Duquesne Law Review

Volume 11 | Number 2 Article 6

1972

The Aesthetic Factor in Zoning

Robert S. Pearlstein

Follow this and additional works at: https://dsc.duq.edu/dlr

 Part of the Law Commons

Recommended Citation
Robert S. Pearlstein, *The Aesthetic Factor in Zoning*, 11 Duq. L. Rev. 204 (1972).
Available at: https://dsc.duq.edu/dlr/vol11/iss2/6

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

The Aesthetic Factor in Zoning

Ever since its ephemeral appearance at the turn of the century, aesthetics has played a vaguely peculiar, yet erratically prominent role in zoning jurisprudence. Because of its deceptively chameleonic nature[1] and the often uncertain status accorded it in zoning conflicts, the precise importance which aesthetics has contributed to the law of zoning becomes difficult to analyze until pinpointed by retrospective analysis which helps to illustrate the strategic placement of this quixotic concept within a definitive trend of zoning cases.[2]

When aesthetics has been either the underlying consideration or a motivating point of interest in legislative zoning enactments, it has not been properly acknowledged by the courts. When courts have had the opportunity to utilize the aesthetic factor and conceptually clarify its basic essence, they have often avoided the real aesthetic issue by resourcefully providing an expedient alternative to justify the exercise of the police power and to substantiate the result achieved. Consequently, courts have conveniently furnished a genesis of conflicting attitudes which reveal an artfully manipulative sophistry and subtly cavalier indifference that have combined to further obscure the importance of the aesthetic factor in zoning dilemmas.

It is the purpose of this comment (1) to explain the differentiated status which aesthetics has occupied in various zoning trends; (2) to review the germination of aesthetics in New York zoning problems with an emphasis on certain major cases; (3) to assess aesthetics in Pennsylvania decisions; and (4) to suggest what forseeable routes the courts will pursue in future zoning litigation which deals with substantial aesthetic considerations.

---

1. Courts have achieved minimal success in providing lucid definitions of the term "aesthetics." One court stated: "Just what is meant by the use of the term aesthetic is not entirely clear; but apparently it is intended to designate thereby matters which are evident to sight only, as distinguished from those discerned through smell or hearing." Sundeen v. Rogers, 83 N.H. 253, 258, 141 A. 142, 144 (1928). Certain writers have provided good approximations of the term: Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMPT. PROB. 218, 218-19 n.2 (1955) [hereinafter cited as Dukeminier]; Norton, *Police Power, Planning and Aesthetics*, 7 SANTA CLARA LAWYER 171, 171-72 (1967).

2. There is a wealth of articles which have examined different aesthetic zoning trends. Two of the most accomplished pieces of writing in this area are Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. CAL. L. REV. 149 (1954) [hereinafter cited as Rodda], and Dukeminier, *supra* note 1. *See also* Agnor, *Beauty Begins a Comeback: Aesthetic Considerations in Zoning*, 11 J. PUB. L. 260 (1962) [hereinafter cited as Agnor]; Masotti & Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URBAN L. 773 (1969).

THE POLICE POWER

A discussion of any aspect of zoning must initially address itself to the concept of the police power.[3] It has become commonplace to state that the police power can constitutionally limit or restrict the use of property for valid societal interests.[4] Such power, however, must serve at least one of four established purposes: the promotion of public health, safety, morals, or general welfare.[5] While the first three objectives are relatively lucid in their definitional aspects and have furnished the courts with little difficulty in their being sustained as a basis for the exercise of the police power, the fourth purpose—general welfare—has plagued the courts with an inability to establish the proper limitations by which such a phrase might be measured.[6] As a result, the problem has emerged: to what extent should the term "general welfare," which is often used interchangeably with "public welfare," be expanded to include considerations such as aesthetics, a concept which has not been traditionally acknowledged as a justification for the employment of the police power? The problem was excellently pinpointed by one court in 1925:

> "Public welfare" and similar phrases are comprehensive expressions. Within them are undoubtedly embraced the health, peace, morals and safety of the community. What beyond these features of social welfare the general phrase in its relation to the police

3. Mr. Justice Holmes, in Noble State Bank v. Haskell, 219 U.S. 104 (1911), stated: "It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Id.* at 111. In the highly influential case, City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925), the Supreme Court of Illinois stated: "With the growth and development of the state the police power necessarily develops, within reasonable bounds, to meet the changing conditions. . . . The power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human progress." *Id.* at 93, 149 N.E. at 788.

4. Such theory poses the oft-stated question: when does a regulation become a taking? Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922); *see* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). In the area of zoning legislation, the recurring problem is precisely to what extent may the state, under the aegis of the police power, regulate—for aesthetic purposes—the use of private property?

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

6. In Wilmington v. Turk, 14 Del. Ch. 392, 129 A. 512 (Ch. 1925), the court, in analyzing the expansive characteristics of a phrase such as "public welfare," stated:

> It is rather in the recognition that the phrase is in danger of carrying too much with it and needs to be somewhat confined. Whatever the expression, whether it be "comfort and welfare," "general welfare," "comfort and welfare of society," "greatest welfare of the people," "great public needs," or any other like expression . . . some such caution as is indicated by the Massachusetts courts is to be exercised against allowing the general import of the phrase too free a scope.

Id. at 401, 129 A. at 516.

power may include, is to be determined from the decided cases in the light of each one's facts and, when new facts arise, from the process of reason which the judicial mind brings to bear on the question. After all, in many instances at least, this judicial function is so involved with the individual sociological views of the judges as to make it difficult to distinguish the relative contribution which reason and social views make to the blended result. This perhaps accounts for the expanding development of the power in such degree as to keep it reasonably abreast of the growing conceptions of the public, for it is doubtless true that as new social ideas find considerable acceptance among the people they will in due course reflect themselves in the subconscious social points of view of judges and thus result in an enlargement of the subjects amenable to the power's regulation.[7]

Aesthetics in the Early Period: Traditional Disregard

At the turn of the century and during the three decades which followed, the prevailing judicial attitude toward aesthetic zoning was basically twofold. Courts refused to uphold zoning ordinances which were either solely or primarily motivated by aesthetic considerations. Even when aesthetics was a reasonably obvious factor in the creation of the regulation, courts—while either simply alluding to or completely disregarding aesthetic viewpoints—would not necessarily invalidate such a regulation so long as there was some other independent basis sufficient to warrant the employment of the police power. Abused and neglected, aesthetics achieved, at best, a pedestrian acknowledgement by courts during this period. "Regulations based on aesthetic considerations are not in accord with the spirit of our democratic institutions."[8] The disdain which confronted aesthetics was due to two public considerations which, at the time, were quite predominant. First, aesthetic considerations were deemed luxuries to please the whims of the aristocratic and the idle rather than a necessity which alone justified the exercise of the police power to take property without compensation.[9] The other primary objection to aesthetics was that, founded upon a subjective nature, what was attractive to one individual was an abomination for another.[10] Therefore, no intelligible standard could objec-

7. *Id.* at 402, 129 A. at 516.
8. City of St. Louis v. Evraiff, 301 Mo. 231, 249-50, 256 S.W. 489, 495 (1923).
9. City of Pasaic v. Paterson Bill Posting, 72 N.J.L. 285, 287, 62 A. 267, 268 (Ct. Err. & App. 1905); *accord*, Curran v. Denver, 47 Colo. 221, 107 P. 261 (1910); Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920 (1911).
10. Wilmington v. Turk, 14 Del. Ch. 392, 407, 129 A. 512, 518 (Ch. 1925); Forbes v. Hubbard, 348 Ill. 166, 181, 180 N.E. 767, 773 (1932).

tively be obtained, and aesthetics had no standing to be considered among other factors embraced by the general welfare.

The area most severely scorned by courts in which aesthetics was an obvious consideration was billboard regulation.[11] Control of billboard advertising on behalf of any aesthetic consideration was virtually negated. The courts either omitted such obvious considerations altogether[12] or simply adhered to the prevalent doctrine that while a city, in the proper exercise of its police power, may adopt billboard regulations, they must be reasonable and not prompted by aesthetic considerations.[13] Most restrictions were dictated by concern for public health and safety,[14] and could be categorized as twofold. First, billboards, being constructed of cheap flimsy material, usually wood, were placed along streets or on the borders of vacant lots. Noting that they were easily blown over by strong gusts of wind, courts held that billboards of sufficient height and proximity to the public thoroughfare were dangerous to the safety of passersby.[15] Billboard regulations were also upheld to prevent the convenient concealment of hiding places for criminals and loiterers, for eliminating immoral sexual activity, and for furnishing protection against attacks on women and children.[16] Public health considerations sought to eliminate debris which collected in such areas and to prevent fires.[17]

There were other areas in which the aesthetic factor was considerable, yet ignored. In *Cochran v. Preston*,[18] the Maryland Court of Appeals, in passing upon the appellant's contention that the sole purpose of the zoning regulation was to preserve the beauty and architectural symmetry of the environment of the Washington Monument, stated:

> We find a more substantial reason for its enactment in the suggestion of the counsel for the appellees that its purpose was to protect

11. A considerable amount of literature has discussed aesthetics and billboard regulation. *See* Moore, *Regulation of Outdoor Advertising for Aesthetic Purposes*, 8 ST. LOUIS U.L.J. 191 (1963); Proffitt, *Public Aesthetics and the Billboard*, 16 CORNELL L.Q. 151 (1931); Rodda, *supra* note 2.

12. City of Chicago v. Gunning Sys., 214 Ill. 628, 73 N.E. 1035 (1905); Bill Posting Sign Co. v. Atlantic City, 71 N.J.L. 72, 58 A. 342 (Sup. Ct. 1904).

13. Varney v. Williams, 155 Cal. 318, 100 P. 867 (1909); Commonwealth v. Boston Advertising Co., 188 Mass. 348, 74 N.E. 601 (1905); State v. Whitlock, 149 N.C. 542, 63 S.E. 123 (1908).

14. *See* Agnor, *supra* note 2, at 266-67.

15. *In re* Wilshire, 103 F. 620 (S.D. Cal. 1900); City of Rochester v. West, 164 N.Y. 510, 58 N.E. 673 (1900).

16. Cusack Co. v. City of Chicago, 242 U.S. 526, 529 (1917); Commonwealth v. Boston Advertising Co., 188 Mass. 348, 353, 74 N.E. 601, 603 (1905); *see* Bellaire v. Lamkin, 159 Tex. 141, 317 S.W.2d 43 (1958).

17. Cusack Co. v. City of Chicago, 242 U.S. 526, 529 (1917).

18. 108 Md. 220, 70 A. 113 (1908).

> handsome buildings and their contents, located in that vicinity, and also the works of art clustered there, from the ravages of fire.[19]

In 1921, the Supreme Court of Texas, in *Spann v. City of Dallas*,[20] emphasized the prevailing tenor of that time:

> It is doubtless offensive to many people for a store to be located within a given area where they own residence property. Others would possibly regard the store as a convenience. An aesthetic sense might condemn a store building within a residence district as an alien thing and out of place, or as marring its architectural symmetry. But it is not the law of this land that a man may be deprived of the lawful use of his property because his tastes are not in accord with those of his neighbors. The law is that he may use it as he chooses, regardless of their tastes, if in its use he does not harm them.[21]

Such remark illustrates the genuine lack of judicial concern in attempting to prevent blatantly incongruous uses which resulted in erratically grotesque aesthetic patterns. In addition to allowing various kinds of retail stores and other business properties to be randomly located in residential areas,[22] courts permitted the more glaring misplacement of gasoline stations in residential districts.[23] Ordinances which attempted to prevent such inharmonious uses in residential districts were considered to have been enacted to satisfy the subjective desires of the inhabitants affected by such aesthetically offensive use. Resulting depreciation in property value was, to a degree, considered to be the direct result of aesthetic considerations and merely the operative consequence of an incidence to the location of any lawful business which might be placed in such an area.[24]

Aesthetic objectives were also obvious in zoning ordinances which attempted to effect standard patterns of minimum floor space measured by indices of square footage. Courts often recognized the primary underlying aesthetic aim of such regulation:

19. *Id.* at 229, 70 A. at 114; Atkinson v. Piper, 181 Wis. 519, 195 N.W. 544 (1923); *see* Piper v. Ekern, 180 Wis. 586, 194 N.W. 159 (1923).
20. 111 Tex. 350, 235 S.W. 513 (1921).
21. *Id.* at 358, 235 S.W. at 516. Such prevailing attitude was premised on the maxim: *Sic utere tuo ut alienum no laedas* (Use your own property in such a manner as not *to injure* that of another).
22. Willison v. Cooke, 54 Colo. 320, 130 P. 828 (1913); People *ex rel.* Friend v. City of Chicago, 261 Ill. 16, 103 N.E. 609 (1913); State *ex rel.* Lachtman v. Houghton, 134 Minn. 226, 158 N.W. 1017 (1916); City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842 (1925).
23. MacRae v. City of Fayettesville, 198 N.C. 51, 150 S.E. 810 (1929).
24. City of Texarkana v. Mabry, 94 S.W.2d 871 (Tex. Civ. App. 1936).

> Beautiful city residences, homologous lines in architecture and symmetry in construction appeal to artistic tastes should be respected in connection with substantial zoning regulations for the promotion of the public welfare, but aesthetics alone for the purpose of zoning ordinances do not seem to be a source of police power, according to the weight of authority.[25]

While difficult to pinpoint an exact date, the years immediately prior to 1940 are an appropriate point at which to posit some observations regarding the initial growth of aesthetic zoning. The earliest cases, in which the concept of aesthetics was either haphazardly discounted or notoriously ignored, furnished an interesting development which, if seemingly unsophisticated and somewhat banal in assessing societal growth as spurred by land-use control, was at least consistent with the trend which resulted. As a consequence of the 1926 Supreme Court decision in *Village of Euclid v. Ambler Realty Co.*, [26] in which comprehensive zoning was constitutionally upheld, zoning objectives for which the police power could be utilized were clarified. To the phrase "public health, safety, and morals," was added "general welfare," even though this term had been sporadically implemented by the courts prior to the *Euclid* decision. A key passage of the *Euclid* decision explains the fundamental necessity for the additional term:

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands and in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half century ago, probably would have been rejected as arbitrary and oppressive . . . the scope of their application must expand or meet the new and different conditions which are constantly coming within the field of their operation.[27]

While *Euclid* opened the floodgates for possible judicial implementation of aesthetics as a factor integral to the "general welfare," there was no flood. The impact of *Euclid*, however, slowly became obvious.

25. Baker v. Somerville, 138 Neb. 466, 471, 293 N.W. 326, 328 (1940). The Supreme Court of Nebraska noted that the term "public welfare"—while having undergone an interpretative expansion—was still not so embracive as to include purely aesthetic considerations.
26. 272 U.S. 365 (1926).
27. *Id.* at 386-87.

Consequently, courts demonstrated an increasingly recognizable perspicacity in depicting factual ramifications in which aesthetic considerations were present. Even where decisions upheld regulations as long as aesthetics was not the controlling factor,[28] the treatment of such concept, while less than princely, at least began to transcend the abuse it was dealt during the earlier years. Perhaps, most importantly, decisions after *Euclid* in which aesthetics appeared began to mirror a more direct honesty as compared to that which, earlier, had been at best, compromising.

Current Status: Aesthetics as a Valid Auxiliary Consideration

In *Welch v. Swasey*,[29] a case concerning height limitations upon buildings to be erected in Boston, the Massachusetts Supreme Judicial Court stated:

> 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.[30]

When appealed to the United States Supreme Court,[31] it was found that the "real purpose of these acts was aesthetics,"[32] but nevertheless what the lower court had said regarding the auxiliary status of aesthetics was reiterated.[33] It was the *Welch* case which, against the overwhelming trend of authority at that time, gave aesthetics its initial liberating impetus that helped to foster aesthetic objectives in zoning legislation. But it was later, when coupled with the 1926 *Euclid* decision, that the endorsement of aesthetic aims would begin to significantly emerge with some noticeable strength and slowly gain an increasing respectability. Meanwhile, there appeared a cluster of decisions, the language of

28. People v. Dickenson, 171 Cal. App. 2d 872, 343 P.2d 809 (Super. Ct. 1959); Gionfriddo v. Town of Windsor, 137 Conn. 701, 81 A.2d 266 (1951); Pearce v. Village of Edina, 263 Minn. 553, 118 S.W.2d 659 (1962); Jackson v. Bridges, 243 Miss. 646, 139 So. 2d 660 (1962); Miller v. Kansas City, 358 S.W.2d 100 (Mo. App. 1962); Little Pep Delmonico Restaurant, Inc. v. City of Charlotte, 252 N.C. 324, 113 S.E.2d 422 (1960); State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959); Davis v. McPherson, 58 Ohio Op. 253, 72 Ohio L. Abs. 232, 132 N.E.2d 626 (Ct. App. 1955); City of Norris v. Bradford, 204 Tenn. 319, 321 S.W.2d 543 (1958); Hagman v. Slaughter, 49 Tenn. App. 338, 354 S.W.2d 818 (1962).

29. 193 Mass. 364, 79 N.E. 745 (1907).

30. *Id.* at 375, 79 N.E. at 746.

31. 214 U.S. 91 (1909).

32. *Id.* at 96.

33. "That in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them." *Id.* at 108.

which, while seemingly subtle, was quite favorable to the aesthetic cause. This could be seen, for example, in cases of billboard regulation in which appeared, among the more traditional objectives justifying the police power exercise, the fact that billboards were "also inartistic and unsightly."[34] Such a terse acknowledgement, which delegated aesthetics to a supportive position, was nonetheless significant in helping to ignite the commencement of a new course toward aesthetic recognition.[35] Courts began to contribute significant language which, couched in an appraisal of the police power function, recognized that the state may control the conduct of individuals by any recognition which upon reasonable grounds could be regarded as promoting the common welfare, convenience, or prosperity of the public community at large.[36]

A major case of this slowly expanding minority that exemplified a direct concern for aesthetics was *State ex rel. Twin City v. Houghton*,[37] in which mandamus was denied to compel the granting of a permit to erect a cereal mill in a residential district. The court recognized the effect such incongruous land-use would have on adjacent property in that area. In acknowledging that it was time for courts to recognize aesthetics as a valuable factor in life, the court stated that:

> . . . giving the people a means to secure for that portion of a city, wherein they establish their homes, fit and harmonious surroundings, promotes contentment, induces further efforts to enhance the appearance and value of the home, fosters civic pride, and thus tends to produce a better type of citizen . . . . People are beginning to realize this more than before, and some are calling for city planning, by which the individual homes may be segregated from not only industrial and mercantile districts, but also from the districts devoted to hotels and apartments.[38]

In an important early case sustaining set-back lines, the Connecticut Supreme Court acknowledged the importance of aesthetics as an auxiliary factor. In addition to enumerating traditional aims employed to effect the public health and safety, the court also commented:

Streets of reasonable width add to the value of the land along the

34. St. Louis Gunning Advertising Co. v. City of St. Louis, 235 Mo. 99, 145, 137 S.W. 929, 942 (1911), *appeal dismissed*, 231 U.S. 761 (1913).
35. *See* Dukeminier, *supra* note 1, at 219-20.
36. State v. Wilson, 101 Kan. 789, 168 P. 679 (1917); *see* St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269 (1919); Churchill v. Rafferty, 32 Phil. 580 (1915), *appeal dismissed*, 248 U.S. 591 (1918).
37. 144 Minn. 1, 176 N.W. 159 (1920), *rev'g on rehearing* 144 Minn. 1, 174 N.W. 885 (1919).
38. *Id.* at 20, 176 N.W. at 162.

> street, and enhance the general beauty of land and buildings in the neighborhood and greatly increase the beauty of neighborhood.[39]

The year 1923 provided three of the most important cases of this expanding course acknowledging the aesthetic factor in zoning. The Kansas Supreme Court noted there was an aesthetic and cultural side of municipal development which, within reasonable limitations, could be properly fostered.[40] The court also noted that the legislation which would provide for such growth was "merely a liberalized application of the general welfare purposes of state and federal constitutions."[41] The Louisiana Supreme Court discussed aesthetics in the perspective of neighborhood nuisances which, while potentially threatening property values, were not limited to merely noises or odors but also embraced visual situations that constituted an "eyesore." Such difference, the court postulated, "is not in principle, but only in degree."[42] The court added, quite significantly:

> If by the term "aesthetic consideration" is meant a regard merely for outward appearances, for good taste in the matter of beauty of the neighborhood itself, we do not observe any substantial reason for saying that such consideration is not a matter of general welfare.[43]

In holding reasonable a zoning regulation that prohibited the enlargement of an existing dairy and milk pasteurizing plant in a residential district, the Wisconsin Supreme Court stated:

> It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and

39. Town of Windsor v. Whitney, 95 Conn. 357, 364-65, 111 A. 354, 356 (1920); *accord*, Thille v. Board of Pub. Works, 82 Cal. App. 187, 255 P. 294 (Dist. Ct. App. 1927); Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925); *see* Randall, *Validity of Use of Set-Back Lines for Street Widening*, 13 MARQ. L. REV. 103 (1929).

40. Ware v. Wichita, 113 Kan. 153, 214 P. 99 (1923).

41. *Id.* at 157, 214 P. at 102.

42. State *ex rel.* Civello v. City of New Orleans, 154 La. 271, 284, 97 So. 440, 444 (1923). The court also provided an important clue regarding the potential elasticity of the term "general welfare:"

> The beauty of a fashionable residence in a city is for the comfort and happiness of the residents and it sustains in a general way the value of property in the neighborhood. It is, therefore, as much a matter of general welfare as in any other condition that fosters comfort or happiness and consequent values generally of the property in the neighborhood.

Id. The court's remarks regarding property values, while then not of any paramount significance, would eventually prove prophetic for many modern cases in this area.

43. *Id.*

> that which formerly did not offend cannot now be endured . . . our ideals [have become] more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered.[44]

In 1925 the Supreme Court of Minnesota[45] demonstrated its general approval of this expanding trend toward recognizing aesthetics in its discussion of the police power. The court noted that the police power was "in its nature indefinable, and quickly responsible in the interest of common welfare, to changing conditions . . . ."[46] The court also observed that while social relations were becoming more complex, restrictions on individual rights were becoming increasingly more common.

The Indiana Supreme Court, in dissecting the limits to which the police power may be exercised, noted:

> Under a liberalized construction of the general welfare purposes of state and Federal Constitutions there is a trend in the modern decisions (which we approve) to foster, under the police power, an aesthetic and cultural side of municipal development—to prevent a thing that offends the sense of hearing and smelling . . . .[47]

After *Euclid*, decisions in the next quarter century provided the necessary judicial acknowledgement that gave aesthetics a guaranteed status as, at least, a relevant supporting factor in zoning legislation.[48] While certain courts stated that aesthetics alone would still not substantiate a zoning regulation, they did simultaneously state that an auxiliary role of an aesthetic aim could be validly considered.[49] Aesthetic considera-

44. State *ex rel.* Carter v. Harper, 182 Wis. 148, 159, 196 N.W. 451, 455 (1923).
45. State *ex rel.* Beery v. Houghton, 164 Minn. 146, 204 N.W. 569 (1925), *aff'd*, 273 U.S. 671 (1927).
46. *Id.* at 150, 204 N.W. at 570.
47. General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 89, 172 N.E. 309, 312 (1930).
48. Courts that endorsed this position often used varying phrases to support such contention, *e.g.*, aesthetics were regarded "while wholly not without weight." State Bank & Trust Co. v. Wilmette, 358 Ill. 311, 193 N.E. 131 (1934); Forbes v. Hubbard, 348 Ill. 166, 180 N.E. 767 (1932); "Aesthetic considerations are in themselves entitled to weight alone with other considerations." Town of Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243 (1945), *cert. denied*, 326 U.S. 739 (1945); "Aesthetics may be an incidental but cannot be the moving factor." Hitchman v. Oakland Township, 329 Mich. 331, 45 N.W.2d 306 (1951); Senefsky v. Lawler, 307 Mich. 728, 12 N.W.2d 387 (1943); Wolverine Sign Works v. City of Bloomfield Hills, 279 Mich. 205, 271 N.W. 823 (1937).
49. Women's Kansas City St. Andrew Soc'y v. Kansas City, 58 F.2d 593 (8th Cir. 1932);

tions were found to be within the reasonable scope of the police power to preserve from destruction the scenic beauties bestowed on the commonwealth by nature. Other protections were the promotion of safety and travel on the public thoroughfares and the protection of travellers from the barbaric intrusion of unwelcome advertising.[50] Courts spoke openly of beautiful parks, acknowledging that as "a chance to develop or gratify a love of natural beauty, it is a proper function of government to provide places in such a community where commercialism, unpleasant noises and scenes are eliminated."[51] A growing tendency was firmly manifested to accord greater weight to aesthetic considerations in cases that challenged the validity of ordinances which regulated billboard and outdoor advertising and activities connected therewith.[52] Courts also realized the need to help sponsor the attractiveness of residential communities.[53]

In 1954, a remark by the Supreme Court, in *Berman v. Parker*,[54] helped to firmly lodge aesthetics as a legitimate consideration in legislative deliberations:

> 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.[55]

The effect of this case was quite significant with regard to expanding the scope of what was meant by the term "public welfare." Mr. Douglas' oft-quoted statement has appeared in every significant aesthetic

Trust Co. v. Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951); Neef v. City of Springfield, 380 Ill. 275, 43 N.E. 2d 947 (1942); Stoner McCray Sys. v. City of Des Moines, 247 Iowa 1313, 78 N.W. 843 (1956); City of Shreveport v. Brock, 230 La. 651, 89 So. 2d 156 (1956); 122 Main Street Corp. v. City of Brockton, 323 Mass. 646, 84 N.E.2d 13 (1949); City of St. Louis v. Freidman, 358 Mo. 681, 216 S.W.2d 475 (1948); Sundeen v. Rogers, 83 N.H. 253, 141 A. 142 (1928); West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 192 S.E. 881 (1937).

50. General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed*, 296 U.S. 543 (1935).

51. Chicago Park Dist. v. Canfield, 370 Ill. 447, 453, 19 N.E.2d 376, 379 (1939).

52. Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944); Federal Elec. Co. v. Zoning Bd. of Appeals, 398 Ill. 142, 75 N.E.2d 359 (1947); City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941); 1426 Woodward Ave. Corp. v. Wolff, 312 Mich. 352, 20 N.W.2d 217 (1945); Oscar P. Gustafson Co. v. City of Minneapolis, 231 Minn. 271, 42 N.W.2d 809 (1945); Criterion Serv., Inc. v. City of East Cleveland, 55 Ohio L. Abs. 90, 88 N.E.2d 300 (Ct. App. 1949).

53. Barney & Casey Co. v. Town of Milton, 324 Mass. 440, 87 N.E.2d 9 (1949); Lexington v. Govenar, 295 Mass. 31, 3 N.E.2d 19 (1936); Point Pleasant Beach v. Point Pleasant Pavillion, 3 N.J. Super. 222, 66 A.2d 40 (Super. Ct. 1949).

54. 348 U.S. 26 (1954).

55. *Id.* at 33.

zoning case that followed. The fact that *Berman* was an eminent domain case and not a zoning conflict is completely immaterial.[56] The *Berman* court contributed language which tended to help obscure the distinction between domain and zoning insofar as they relate to aesthetics:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.[57]

Two points are particularly important here. First, as courts handed down decisions in the late 1950's and throughout the 1960's, there was a marked laxity in pinpointing the degree to which the aesthetic factor could be implemented as a consideration in zoning enactments. Quite cleverly, courts did not prescribe the degree to which aesthetics could be stretched. While advocating the auxiliary theory of aesthetics, courts employed language that was rather casual in ascertaining the precision by which aesthetics was to be measured.[58] Consequently, courts tended to display a greater degree of flexibility than was intended by a proper interpretation of the auxiliary rule. Under the auxiliary factor theory, a zoning regulation need not be a necessity but need only be substantially related to promoting the general welfare of the community to

---

56. State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 272, 69 N.W.2d 217, 222-23 (1955). The Supreme Court of Wisconsin also questioned whether the traditional rule regarding aesthetics was valid any longer.

57. 348 U.S. at 32-33. *See* Kamrowski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1955).

58. The language of the courts, recognizing the auxiliary factor status of aesthetics, often allows a greater degree of flexibility than is probably the intent of the auxiliary theory. Stone v. City of Maitland, 446 F.2d 83, 89 (5th Cir. 1971); City of St. Paul v. Chicago, St. Paul, Minneapolis & Omaha Ry., 413 F.2d 762, 767 (8th Cir. 1969); *see, e.g.*, McMahon v. City of Dubuque, 255 F.2d 154, 158 (8th Cir. 1958); Bachman v. State, 235 Ark. 339, 359 S.W.2d 815 (1962); Petition of Franklin Builders, Inc., 207 A.2d 12, 29 (Del. 1964); Jasper v. Commonwealth, 375 S.W.2d 709, 711 (Ky. 1964); Wright v. Michaud, 160 Me. 164, 173, 200 A.2d 543, 548 (1964); Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 499, 162 N.W.2d 206, 212 (1968); Deimeke v. State Highway Comm'n, 444 S.W.2d 480, 484 (Mo. 1968); Town of New Boston v. Coombs, 284 A.2d 920 (N.H. 1971); Piscitelli v. Township Comm., 103 N.J. 589, 598, 248 A.2d 274, 278 (1968); Klotz v. Board of Adjustment, 90 N.J. Super. 295, 298, 217 A.2d 168, 169 (Super. Ct. 1966); State v. Buckley, 16 Ohio St. 2d 128, 132, 243 N.E.2d 66, 70 (1968); Kenyon Peck, Inc. v. Kennedy, 210 Va. 60, 168 S.E.2d 117 (1969); DeWitt v. Town of Brattleboro Zoning Bd. of Adjustment, 262 A.2d 472, 476 (Vt. 1970); Farley v. Graney, 146 W. Va. 22, 39-40, 119 S.E.2d 833, 843-44 (1960); State *ex rel.* American Oil Co. v. Bessent, 27 Wis. 2d 537, 545, 135 N.W.2d 317, 322 (1965).

meet the constitutional requirements of reasonableness demanded by the police power.

Besides the lack of precision in the language of decisions, another problem confronted the courts: Where the regulation is predominately motivated by aesthetics, will the courts content themselves to subordinate such prevailing aesthetic considerations to the judicially established auxiliary status. Further, will the court sustain the regulation only so long as an independent basis which justifies the police power exercise can be pinpointed?

The Evolution Completed: Aesthetics in New York

In 1963, the New York Court of Appeals decided *People v. Stover*,[59] a landmark case in the development of aesthetics in land-use planning. The case is of extreme significance in that it not only presented the next logical step in furtherance of aesthetics, but also represented the culmination of a considerable wealth of New York cases that had simultaneously paralleled the national development.

The early New York cases had much in common with those of other jurisdictions in which courts either discarded or disguised aesthetic objectives and directed considerations of zoning regulations toward public health, safety, and morals. Courts either omitted any mention of aesthetics, instead proceeding to effect some stretched justification to sustain a certain regulation,[60] or simply invalidated the ordinance where a basis with the traditional objectives could not be reasonably substantiated, even where the aesthetic factor was considerable.[61] Whatever the particular nature of the case, these early decisions clearly held that aesthetics could not furnish the sole basis for prompting the employment of the police power.[62] However, the presence of an aesthetic purpose, even when alluded to, would not necessarily void a regulation provided another basis was found to uphold it.[63] In 1925, one court redefined the scope within which the police power was to

59. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963).
60. City of Rochester v. West, 164 N.Y. 510, 514, 58 N.E. 673, 674 (1900).
61. People *ex rel.* M. Wineburgh Advertising Co. v. Murphy, 195 N.Y. 126, 88 N.E. 17 (1909).
62. Isenbarth v. Bartnett, 206 App. Div. 546, 549, 201 N.Y.S. 383, 386 (1923); City of Utica v. Hanna, 202 App. Div. 610, 612, 195 N.Y.S. 225, 226-27 (1922); Melita v. Nolan, 126 Misc. 345, 347, 213 N.Y.S. 674, 677 (Sup. Ct. 1926); City of Syracuse v. Snow, 123 Misc. 568, 574, 205 N.Y.S. 785, 790 (Sup. Ct. 1924); Buffalo v. Kellner, 90 Misc. 407, 414-15, 154 N.Y. 472, 476 (Sup. Ct. 1915).
63. Cordis v. Hutton, 146 Misc. 10, 262 N.Y.S. 539 (Sup. Ct. 132).

act for the general welfare.[64] Certain cases in the late 1920's provided strong dicta which, collectively, were to contribute to an increasing group of cases that began to question the role of aesthetics.[65] By 1930 Judge Cardozo pronounced the aesthetic dilemma to be "unsettled."[66] In cases that followed, the New York Court of Appeals began to dissect the strategic influence which aesthetics subtly demonstrated in legislative enactments.[67] Consequently, aesthetics was soon acknowledged as a valid auxiliary consideration.[68] Zoning regulations finally extended

---

64. In Wolfsuhn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925), the court of appeals discussed the general welfare with regard to the changing times and furnished one of the more important passages from the early New York cases:

> Of course zoning regulations are an exercise of the police power, and as we approach the decision of this question we must realize that the application of the police power has been greatly extended during a comparatively recent period and that while the fundamental rule must be observed that there is some evil existent or reasonably to be apprehended which the police power may be invoked to prevent and that the remedy proposed must be generally adapted to that purpose, the limit upon conditions held to come within this rule has been greatly enlarged. The power is not limited to regulations designed to promote the public health, public morals, or public safety or to the suppression of what is offensive, disorderly or unsanitary, but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity.

Id. at 298, 150 N.E. at 122.

65. People v. Wolf, 127 Misc. 382, 216 N.Y.S. 741 (Nassau County Ct. 1926). *See also* People v. Sterling, 128 Misc. 650, 653, 220 N.Y.S. 315, 318 (Sup. Ct. 1927) ("We have reached a point in the development of the police power where an aesthetic purpose needs but little assistance from a practical one in order to withstand an attack on constitutional grounds.").

66. People v. Rubenfeld, 254 N.Y. 245, 172 N.E. 485 (1930), in which Judge Cardozo stated, quite significantly:

> The organs of smell and hearing, assailed by sound and odors too pungent to be borne, have been ever favored of the law, more conspicuously, it seems, than sight, which perhaps is more inured to what is ugly or disfigured. Even so, the test for all the senses, for sight as well as smell and hearing, has been the effect of the offensive practice upon the reasonable man or woman of average sensibilities. One of the unsettled questions of the law is the extent to which the concept of nuisance may be enlarged by legislation so as to give protection to sensibilities that are merely cultural or aesthetic. The question need not be answered to decide the case at hand.

Id. at 248-49, 172 N.E. 486-87.

67. In Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427 (1931), it was said:

> Aesthetic considerations are, fortunately, not wholly without weight in a practical world. Perhaps such consideration need not be disregarded in the formulation of regulations to promote the public welfare . . . . "Public welfare" is a concept which in recent years has been widened to include many matters which in other times were regarded as outside the limits of the governmental concern. As yet, at least, no judicial definition has been formulated which is wide enough to include purely aesthetic considerations.

Id. at 230-31, 177 N.E. at 430.

68. People v. Calvar Corp., 69 N.Y.S.2d 272, 279 (Naussau County Ct. 1940). The court in Preferred Tires, Inc. v. Village of Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (Sup. Ct. 1940), furnished a statement of relative significance:

> For years the courts have strained to sustain the validity of regulatory or prohibitory ordinances of this character upon the basis of public safety. They decided that aesthetic considerations could afford no basis for sustaining such legislation . . . . But the views of the public change in the passing of years. What was deemed wrong in the past is looked upon very often today as eminently proper . . . . Among the changes which have come in the viewpoint of the public is the idea that our cities should be

beyond the traditionally narrow scope of public health and safety.[69] Numerous cases emerged that furnished the launching ground which, while supposedly restricting aesthetics to a secondary purpose, actually helped, by their shrewdly implicative language, to accord aesthetics an influence that was quite considerable.[70]

In 1963, the *Stover* decision was handed down by a nearly unanimous court. In *Stover*, the appellants, in 1956, hung a clothesline with old clothes and rags in the front yard of their home as a form of peaceful protest against the high taxes imposed by the city. During each of the five succeeding years, the defendants added another clothesline in order to protest their continuing disenchantment with the municipal assessments. By 1961, six lines from which hung tattered clothing, old uniforms, underwear, rags, and scarecrows were strung across the appellants' yard. During that year the city enacted an ordinance that prohibited the erection and maintenance of clotheslines or other devices for hanging clothes or other fabrics in a front or side yard abutting the street. The ordinance provided for a variance in case of hardship due to area limitations of one's property. There was also an opportunity for appeal should the variance be denied. The appellants' application for a hardship permit having been denied, the Stovers took no appeal and the clotheslines were not removed. The city, relying upon the ordinance, charged the Stovers with violating its provisions.

The defendants claimed that the ordinance as applied to them was unconstitutional both as an interference with free speech and as a deprivation of property without due process. The court dealt with the defendants' contention quite efficaciously. In assuming that the nonverbal expression was a proper form of speech within the meaning of the first amendment, the court commented that such rights are subject to reasonable regulation, as was provided by the particular ordinance in question.

---

beautiful and that the creation of such beauty tends to the happiness, contentment, comfort, prosperity and general welfare of our citizens.

Id. at 1019, 19 N.Y.S.2d at 377.

69. People *ex rel.* Barker v. Elkin, 196 Misc. 188, 190, 80 N.Y.S.2d 525, 528 (Ct. Spec. Sess. 1948); *see* New York Trap Rock Corp. v. Clarkstown, 1 App. Div. 2d 890, 891, 149 N.Y.S.2d 290, 293 (1956).

70. Krantz v. Town of Amherst, 192 Misc. 912, 916, 80 N.Y.S.2d 812, 817 (Sup. Ct. 1948); *see* New York State Thruway Authority v. Ashley Motor Court, Inc., 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961); Presnell v. Leslie, 3 N.Y.2d 384, 389, 144 N.E.2d 381, 384, 165 N.Y.S.2d 488, 492 (1957); Village of Larchmont v. Levine, 225 N.Y.S.2d 452, 454 (Sup. Ct. 1961); Village of Larchmont v. Sutton, 30 Misc. 2d 245, 249, 217 N.Y.S.2d 929, 935 (Sup. Ct. 1961). *See also* Town of Vestal v. Bennett, 109 Misc. 41, 44, 104 N.Y.S.2d 830, 832 (Sup. Ct. 1950).

> Although the city may not interfere with nonviolent speech, it may proscribe conduct which incites to violence or works an injury on property, and the circumstances that such prohibition has an impact on speech or expression, otherwise permissible, does not necessarily invalidate the legislation.[71]

The ordinance, the court stated, bore no relationship to the dissemination of ideas or opinions. It was held the defendants were not privileged in violating the ordinance in the manner which they employed. "It is obvious that the value of their "protest" lay not in its message but in its offensiveness."[72]

The City of Rye claimed the ordinance prohibiting clotheslines in front and side yards was valid because it tended to reduce the traffic collisions by providing better visibility and enhancement of pedestrians' safety. It is important to note that the residence of the Stovers was located at the corner of two intersecting avenues. Three clotheslines were strung from the porch of the house across the front yard to trees along one avenue; the other three extended from the porch across the side yard to trees on the other avenue. The city asserted a valid claim under the circumstances, especially in that the extraordinarily unsightliness of the clotheslines would serve to distract drivers as they approached the intersection.[73]

In questioning the causal connection between the traffic accidents and the visually distracting situation, the court found the plaintiff's contentions were too theoretical. Instead, it held:

> . . . it is our opinion that the ordinance may be sustained as an attempt to preserve the residential appearance of the city and its property values by banishing, insofar as practicable, unsightly clotheslines from yards abutting a public street. In other words, the statute, though based on what may be termed aesthetic consid-

---

71. 12 N.Y.2d at 469, 191 N.E.2d at 276, 240 N.Y.S.2d at 739-40.

72. *Id.* at 470, 191 N.E.2d at 277, 240 N.Y.S.2d at 740. A comprehensive discussion of the defendants' contention appears in Comment, *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81 (1964). *See also* Leahy, *"Flamboyant Protest," The First Amendment and the Boston Tea Party*, 36 BROOKLYN L. REV. 185 (1970). *Stover* is cited as authority in each of the following cases which deal with the same first amendment problem but in a different context: People v. Radich, 26 N.Y.2d 114, 118-19, 257 N.E.2d 30, 32, 308 N.Y.S.2d 846, 849 (1970), *aff'd*, 401 U.S. 531 (1971); Gibbons v. O'Reilly, 44 Misc. 2d 353, 355, 253 N.Y.S.2d 731, 733 (Sup. Ct. 1964); *see* Cactus Corp. v. State *ex rel.* Murphy, 14 Ariz. App. 38, 480 P.2d 375 (1971).

73. *But see* Anderson, *Regulation of Land Use for Aesthetic Purposes—An Appraisal of People v. Stover*, 15 SYRACUSE L. REV. 33, 38, 40-41 (1963). For an interesting assessment of the *Stover* problem under the theory of nuisance, *see* 49 CORNELL L.Q. 310-11 (1963). *See generally* Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1 (1939); Comment, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U.L. Rev. 1075 (1970).

> erations, proscribes conduct which offends sensibilities and tends to debase the community and reduce real estate values.[74]

Having reviewed the trends in aesthetic zoning up to that time, the court held that once it was conceded aesthetics was a valid subject of legislative concern, it was inevitable that reasonable legislation designed to promote that end was a valid exercise of the police power.[75] The focal point was the element of reasonableness of the control when applied to a particular factual context. Quoting Dukeminier,[76] the court concluded:

> Consequently, whether such a statute or ordinance should be voided should depend upon whether the restrictions was "an arbitrary and irrational method of achieving an attractive efficiently functioning, prosperous community—and *not* whether the objectives were primarily aesthetic." . . . And, indeed, this view finds support in an ever-increasing number of cases from other jurisdictions which recognize that aesthetic considerations alone may warrant an exercise of the police power.[77]

Holding the ordinance to be regulatory rather than prohibitive, the court proceeded to define the standard by which visual offensiveness could be measured. The court stated the ordinance imposed no arbitrary or capricious standard of beauty or conformity upon the community. Rather, it simply proscribed conduct that was unnecessarily offensive to the visual sensibilities of the average individual.[78]

As might have been expected, the impact of *Stover* was considerable. While the New York courts no longer felt constrained to employ clever word games[79] regarding the degree to which aesthetics was to be accorded legislative status, the courts were, at the same time, cognizant of the limitations by which aesthetics could be effectively controlled.[80] One unusual application of the *Stover* holding was in *Paterson v. University of State of New York*,[81] a suit challenging the validity of a statute

74. 12 N.Y.2d at 466, 191 N.E.2d at 274, 240 N.Y.S.2d at 737.
75. *Id.* at 467, 191 N.E.2d at 275, 240 N.Y.S.2d at 738.
76. *See* note 1 *supra*.
77. 12 N.Y.2d at 467, 191 N.E.2d at 275, 240 N.Y.S.2d at 738.
78. *Id.* at 468, 191 N.E.2d at 276, 240 N.Y.S.2d at 739.
79. The author notes the varying degrees of the word "merely" and the use of the word in other adjectival forms in relation to aesthetics. Anderson, *supra* note 73, at 36-37.
80. In its opinion, the *Stover* court was quick to point out that there may be instances "in which the legislative body goes too far in the name of aesthetics." 12 N.Y.2d at 468, 191 N.E.2d at 275, 240 N.Y.S. at 738. Such admonition was heeded in a case that followed *Stover* in the same year. Chusud Realty Corp. v. Village of Kensington, 40 Misc. 2d 259, 264, 243 N.Y.S.2d 149, 155 (Sup. Ct. 1963).
81. 40 Misc. 2d 1023, 244 N.Y.S.2d 394 (Sup. Ct. 1963).

purporting to license landscape architects. Citing *Stover*,[82] the court held that the duties and responsibilities of a professional landscape architect affect matters of the health and safety of communities in relation to aesthetics. Therefore, the statute, that not only licensed landscape architects but also regulated the practice of their work, was deemed a reasonable exercise of the police power. The court took judicial notice of "the myriad of consequences which may flow from improper drainage and the flooding of structures and roadways."[83]

In 1967, the New York Court of Appeals decided *Cromwell v. Ferrier*.[84] In that case the owner of a tract of land, bisected by a highway, operated a diner and service station on one side of the highway. He had already begun to erect signs on the opposite side of the highway to advertise his business when he was served with a stop order by the respondent building inspector. The order, later upheld by the zoning board, stated that the proposed signs under construction violated a town ordinance that prohibited "non-accessory" signs.[85] The court of appeals sustained the constitutionality of the ordinance.

Ferrier is significant for two reasons. First, it unequivocally proclaimed aesthetics alone to be a valid basis for zoning. This is important since although *Stover* held the same, the *Stover* opinion was inherently tempered by underlying considerations of property values.[86] The court addressed itself to the problem of the proliferation of signs and billboards, noting that since a quarter of a century previous to that time, while outdoor advertising had become a less important facet of the advertising business, the numbers of such objects have substantially increased through the years. Such increase has resulted in a severe blight upon the national landscape.[87] Second, the type of regulation imposed in *Ferrier* was different. In *Stover*, the ordinance was regulatory; in *Ferrier*, prohibitory. The difference was that the former provided an opportunity to apply for a variance, coupled with appeal proceedings. In *Ferrier*, no such exceptions were allowed. The ordinance restricting non-accessory signs was a blanket prohibition.

---

82. *Id.* at 1037, 244 N.Y.S.2d at 409. The court applied the *Stover* holding and stated that aesthetics was a valid subject of legislative concern, and that reasonable legislation designed to promote that end was a valid and permissible exercise of the police power.
83. *Id.*
84. 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).
85. Accessory signs are those which are related to an establishment on the same lot, while non-accessory signs are those which are physically not a part of the business premises for which they advertise.
86. 12 N.Y.2d at 466, 191 N.E.2d at 274, 240 N.Y.S.2d at 737.
87. 19 N.Y.2d at 271-72, 225 N.E.2d at 754-55, 279 N.Y.S.2d at 29.

The import of the court's holding is somewhat unclear. Employing a prohibitory regulation, the court did not furnish an intelligible index or standard by which to measure the unreasonableness of sign board ordinances. The court did not address itself to any land-use control factors which, to some degree, always shape the outcome of such decisions. The court merely noted the overall effect of the growth of outdoor advertising signs and their unattractive effect on the environment. In failing to promulgate workable standards by which to evaluate the validity of ordinances, the *Ferrier* court leaves open the problem to what degree, if any, can the power to legislate for aesthetic ends be controlled or restricted?

The New York cases that have followed *Ferrier* may be placed in two categories. There are those which adhered to the basic *Stover* premise that once it is conceded that aesthetics is a valid subject of legislative concern, then reasonable legislation designed to promote that end is a valid, permissible utilization of the police power.[88] Certain cases that have adhered to this viewpoint are more representative of the land-use control situations involving aesthetics. Such cases have indicated that it is now unquestioned that aesthetics alone can warrant the exercise of the police power.[89] The second group of cases suggests an endorsement of *Ferrier* in that, while courts are willing to apply an aesthetic index as a basis by which a particular problem may be measured, they leave unsettled and unclear the reasonable standard by which such aesthetic criterion is initially founded. For example, New York courts have extended the police power to situations where an individual's intellectual and spiritual needs should be taken into account without really giving an adequate basis for such justification.[90] The application of aesthetics by the courts—some of which are very brief, conclusively written opinions that lack analytical depth—no longer seems to be by necessity, but rather by casual reference and occasional extravagance.[91] Perhaps it would not seem so were the courts to define more clearly the precise criteria by which such an aesthetic ethic could be applied.

While aesthetics has finally come full circle in New York, such a

88. People v. Artrol Corp., 67 Misc. 2d 1087, 1089, 325 N.Y.S.2d 800, 803 (Village J. Ct. 1971).

89. People v. Scott, 26 N.Y.2d 286, 291, 258 N.E.2d 206, 210, 309 N.Y.S.2d 919, 924-25 (1970); People v. Berlin, 62 Misc. 2d 272, 272-73, 307 N.Y.S.2d 96, 97 (Dist. Ct. 1970).

90. Nettleton v. Diamond, 27 N.Y.2d 182, 193, 264 N.E.2d 118, 123, 315 N.Y.S.2d 625, 632 (1970).

91. People v. Lou Bern Broadway, Inc., 68 Misc. 2d 112, 325 N.Y.S.2d 806 (Crim. Ct. 1971); *see* Town of Huntington v. Estate of Schwartz, 63 Misc. 2d 836, 313 N.Y.S.2d 918 (Dist. Ct. 1970).

completed evolution has not been seen elsewhere. Only two jurisdictions—Oregon[92] and Hawaii,[93] have joined in the view that aesthetics alone may warrant an exercise of the police power. A third state has decided a case on a predominately aesthetic basis, but has not unequivocally stated its adherence to such a view.[94]

Aesthetics has, however, received overwhelming acknowledgement beyond the auxiliary level when, as a proponent of the "general welfare," it is linked with economic prosperity. Aesthetics has served a vital role not only in preserving historic sites[95] but also in fostering tourism[96] in certain states. Courts in these jurisdictions, while reluctant to uphold aesthetics solely as basis for police power intervention,[97] nonetheless assert that aesthetics, when coupled with aspects of commercial prosperity, consequently perpetuates the "general welfare" of all citizens.

Property Values: The Obscured Coordinate

Both aesthetics and property values, though considered so different, have been acknowledged only indirectly and to a limited extent.[98]

92. Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965). The court proclaimed its unequivocal endorsement of aesthetics as the sole basis which may warrant police power exercise. *Id.* at 49, 400 P.2d at 262. In doing so, the court felt the need to emphasize that it was aesthetics alone which it was fostering, totally unrelated to any other concept:

> The prevention of unsightliness by wholly precluding a particular use within the city may inhibit the economic growth of the city or frustrate the desire of someone who wishes to make the proscribed use, but the inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community.

Id. at 50, 400 P.2d at 263.

93. State v. Diamond Motors, Inc., 50 Hawaii 33, 36, 429 P.2d 825, 827 (1967).

94. Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964).

95. City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953); City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941); Opinion of the Justices, 333 Mass. 783, 128 N.E.2d 563 (1955); *see* Anderson, *Architectural Controls*, 12 Syracuse L. Rev. 26 (1960); Comment, *Aesthetic Zoning; Preservation of Historic Areas*, 29 Fordham L. Rev. 729 (1961).

96. The two jurisdictions in which this concept is more prominent are Florida and California. The major Florida cases which have dealt with this interrelationship between aesthetics and tourism are: Eskind v. City of Vero Beach, 159 So. 2d 209 (Fla. 1963); Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960); City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941). An excellent article discussing the development of Florida cases in this area of aesthetics may be found in Little, *New Attitudes About Legal Protection for Remains of Florida's Natural Environment*, 23 U. Fla. L. Rev. 459 (1971). California cases dealing with similar considerations are: Carlin v. City of Palm Springs, 14 Cal. App. 3d 706, 92 Cal. Rptr. 535 (1971); Desert Outdoor Advertising v. County of San Bernardino, 255 Cal. App. 2d 765, 63 Cal. Rptr. 543 (1968); National Advertising Co. v. County of Monterey, 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (1962). *See also* Opinion of the Justices, 103 N.H. 268, 169 A.2d 672 (1961).

97. *Cf.* Merritt v. Peters, 65 So. 2d 861, 862 (Fla. 1953).

98. Sayre, *Aesthetics and Property Values: Does Zoning Promote the Public Welfare?* 35 A.B.A.J. 471 (1949).

During the early years of the century the concern for property values was relatively obscured by the notoriety occasioned by the presence of aesthetic objectives in zoning enactments. When courts spoke of the indefinable term "general welfare," and referred to convenience, prosperity and the like, they usually never exerted themselves to attempt a categorization of property values within such scope. Property values, for the most part, went unnoticed. In their burdensome preoccupation with achieving justifications of public health, safety, morals, and even general welfare, courts simply were not altogether cognizant of the underlying essence of property values[99] and accorded them little, if any, attention.[100] It was not until aesthetics had risen to its auxiliary status that property values emerged from the inner recesses of previous court decisions to become a factor worthy of judicial interest. Courts gradually became aware that, in addition to the traditional zoning objectives, there were other ends which were of equal importance; namely, that a certain conformity to a particular use helps stabilize and insure the value of land in a given area; that the usefulness and value of each parcel, not only to the owner but also to the community, was vitally affected by the use made of the adjoining parcel.[101] Courts were alerted to the need for the assurance of orderliness in residential areas to foster community development.[102] In the 1940's there were several cases that illustrated the situations upon which this growing concern for property values was predicated.

In a suit to enforce the town's zoning by-law by restraining defendants from removing top soil or loam from two tracts of land, the Supreme Judicial Court of Massachusetts in *Town of Burlington v. Dunn*,[103] supporting the auxiliary theory of aesthetics, commented on the deleterious effects of such operation. It noted the agricultural ruin

99. Occasionally, significant dissenting opinions would realize the importance of property values. *See* Goldman v. Crowther, 147 Md. 282, 312, 128 A. 50, 61 (1928); State *ex rel.* Penrose Inv. Co. v. McKelvey, 301 Mo. 1, 41, 256 S.W. 474, 479 (1923).

100. Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925), *appeal dismissed*, 273 U.S. 781 (1927); Town of Lexington v. Govenar, 295 Mass. 31, 3 N.E.2d 19 (1936); State *ex rel.* Beery v. Houghton, 164 Minn. 146, 204 N.W. 569 (1925); Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N.W.2d 634 (1944); Stone v. Crey, 89 N.H. 483, 200 A. 517 (1938); Gabrielson v. Glen Ridge, 13 N.J. Misc. 142, 176 A. 676 (Sup. Ct. 1935); Lombardo v. City of Dallas, 47 S.W.2d 495 (Tex. Civ. App. 1932).

101. The basic theory underlying property values is that the general welfare of the community is superior in importance to the pecuniary profits of the individual landowner. Fritts v. Ashland, 348 S.W.2d 712, 714 (Ky. 1961); *see* Landels, *Zoning: An Analysis of its Purposes and its Legal Sanctions*, 17 A.B.A.J. 163 (1931).

102. General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935); Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 191 S.E. 368 (1937).

103. 318 Mass. 216, 61 N.E.2d 243 (1945).

and the valueless land which resulted. The effect of such unsightly waste in a residential community, the court stated, could hardly be otherwise than to permanently depress values of other lands in the neighborhood and render them less desirable for homes.

The following year the Texas Court of Civil Appeals, in *Connor v. City of University Park*,[104] held that, under statutes authorizing them to enact zoning regulations, cities have a duty to conserve property values, encourage the most appropriate use of property throughout the municipality, and not to impose any regulation that would adversely affect the value of property or encourage an inharmonious or inappropriate use. The court stated that "the general welfare is served by the promotion of prosperity and the conservation of values."[105] Linking property values with aesthetics, the court noted that "harmonious appearance, appropriateness, good taste and beauty displayed in a neighborhood not only tend to conserve the value of property, but foster contentment and happiness among homeowners."[106] In 1949, the Supreme Court of New Jersey held valid an ordinance that excluded all heavy industry from a small residential municipality, the physical location of which was such that it was best suited for residential development.[107] There were, however, ordinance provisions for small businesses, trades, and light industries in the area. Avoiding the direct aesthetics issue, the court premised its decision upon the most appropriate use of land throughout the municipality with concern for preserving the property values and promoting steady residential growth in the area.

In the 1940's there was a group of cases which were directly affected by the validity and construction of zoning regulations which prescribed minimum floor space and cubic content of residences.[108] These cases, while stating that aesthetics alone could not warrant an exercise of the police power, generally endorsed aesthetics in an auxiliary capacity. The courts discussed the role of property values. While they often found no relation between the particular regulation and the public health, safety, or morals, courts at least acknowledged the presence

104. 142 S.W.2d 706 (Tex. Civ. App. 1946).
105. *Id.* at 712.
106. *Id.*
107. Duffcon Concrete Prods., Inc. v. Borough of Creskill, 1 N.J. 509, 64 A.2d 347 (1949).
108. Ritenour v. Dearborn, 326 Mich. 242, 40 N.W.2d 137 (1949); Elizabeth Lake Estates v. Waterford Township, 317 Mich. 359, 26 N.W.2d 788 (1947); Frischkorn Constr. Co. v. Redford Township Inspector, 315 Mich. 556, 24 N.W.2d 209 (1946); Sensfsky v. Huntington Woods, 307 Mich. 728, 12 N.W.2d 387 (1943).

of property values and deemed them to be worthy of an auxiliary status, equating such values with aesthetics. One case that dealt with ramifications of minimum floor space held that the purpose of the ordinance was to stabilize and conserve property values, and that such purpose was clearly within the ambit of the police power.[109] In 1946, one court remarked that the police power was not confined solely to traditional analyses of public health, safety and morals. Rather, the preservation of property values, and even aesthetic considerations, may be weighed in arriving at the determination of the reasonableness of the regulation.[110]

Courts began to use aesthetic controls to preserve property values. Emphasis upon the preservation of property values as a contribution to the public welfare helped simplify the rationalization of aesthetic purposes as legitimate objectives of the police power.[111]

In 1952, *Lionshead Lake, Inc. v. Wayne Township*,[112] was decided. The case invited great controversy among land-use scholars.[113] The Supreme Court of New Jersey upheld an ordinance which fixed a minimum living-floor space of 768 square feet for a one-story dwelling, of not less than 1000 square feet for a two story dwelling having an attached garage, and of not less than 1200 square feet for a dwelling not having an attached garage. In reversing the lower court, which held such regulations were unreasonable and arbitrary, the supreme court held they were reasonable and valid. The court was impressed with the defendant's witness, a public health expert who testified to the direct relation between the mental and emotional health of its occupants and the minima established by the ordinance for footage to be adhered to. The court based its decision primarily upon considerations of public health coupled with an acknowledgement of preserving property values:

> But quite apart from these considerations of public health which cannot be overlooked, minimum floor-area standards are justified on the ground that they promote the general welfare of the community . . . . The size of the dwellings in any community

109. Thompson v. City of Carrollton, 211 S.W.2d 970 (Tex. Civ. App. 1948).
110. Burroughs Landscape Constr. Co. v. Oyster Bay, 186 Misc. 930, 934, 61 N.Y.S.2d 123, 126 (Sup. Ct. 1946).
111. 1 R. ANDERSON, AMERICAN LAW OF ZONING 532 (1968).
112. 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1952).
113. Haar, *Wayne Township: Zoning for Whom? In Brief Reply*, 67 HARV. L. REV. 986 (1954); Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Nolan & Borack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954).

> inevitably affects the *character of the community* and does much to determine whether or not it is a desirable place in which to live.[114]

The concurring opinion was premised upon aesthetic considerations which were held to be a considerable influence among the factors entering into the legislation.[115] The ordinance was deemed, quite simply, to preserve the acknowledged residential character of the entire community. The concurring opinion asserted that regulations based on aesthetic grounds are within the ambit of the police power if they promote the interests of the public through resultant community development and profit. They must also outweigh the incidental restraint upon private ownership. A contrast between the majority and concurring opinions illustrates the interplay between aesthetics and property values. The majority alludes to considerations of property values under the term "character of the community" while the concurring opinion employs direct aesthetic considerations with which to deal. Such an example suggests that courts will manipulate the factor of property values to uphold an ordinance actually based on subtle aesthetic considerations.

The dissent[116] based its opinion upon the result of economic segregation and equal protection:

> A zoning provision that can produce this effect certainly runs afoul of the fundamental principles of our form of government. It places an unnecessary and severe restriction upon the alienation of real estate . . . . Certain well-behaved families will be barred from these communities, not because of any acts they do or conditions they create, but simply because of the income of the family will not permit them to build a house at the cost testified to in this case. They will be relegated to living in the large cities or in multiple-family dwellings even though it be against what they consider the welfare of their immediate families.[117]

In evaluating *Lionshead*, Haar[118] stated that the ordinance was not really formulated to promote public health, safety or even aesthetics, but was simply "designed to do indirectly what those courts which

114. 10 N.J. at 174, 89 A.2d at 697 (emphasis added).
115. *Id.* at 176, 89 A.2d at 698.
116. *Id.* at 181, 89 A.2d at 701.
117. *Id.* at 181-82, 89 A.2d at 701. *See* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Snob Zoning—A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYRACUSE L. REV. 507 (1964).
118. 10 N.J. 165, 89 A.2d 693 (1952).

have passed on the question have held cannot be done directly in our society."[119] In other words, through public action, it is improper to allow one group of citizens to exclude a class of residents by enforcing regulations containing structural size provisions. "Casting an ordinance in terms of minimum livable area, with no correlation to the number of persons occupying that area, can have but one purpose: the protection of high cost buildings in the restricted area."[120] Haar implies that courts are simply not sophisticated enough to comprehend the essence of such problems as posited by the case in point, especially where there are complex economic ramifications. Courts, he states, are simply content to stop the analysis if they can justify the ordinance on some traditional zoning objective, however tenuous.

Other cases of this period contributed to the recognition that property values were a factor worthy of consideration in addition to[121] or in the absence of aesthetics.[122] The 1963 *Stover* decision was based primarily on aesthetic considerations; but it also relied on the conservation of values. Thereafter, courts more openly focused their attention on the extent to which property values may be diminished through the application of zoning regulations. In articulating the relationship between aesthetics and property values, some displayed a shrewdly compromising honesty in their manipulation of the degree to which the regulation was slanted toward aesthetics, rather than conservation of property values.[123] There were, conversely, courts that realized the central connection between the two factors.[124]

An examination of recent cases is helpful to substantiate the interrelationship of aesthetics and property values. These cases dramatically prophesy that aesthetics will be a valid force in zoning cases, but only when connected with the stabilization of property values with regard to the myriad possibilities of land utilization. Certain cases pinpoint

119. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1062 (1953).
120. *Id.*
121. Gustafson Co. v. City of Minneapolis, 231 Minn. 271, 42 N.W.2d 809 (1950); Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955).
122. Rockingham Hotel Co. v. North Hampton, 101 N.H. 441, 146 A.2d 253 (1958); Presnell v. Leslie, 3 N.Y.2d 384, 144 N.E.2d 381, 165 N.Y.S.2d 488 (1957); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955).
123. *See* Note, *The Administration of Zoning Flexibility Devices: An Explanation for Recent Judicial Frustration*, 49 MINN. L. REV. 973 (1965). *See generally* 27 WASH. & LEE L. REV. 303 (1970).
124. United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964).

the association of aesthetics and property values and acknowledge their validity as joint factors.[125]

In *Naegele Outdoor Advertising Co. v. Village of Minnetonka*,[126] this relationship is made clear. The Minnesota Supreme Court held reasonable the length of an amortization period within which pre-existing nonconforming billboards were required to be removed from residential districts. The court acknowledged the role that planning and zoning play in municipal efforts to guide the future development of land to insure pleasanter and more prosperous environments in which its residents may live and work. The court noted that a growing number of courts were becoming more receptive to aesthetics "on the ground that the pleasant appearance of a district or community has a direct and beneficial effect on property values and on the well-being of its residents, and thus inevitably promote the general welfare."[127] In recognizing that residential zoning enhances property values, thereby gradually increasing the tax base of the village, the court remarked:

> Obviously, aesthetics play a significant part in residential zoning. But such considerations of taste and beauty more likely reflect a community-wide opinion of what is necessary to advance and stabilize neighborhood values rather than the purely subjective opinions of members of the council. Thus, while, aesthetics admittedly were a significant factor in the council's decision, they were not the sole basis.[128]

The court upheld the regulation on the basis of aesthetics and property values even where the public health, safety, and morals were clearly not endangered.[129]

In a case employing similar logic, *Deimeke v. State Highway Commission*,[130] the Supreme Court of Missouri held valid a statute which provided for the screening of nonconforming junkyards adjacent to highways at the expense of the State Highway Commission. The statute also provided for condemnation of such property if adequate screening was not feasible. The court recognized that there was no

125. Melton v. City of San Pablo, 252 Cal. App. 2d 794, 61 Cal. Rptr. 29 (1967); Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d 270, 30 Cal. Rptr. 731 (1963); Piscitelli v. Township Comm., 103 N.J. Super. 589, 248 A.2d 274 (Super. Ct. 1968).
126. 281 Minn. 492, 162 N.W.2d 206 (1968).
127. *Id.* at 499, 162 N.W.2d at 212.
128. *Id.* at 500, 162 N.W.2d at 212-13.
129. *Id.* at 500, 162 N.W.2d at 213; *see* Board of Supervisors v. Miller, 170 N.W.2d 358 (Iowa 1969).
130. 444 S.W.2d 480 (Mo. 1969).

contention asserted in this case that the regulation was for the promotion of the public health, safety, or morals. After reviewing the history of aesthetics in Missouri, the supreme court referred to the *Stover* decision and deduced that the appearance of property also affects not only its own value but also that of the surrounding property.[131] The court concluded that the regulatory measure in question, while not based on traditional zoning objectives, was nevertheless valid because the "general welfare" suffered due to the combined loss of aesthetic and property values. The same court, one year later, held that the denial of a permit for a modernistic residence in an area in which homes of traditional Colonial, French Provincial and English Tudor styles predominated was not arbitrary or unreasonable if the central purpose to be served was the furtherance of the general welfare of the community.[132] The court stated that the forceful argument that aesthetics was the sole factor for the enactment was not so: "Along with that inherent factor is the effect that the proposed residence would have upon property values in the area."[133]

In the area of mobilehomes and trailers,[134] considerations of property values and aesthetics have been traditionally obscured by justifications based upon the public health, safety, and morals.[135] Some cases, however, illustrate the focus of the two factors as additions to the standard objectives. The Supreme Court of New Jersey[136] has been cognizant of two of the basic concepts of zoning—encouragement of the most appropriate use of land and the conservation of property values—may be undermined by the indiscriminate location of trailers within a municipality. One court has noted that "from the point of view of aesthetic considerations (which are inextricably intertwined with conservation of the value of property), trailers may mar the landscape."[137] Some cases in this area have dealt with the perspective of rapid growth of particular townships and have held that there is a

131. *Id.* at 484.
132. State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970).
133. *Id.* at 310.
134. *See generally* Bartke & Gage, *Mobile Homes: Zoning and Taxation*, 55 CORNELL L.Q. 491 (1970); Comment, *Regulation and Taxation of House Trailers*, 22 U. CHI. L. REV. 738 (1955); Note, *Regulation of Mobile Homes*, 13 SYRACUSE L. REV. 125 (1961).
135. *See* Annot., 96 A.L.R.2d 232 (1964).
136. *See* Cunningham, *Control of Land Use in New Jersey by Means of Zoning*, 14 RUTGERS L. REV. 37 (1960).
137. Napierkowski v. Township of Gloucester, 29 N.J. 481, 494, 150 A.2d 481, 487 (1959). *See also* Corning v. Town of Ontario, 204 Misc. 38, 121 N.Y.S.2d 288 (Sup. Ct. 1953); People v. Clute, 47 Misc. 2d 1005, 263 N.Y.S.2d 826 (Wash. Cty. Ct. 1965); Craver v. Zoning Bd. of Adjustment, 267 N.C. 40, 147 S.E.2d 599 (1966).

reasonable basis for township officials to conclude that there existed a long-range potential for residential development which could conceivably be stunted by the uncontrolled presence of trailers in residential districts.[138] Recent cases dealing with problems of mobilehomes and trailers adhere to the more traditional zoning objectives without having to reach the plateau of aesthetics-property values association.[139] Most importantly, the combination of factors is often unlimited and each case must finally be decided on the peculiar factual setting viewed in its proper perspective.[140]

In contrast to the recent decisions in which the connection between aesthetics and property values was clearly delineated by courts, there have been decisions in which the relationship has lacked precision. In those cases the courts were influenced by aesthetic considerations, however, they did not clearly identify that factor with precise language.

In *Frankel v. C. Burwell, Inc.*,[141] the New Jersey Superior Court held invalid a variance granted to an owner of land in a residential zone to erect an office building when the owner changed the plans of the building. The court stated the board of adjustment, in recommending a variance, is concerned primarily with the welfare of the entire community, and such concern may involve consideration of a variety of factors other than mere dimensions and the location of the particular building in dispute. The court noted that the public interest may require a determination of whether the appearance of the proposed building was compatible with the neighborhood aesthetics. The court never discussed aesthetics in relation to property values, nor how the change in plans affected the property values of the location. The court, furthermore, offered no explanation of what was meant by the term "neighborhood aesthetics."

One court held that it is a fundamental theory of a zoning scheme that it is for the general good, "to secure reasonable neighborhood uniformity, and to exclude structures and occupations which clash therewith . . . . The expansion of a nonconforming use offends the spirit of zoning regulation."[142] In holding that a zoning board did not

138. Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962).
139. State v. Larsen, 195 N.W.2d 180 (Minn. 1972); Town of Conover v. Jolly, 277 N.C. 439, 177 S.E.2d 879 (1970).
140. Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (Ct. App. 1971) (traffic patterns were valid local interests of greater concern than aesthetics or economic uniformity being fostered); *see* Town of New Boston v. Coombs, 284 A.2d 920 (N.H. 1971).
141. 94 N.J. Super. 53, 226 A.2d 748 (Super. Ct. 1967).
142. DeWitt v. Town of Brattleboro Zoning Bd. of Adjustment, 262 A.2d 472, 476 (Vt. 1970).

have the power to permit the extension of a nonconforming use, the court did not clarify the role that aesthetics or property values played in the decision. The language was suggestive as to the real reasons underlying the decision.

In *Damick v. Planning & Zoning Commission*,[143] the defendant rezoned from residential to industrial an eighteen and one-half acre tract located in the middle of a large residential zone. The primary reason for the change was to enable a nonconforming manufacturer to expand its plant building that occupied a very small portion of the tract. Although the change fostered the interest of the manufacturing concern, it clearly violated the well-established zoning regulations, was detrimental to the owners of residences in the area, and had all the vices illustrative of spot zoning. The trial court concluded that the change was not in accordance with the applicable comprehensive plan and that the action of the Commission was improper. While noting that an essential purpose of zoning regulations was the stabilization of "property use," the court stated that changes in zone should not be effectuated "unless some new condition has arisen which substantially alters the character of the area."[144] The court neither considered the standards by which such an examination could be made, nor clarified what was meant by the usage of the phrase "character of the area."[145]

In analyzing cases which interrelate property values and aesthetics, certain factors emerge which necessitate a thorough examination. The aesthetic development of the neighborhood, zoning and the use of properties either adjoining or nearby, the suitability of property for certain uses and restrictions thereby imposed, the extent to which renewal of the restriction will detrimentally affect adjoining or nearby property, the length of time since structures of the type permitted by the restriction have been built, and the basic balance drawn between the general welfare and the rights of the private owner in accordance with a given comprehensive zoning plan are important factors. Whatever the use, it is becoming clear that land-use controls which deal with

143. 158 Conn. 78, 256 A.2d 428 (1969).
144. *Id.* at 84, 256 A.2d at 431.
145. A similar problem is raised in correlating "maintaining and preserving the character of a particular area" to "significant economic injury." *See* Fulling v. Palumbo, 21 N.Y.2d 30, 233 N.E.2d 272, 286 N.Y.S.2d 249 (1967); Rowe Street Associates, Inc. v. Town of Oyster Bay, 63 Misc. 2d 46, 310 N.Y.S.2d 138 (Sup. Ct. 1969); *cf.* Gougeon v. Board of Adjustment, 52 N.J. 212, 245 A.2d 7 (1968) ("physically harmonious growth of land use in municipality").

these enumerated factors, are applied recognizing the interplay of aesthetics and property values.

Aesthetics: The Pennsylvania Cases

In Pennsylvania the development of aesthetics in zoning has been incongruous with that of most American jurisdictions. At the turn of the twentieth century, the Pennsylvania courts viewed aesthetics, either expressly[146] or impliedly[147] with scorn and disenchantment. In doing so they followed the national normative standard. However, after aesthetics reached the judicially acknowledged status of an auxiliary component in zoning enactments, the concept rarely achieved any consistency. There are reasons for this, but it would be best, first, to examine the reception aesthetics received in Pennsylvania from that earlier period through mid-century.

The police power could be utilized, as in most other jurisdictions, for the public health, safety, morals, and general welfare. The supreme court noted, "The exercise must have a substantial relation to the public good within the spheres held proper. It must not be from an arbitrary desire to resist the natural operation of economic laws or for purely aesthetic considerations."[148] One early case illustrates how courts avoided aesthetic considerations and based their opinions on traditional police power objectives. In *Gilfillan's Permit*,[149] the court stated that a permit for the construction of a cement warehouse to take the place of an open lumber yard would greatly diminish the fire risk and would help promote the public health, safety, and morals. In holding that the proposed construction would not detrimentally alter the character of the neighborhood, the court furnished a list of guidelines among which was that "the building would not be detrimental to the neighborhood, but, on the contrary, render it more safe, clean and attractive in appearance."[150] The court only alluded to the aesthetic embetterment of the neighborhood that would result from a change in the kind of building to be erected; it did not treat the aesthetic factor as it did other more traditional ones.

146. Bryan v. Chester, 212 Pa. 259, 262, 61 A. 894, 895 (1905); Pittsburgh Poster Advertising Co. v. Swissdale Borough, 70 Pa. Super. 224, 227 (1918).
147. Jenning's Appeal, 330 Pa. 154, 198 A. 621 (1938); Brosnan's Appeal, 330 Pa. 161, 198 A. 629 (1938); Ward's Appeal, 289 Pa. 458, 137 A. 630 (1927); Junge's Appeal, 89 Pa. Super. 548 (1926).
148. White's Appeal, 287 Pa. 259, 266, 134 A. 409, 412 (1926).
149. 291 Pa. 358, 140 A. 136 (1927).
150. *Id.* at 361, 140 A. at 137.

In *Miller v. Seaman*,[151] the court held that an owner of a lot, containing the minimum area required by city zoning regulations, may erect a one-story frame dwelling even if not in aesthetic harmony with buildings on adjoining lots. The court stated:

> The limitation of the right to use one's own property, which is one of the consequences of zoning regulations, must be reasonable and based on imperious considerations of public health, morals and safety, not on artistic or aesthetic considerations.[152]

Parelleling such earlier decisions through the mid-century was a severely scattered cluster of cases that provided more liberal alternatives to the status of aesthetics. In a case dealing with regulation of advertising signs in a residential area, the supreme court, in 1927, stated that while zoning legislation may not rest entirely upon aesthetic considerations, the incidental consideration of a question of aesthetics will not invalidate the exercise of the police power.[153] One year later, the supreme court analyzed the validity of a zoning ordinance that issued set-back regulations in strictly residential areas.[154] The court stated that the presence of an aesthetic objective among other justifications may be considered in connection with the general welfare. The supreme court, however, did not define or discuss what it meant by the term "general welfare," nor had it previously done so.

Two other cases—both dealing with aesthetics in relation to the public at large—proclaimed their support for the aesthetic ethic. In *Walnut & Quince Streets Corp. v. Mills*,[155] the supreme court added:

> It is true that recognition of the power to regulate aesthetics is of comparatively recent mention in the law books in this country, but it would be an unwarranted repudiation of much that has been accomplished toward the beautification of our towns and cities by state and municipal effort, exercised principally, and rightfully, under the police power, to hold, at this date, that our fundamental law does not permit state and municipal control over aesthetic considerations in the regulation of public property.[156]

In *Commonwealth v. Trimmer*,[157] the court held the police power authorized an ordinance regulating the display of advertisements in a

151. 137 Pa. Super. 24, 8 A.2d 415 (1939).
152. *Id.* at 31, 24 A.2d at 417.
153. Appeal of Liggett, 291 Pa. 109, 139 A. 619 (1927).
154. Appeal of Kerr, 294 Pa. 246, 144 A. 81 (1928).
155. 303 Pa. 25, 154 A. 29 (1931).
156. *Id.* at 34, 154 A. at 32.
157. 53 Dauph. County R. 91 (Pa. 1942).

predominately residential area. It was to the interest of the city as a whole, the court stated, that the dignity and beauty of the area should be maintained. Traffic hazards and nuisances within the area would also be prohibited. The defendant was convicted of having attached two large illuminated signs above the sidewalk. The light projected approximately six feet within the line of the street. The appeal was dismissed, and the ordinance was upheld on aesthetic grounds coupled with reasons of public safety. The court stated: "The question immediately before us illustrates how legal principles are and must sometimes be changed to conform to the changing manner of living."[158] The court then held that aesthetic considerations *alone* could justify the exercise of the police power. Of the six cases cited in the opinion, five were wrongly interpreted by the *Trimmer* court by misconstruing the status of aesthetics as implied by the cited decisions. What the *Trimmer* court clearly failed to do—which, at least, five of the six cases did do—was to clarify what was meant by the term "general welfare." This would have been a difficult undertaking for the court since prior Pennsylvania cases dealing with the police power and zoning had not defined the term in any depth.

After 1950 a multitude of cases emerged in which the courts, in focusing on the aesthetic consideration, limited themselves to a pronunciation of the traditional aesthetics rule.[159] In *Appeal of Lord*,[160] the supreme court held that a home owner could not be deprived of a right to use his own property as he so wished merely because a zoning board believed that what he intended to erect was not aesthetic or artistic.[161] The question before the court in *Commonwealth v. Flannery*[162] was whether a house trailer which was placed on cinder-blocks and connected to the municipal water lines, sewage systems, and power lines was a dwelling within the purview of a zoning ordinance.[163] Finding the house trailer to be within the contemplation of the ordinance, the court stated:

158. *Id.* at 97.

159. Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); H.A. Steen Indus., Inc. v. Cavanaugh, 430 Pa. 10, 241 A.2d 771 (1968); Exton Quarries, Inc. v. Board of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967); National Land Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965); Landis v. Zoning Bd. of Adjustment, 414 Pa. 146, 198 A.2d 574 (1964); Rogalski v. Township of Upper Chichester, 406 Pa. 550, 178 A.2d 712 (1962).

160. 368 Pa. 121, 81 A.2d 533 (1951).

161. *Id.* at 128, 81 A.2d at 536.

162. 1 Pa. D. & C.2d 680 (C.P. Cumber. Co. 1954).

163. *See* Eshelman, *Municipal Regulation of House Trailers in Pennsylvania*, 66 DICK. L. REV. 301 (1962).

> Although the location of this trailer on a lot in an area where there are only permanently constructed homes may not harmonize or be in aesthetic agreement with the other buildings, the health, morals and safety of the community are not affected thereby. Its location thereon may not, therefore, be prohibited.[164]

In 1954, the supreme court decided *Appeal of Medinger*,[165] a case which held invalid an ordinance which zoned a residential area for a minimum floor space requirement of 1800 square feet. The court granted the petitioner the right to construct a home with a floor space containing only 1125 square feet. Finding no sufficient justification on the grounds of public health, safety or morals,[166] the court then inquired whether the ordinance could be sustained as promoting the general welfare. It held that:

> . . . neither aesthetic reasons nor the conservation of property values or the stabilization of economic values in a township are, singly or combined, sufficient to promote the health or the morals or the safety or the general welfare of the township or its inhabitants or property owners . . . .[167]

This statement has since retained an extraordinary vitality in the Pennsylvania courts.

In a case decided the same year as *Medinger*, the supreme court stated that the spirit of zoning regulations is limited to a consideration of public health, safety, and general welfare.[168] No other considerations should enter into the decisions.[169] The court did not explain what it meant by the term "general welfare."

Cases after *Medinger* that dealt with aesthetic ramifications in zoning not only followed its reasoning,[170] but also continued to evaluate aesthetics in a vacuum. Courts acknowledged aesthetics in its traditional role and, for the most part, would not even extend the discussion of

164. 1 Pa. D. & C.2d at 683; *accord*, Commonwealth v. DePriest, 77 Montg. County L. Rptr. 11 (Pa. 1959).
165. 377 Pa. 217, 104 A.2d 118 (1954).
166. *See* American Veterans Housing Cooperative, Inc. v. Zoning Bd. of Adjustment, 69 Pa. D. & C. 449 (C.P. Montg. Co. 1949).
167. 377 Pa. at 226, 104 A.2d at 122.
168. Pincus v. Power, 376 Pa. 175, 101 A.2d 914 (1954).
169. *Id.* at 180, 101 A.2d at 916.
170. H.A. Steen Indus., Inc. v. Cavanaugh, 430 Pa. 10, 241 A.2d 771 (1968); Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967); Fellowship Ambulance Club's Appeal, 406 Pa. 465, 178 A.2d 578 (1962); Archbishop O'Hara's Appeal, 389 Pa. 35, 131 A.2d 587 (1957); Pymatuning Township Zoning Ordinance, Appeal of Hamm, 52 Pa. D. & C.2d 187 (C.P. Mercer Co. 1971).

aesthetics to include the possibility of its being an auxiliary component of a regulation.[171]

If before 1950 aesthetics as an auxiliary factor had a brief development, its appearance after mid-century was even less noticeable. In 1953, one court stated: "Public welfare is more than a phrase and above aesthetics . . . though it may be found that 'the key to a science of values will be found in aesthetics.' "[172] Two years later, while acknowledging the traditional rule and the overwhelming force of decisions in Pennsylvania against aesthetic considerations, the court nonetheless proceeded to note the auxiliary development of aesthetics in other jurisdictions and upheld an ordinance that subjected to the approval of a municipal art commission the design, construction, erection, and maintenance of signs in the area bordering historic Philadelphia sites.[173]

The year 1958 witnessed a sudden eruption of the aesthetic ethic in the supreme court decisions of *Best v. Zoning Board of Adjustment*[174] and *Bilbar Construction Co. v. Zoning Board of Adjustment.*[175] In *Best,* the supreme court noted that in determining the constitutionality of zoning ordinances, community attractiveness and property values are proper elements of the general welfare.[176] In *Bilbar Construction Co.,* the court noted that although some recent cases ignored the "general welfare" term in considering the police power, it was still one of the important factors to be analyzed in any such inquiry. "Its importance lies partly in the fact that it admits of aesthetic considerations when passing upon the validity of a zoning ordinance."[177] In citing *Appeal of Kerr,*[178] the court stated that aesthetics may be considered in connection with questions of general welfare.[179] The court concluded:

---

171. *Cf.* cases cited notes 159 & 170 *supra. See also* the following recent cases which deal with "blanket" prohibitions and burden of proof problems. These cases themselves adhere, by implication, to the traditional rule disdaining aesthetics: Beaver Gasoline Co. v. Zoning Bd., 445 Pa. 571, 285 A.2d 501 (1971); Derry Borough v. Shomo, 5 Pa. Comm. Ct. 216, 289 A.2d 513 (1972); Daikeler v. Zoning Bd. of Adjustment, 1 Pa. Comm. Ct. 445, 275 A.2d 696 (1971).

172. Dobison v. Zoning Bd. of Adjustment, 87 Pa. D. & C. 172, 174 (C.P. Phila. Co 1953).

173. Levin v. Philadelphia, 10 Pa. D. & C.2d 272 (C.P. Phila. Co. 1955).

174. 393 Pa. 106, 141 A.2d 606 (1958).

175. 393 Pa. 62, 141 A.2d 851 (1958).

176. 393 Pa. at 117, 141 A.2d at 612; *see* Paxtang Zoning Bd. of Adjustment v. Brady, 73 Dauph. County R. 98 (Pa. 1958) (relied on *Best* in holding that aesthetic considerations have a direct relation to the general welfare).

177. 393 Pa. at 72, 141 A.2d at 856-57.

178. Appeal of Kerr, 294 Pa. 246, 144 A. 81 (1928).

179. 393 Pa. at 72, 141 A.2d at 857.

> 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.[180]

These cases must not pass unnoticed because they illustrate the complex problem that Pennsylvania courts have traditionally avoided: namely, what is meant by the term "general welfare," and furthermore, what is the relationship between aesthetics and "general welfare." Virtually nowhere in the Pennsylvania decisions have the courts clearly explained what is meant by the term "general welfare." While the court in *Appeal of Kerr* tersely mentioned the term, it did not explain it. This point is crucial because it pinpoints where Pennsylvania, at a very early stage, divorced itself from the majority of jurisdictions that eventually recognized aesthetics as a valid auxiliary component of zoning legislation. Other state courts attempted to come to grips with the term "general welfare," and often furnished dicta that provided a detailed chronological development of judicial recognition of the term. However, the Pennsylvania courts barely touched on the term; neither its meaning nor its essence were discussed. While other state courts broadened their interpretation of "general welfare" in response to an acknowledgement of more sophisticated societal needs, Pennsylvania decisions remained relatively static. It therefore came as no surprise when, in *Medinger*, Justice Bell had mentioned:

> These broad general words which are difficult to define must be construed in connection with their statutory context as well as with and subordinate to the individual and property rights which are guaranteed by the Constitution.[181]

Four years after *Bilbar*, in *Key Realty Co. Zoning Case*,[182] Chief Justice Bell, in his concurring opinion of substantial impact, attacked the status of Pennsylvania zoning as it then existed.[183] The decision negated any validity of aesthetics which may have been derived from either the *Best* or *Bilbar* decisions. The Chief Justice provided the clue to Pennsylvania statutory interpretation of the traditional "public health, safety, morals and general welfare" clause when he stated that the words "general welfare" were *ejusdem generis* with health,

180. *Id.*
181. 377 Pa. at 255, 104 A.2d at 122.
182. 408 Pa. 98, 182 A.2d 187 (1962).
183. *Id.* at 102-21, 182 A.2d at 190-99.

safety, and morals.[184] Such an approach prevents aesthetics from achieving its rightful status in Pennsylvania. The Chief Justice concluded with a remark which retarded any further consideration of aesthetics by the supreme court:

> I would hold (a) that aesthetic values are not a factor in the consideration of the validity or constitutionality of a zoning Act or ordinance, and (b) that "general welfare" alone is not sufficient to validate or constitutionalize a zoning Act or ordinance or regulation. To this extent, I would disapprove Bilbar and Best.[185]

Since Chief Justice Bell's comments in 1962, considerations of aesthetics have virtually disappeared from Pennsylvania decisions.[186] Where they are mentioned, they are referred to only in a few sentences.[187]

It is interesting to note that where aesthetic factors have been substantial considerations in cases during the last two decades, Pennsylvania courts have managed to shift the focus to property values, the obscured coordinate of aesthetics. The difficulty with Chief Justice Bell's remarks can be analyzed. His blanket prohibition of aesthetics means property values, which have gradually emerged as a consideration for zoning enactments,[188] cannot be interrelated with aesthetics to be part of general welfare. Depending on the severity of Bell's remarks regarding the "general welfare," such coupling of aesthetics and property values might not matter. This is unfortunate in that Pennsylvania cases are so similar to those in other jurisdictions where aesthetic factors are deemed auxiliary considerations which are linked with property values. It should also be noted that not only has aesthetics never been

184. *Id.* at 112, 182 A.2d at 194.

185. *Id.* at 119, 182 A.2d at 198.

186. *But see* Harrison v. Upper Merion Township Zoning Bd. of Adjustment, 45 Pa. D. & C.2d 452, 457 (C.P. Montg. Co. 1968); Johnstown Advertising Co. v. Portage Borough, 27 Pa. D. & C.2d 617 (C.P. Cambria Co. 1962). The court, while acknowledging the *Medinger* holding, nonetheless stated: "Despite the fact that this quotation has been cited with approval . . . we conclude that aesthetics may and the preservation of property values does come within the proper objectives of zoning." *Id.* at 625.

187. Cases cited note 159 *supra.*

188. Cases prior to Chief Justice Bell's comments recognized property values as an incident of zoning laws. Phillips v. Griffith, 366 Pa. 468, 77 A.2d 375 (1951); Shoemaker v. York Jr. College, 30 Pa. D. & C.2d 750 (C.P. York Co. 1963); Steppler v. Board of Adjustment, 5 Pa. D. & C.2d 8 (C.P. Del. Co. 1955). The Pennsylvania courts have expressed a concern for discerning how property values are affected in zoning conflicts. The validity of the testimony of real estate experts is often the determinative factor in the case. Pymatuning Township Zoning Ordinance, Appeal of Hamm, 52 Pa. D. & C.2d 187, 189 (C.P. Mercer Co. 1971); *see* Colonial Park for Mobile Homes, Inc. v. New Britain Borough Zoning Hearing Bd., 5 Pa. Comm. Ct. 594, 600, 290 A.2d 719, 722 (1972); Appeal of Groff, 1 Pa. Comm. Ct. 439, 443, 274 A.2d 574, 575-76 (1971); Van Gerbig v. Marshall, 36 Pa. D. & C.2d 133, 141 (C.P. Chester Co. 1965).

properly considered an auxiliary factor in defining "general welfare," but courts have not even discerned their importance on an *ad hoc* basis. And now, when Pennsylvania courts attempt to examine the fundamental complexities of property values and try to implement them as a factor to substantiate the general welfare, they will be confronted with the difficult task of correlating property values with public health, safety, and morals rather than with the pariah, aesthetics.

Conclusion

Almost ten years have passed since the *Stover* decision, almost five since *Ferrier*. These New York cases held that aesthetics alone may warrant an exercise of the police power. The first decision was tempered by hazy underlying considerations of property values; the second was couched in a complete appreciation of the aesthetic ethic divorced from any other factor which might have been influential. What is most significant about the *Stover* decision is its allusion to property values. So few jurisdictions have made an unequivocable endorsement of aesthetics, as in *Ferrier*, that it is apparent that aesthetics, in order to substantiate an exercise of the police power through the "general welfare," must be coupled with some other factor. In other words, the auxiliary theory of aesthetics remains prominent, and it is highly improbable that the New York view as derived from *Ferrier* will ever become a majority standard for aesthetics. As an auxiliary factor, aesthetics will have to rely on some other dominant consideration with which it will have to form a partnership to enhance the "general welfare" term of the traditional zoning analysis. Aesthetics would be best suited for an association with property values. The correlation of property values with aesthetics would furnish the courts with an objective guideline to determine the extent to which aesthetically-motivated legislation truly advances the general welfare.

Of course, aesthetics can be the sole basis on which to base the exercise of the police power in situations where it would be extraordinarily foolish to do otherwise. Even then, however, there is the attachment of property values as a subordinate consideration which would also be reasonable to assert. Courts will refrain from basing their decisions on a purely aesthetic viewpoint.

Zoning regulations for the promotion of the public health, safety, morals, and general welfare are made with reasonable consideration for

certain factors derived from legislative standards: for example, the particular district in question, its suitability for particular uses, and the assurance of developing a future environment which realizes the greatest possible use and enjoyment of land with respectful considerations for adjoining properties. Such factors combine not only to promote but also to protect the general welfare through the regulation of land-use control for the benefits of an intelligently planned development. Given these standards, it is remarkable aesthetics has not yet been accorded a status worthy of those traditional objectives which alone will sustain an exercise of the police power. It is more remarkable that it should have taken so long for aesthetics to garner the elementary respect it has achieved in the last quarter century.

ROBERT S. PEARLSTEIN