a funeral home and morgue were more than 125 feet from the nearest dwelling of the plaintiffs and the evidence showed that they would be in no danger of contracting communicable diseases or discomfort from odors or fumes escaping from the premises. Further, it was shown that the defendants intended to construct their funeral home so that the unloading of bodies would not be exposed to view.<sup>69</sup> This notwithstanding, an injunction to restrain the maintenance of such an establishment was granted, when it was shown that the establishment was located in an exclusively residential section of the city. Here the court showed its concern for aesthetics although not in so many words when it commented on the depressing effect the business would have on the immediate neighborhood. Capping this was the court's concern for the lowered desirability of the surrounding properties.

A subsequent case<sup>70</sup> upholding the validity of a zoning ordinance adopted the rationale of the *Jordan* decision. Here the defendants sought to question the validity of a zoning ordinance which denied the request for a permit to conduct

<sup>68</sup> 132 Okla. 226, 269 Pac. 1096 (1928).

<sup>69</sup> *Id.* at ———, 269 Pac. at 1099.

<sup>70</sup> *In re Dawson*, 136 Okla. 113, 277 Pac. 226 (1929).

funeral homes. The court went into a long and arduous explanation of how allowing the funeral home would violate the spirit of the zoning ordinance. However, its argument was long, tenuous and rather unconvincing. One receives the feeling from the court's reasoning that it felt that the funeral home would offend the delicate feelings of the neighborhood and shouldn't be allowed. Is this not an aesthetic consideration? As usual, this rather apparent concern for a feeling more abstruse than legal was concealed even though the court was hard put to explain why a grocery store and not a funeral home was granted a variance. The court rather weakly explained:

The board may have made a mistake in granting the permit to operate the grocery store in this zone . . . . Under the evidence in the case at bar, the board of adjustment doubtless found that no unnecessary hardship existed and the maintenance of undertaking parlors in the restricted zone would not be in conformity with the spirit of the zoning ordinance and would be contrary to the building intent . . . .<sup>71</sup>

Other decisions seem to bolster the idea that the Oklahoma courts really do acknowledge the existence of aesthetics, although admittedly in a circumspect manner.<sup>72</sup> In *Oklahoma City v. Barclay*,<sup>73</sup> involving changing the zoning of two lots from residential to commercial and extending the commercial zone into a residential district, the court struck down the zoning. Here, although done in the name of the police power, the court relied very strongly on facts which could have their basis in nothing but aesthetics in the broad meaning of the term.<sup>74</sup> In a recent case,<sup>75</sup> the facts were that an engineer was carrying on his profession in an

<sup>71</sup> *Id.* at ———, 277 Pac. at 229, 230.

<sup>72</sup> *E.g.*, *Oklahoma City v. Barclay*, 359 P.2d 237 (Okla. 1961); *Application of Shadid*, 205 Okla. 462, 238 P.2d 794 (1951); *Modern Builder Inc. v. Bldg. Inspector of City of Tulsa*, 197 Okla. 80, 168 P.2d 883 (1946); *Howard v. Mahoney*, 188 Okla. 89, 106 P.2d 267 (1940).

<sup>73</sup> 359 P.2d 237 (Okla. 1961).

<sup>74</sup> In describing the additions into which the lots in question would be extended, the court states: “. . . that the entire addi-

unobtrusive manner in his home, allegedly in violation of the zoning ordinance. It appears that he carried on his profession in his home in a residentially zoned area with the knowledge and apparent approval of his neighbors. However, when plaintiff converted the space in his garage and added to an adjoining playroom, he aroused fears that the residential character or aesthetic picture of the community might change. Believing that this would bring on an influx of clients, thereby spoiling the residential character of the neighborhood as well as violating the zoning ordinance, the court ordered the plaintiff to cease practicing his profession at home. While invoking the familiar police power, the court appeared more eager to restrain the plaintiff on aesthetic rather than other grounds.<sup>75</sup>

It may be seen from an examination of the cases that the Oklahoma courts are generally in accord with the results obtained in most jurisdictions in zoning cases. However, the reasoning and logic employed to arrive at these decisions in other jurisdictions are rarely used by the Oklahoma courts. It has been shown that a great majority of jurisdictions are becoming increasingly bold in the recognition of aesthetics in zoning considerations. The chameleon-like character of aesthetics is now taking on a more definite hue. There is an increasing tendency to recognize that aesthetics per se without the crutch of the police power may be all that is necessary to sustain a zoning ordinance. It may be said, in conclusion, that the Oklahoma courts do take aesthetics into consideration by smuggling aesthetic effects into their rulings and garbing them in the less controversial mantle of the police power.

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tion in the north-east corner of the intersection except the two lots in question, contain lots which are improved with single family, brick dwellings, and landscaped, have nice lawns, shrubs, flowers and trees and are well-cared for; that the addition is a quiet, well-developed, well-planned, well-improved and orderly residential district. . . ." *Id.* at 242.

<sup>75</sup> *Cauvel v. City of Tulsa*, *supra* note 62.

<sup>76</sup> *Id.* at 662-63.