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To Destroy or to Preserve: Urban Renewal and the Legal Foundation of Historic District Zoning
A thesis submitted in partial fulfillment of the requirements for the degree of Master of Urban
and Regional Planning at Virginia Commonwealth University.

By

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Acknowledgments

The author wishes to extend his sincerest thanks to Dr. I-Shian (Ivan) Suen, Mr. Philip Carter Strother, Professor Aubrey Fountain, and Professor Kimberly Chen for their time, insights, and support throughout the completion of this Thesis. The author also offers heartfelt gratitude to his family and to Natalie for their encouragement during the completion of another chapter in his formal education.

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Abstract

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By: Andrew Eugene Tarne, J.D., B.A.

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Virginia Commonwealth University, 2014.

Major Director: Dr. I-Shian Suen, Chair, Urban and Regional Studies

Historic preservation and urban renewal are often thought to be polar opposites. Where one seeks to preserve, the other generally seeks to destroy in order to rebuild. While the programs appear on the surface to be in opposition, this Thesis seeks to demonstrate that there is a fundamental connection between the underlying legal principles of historic zoning and urban renewal. To that end, the jurisprudence involving historic zoning and aesthetic regulations before and after the seminal urban renewal case of *Berman v. Parker* has been collected and analyzed.

This analysis revealed that courts were hesitant to support aesthetic, and by extension would have been unlikely to support historic zoning, prior to the Supreme Court's validation of urban renewal programs in *Berman*. For example, in 1949 the Supreme Court of Massachusetts stated that specifically stated that a zoning regulation cannot be enacted solely to preserve the beauty of a community. In *Berman*, however, the United States Supreme Court justified urban renewal on the basis that governments should be able to condemn and regulate property for the creation of a more attractive community.

An analysis of the jurisprudence following *Berman* indicated that courts were more likely to uphold aesthetic or historic zoning ordinances. For example, in a 1955 opinion, the Supreme

Court of Massachusetts cited *Berman* and stated that, because construction of aesthetically or historically incompatible structures could destroy the historic character of a town, historic zoning ordinances fell within the scope of the police power. In short, the cases identified by this Thesis ultimately indicated that *Berman* had an impact on the acceptance of aesthetic and historic zoning. Therefore, they suggest that the programs of historic zoning and urban renewal, while seemingly in opposition, share fundamental legal roots.

Vita

Andrew Eugene Tarne was born in May 1988. In 2006, he graduated from Osbourn High School in the City of Manassas, Virginia. In May 2010, he received a Bachelor of Arts in Classics, with a Minor in Architecture, from the University of Virginia. Thereafter, in May 2013, Andrew received a Juris Doctor from the University of Richmond, T.C. Williams School of Law, where he served as the Managing Editor for Volume 47 of the *University of Richmond Law Review*. In October 2013, Andrew was licensed to practice law in the Commonwealth of Virginia.

Having been raised and educated in one of the original Thirteen States and the site of the first permanent English colony in the New World, Andrew strongly believes in the value that history adds to contemporary life and culture. Considering himself an amateur architect, he is particularly fond of historic sites and structures throughout Virginia, from the grand Neo-Classical and Federal homes of famous statesmen to the vernacular Victorians and American Foursquares inhabited by ordinary citizens who helped to build the Commonwealth and the nation.

I. INTRODUCTION

In 1978, the Supreme Court of the United States, in a divided decision, generally recognized the validity of historic preservation ordinances in the landmark case *Penn Central Transportation Co. v. City of New York*.¹ Since 1978, the historic preservation movement in the United States has continued to grow. Currently, a number of laws, regulations, and policies at the federal, state, and local levels affect millions of properties across the nation.

Government managed historic preservation began with the admirable intention of preserving “the historical and cultural foundations of the Nation . . . as a living part of our community life and development in order to give a sense of orientation to the American people.”² With a growing number of laws and designated historic districts, however, some property owners and residents have grown concerned that historic preservation efforts may harm both their individual interests and their larger communities.³ Indeed, many of those affected by historic preservation laws have reason to be concerned. Within urban environments nationwide, a multitude of neighborhoods have been designated as historic by government at all levels.⁴ Many residents of these neighborhoods still have very real memories of an earlier government program that sought to create better neighborhoods and cities, urban renewal. Residents fear that historic

¹ 438 U.S. 104 (1978). The primary challenge to the New York City Landmark Ordinance was that, as applied to Plaintiff’s property, it constituted a takings requiring just compensation. In reaching the conclusion that the ordinance did not amount to a takings, the majority generally recognized the validity of historic zoning and landmark designation. *See infra* notes 283-91 and accompanying text.

² National Historic Preservation Act, 16 U.S.C. § 470(b)(2) (2006).

³ *See, e.g.,* Jess R. Phelps, *Moving Beyond Preservation Paralysis? Evaluating Post-Regulatory Alternatives for Twenty-First Century Preservation*, 37 VT. L. REV. 113, 113 (2012).

⁴ *See, e.g.,* Ryan Howell, note, *Throw the “Bums” Out? A Discussion of the Effects of Historic Preservation Statutes on Low-Income Households Through the Process of Urban Gentrification in Old Neighborhoods*, 11 J. GENDER RACE & JUST. 541, 545-46 (2008) (discussing historic preservation ordinances).

preservation laws will lead to the same pain of displacement felt by communities affected by Twentieth Century urban renewal programs.⁵ Indeed, some scholars have even noted that government managed historic preservation ultimately has its roots in mid-century urban renewal.⁶ Others take a different, though not inherently contradictory, approach, arguing that historic preservation, as a movement, grew from the opposition to mid-century interventionist, demolition based urban renewal tactics.⁷

This Thesis will expand on current scholarship regarding the links between historic preservation and urban renewal. It will begin by exploring the roots of mid-century urban renewal programs and of historic preservation programs. The focus will then turn to a direct analysis of the fundamental legal similarities of urban renewal and historic preservation as developed in case law. Specifically, this Thesis will compare historic preservation and aesthetic regulation cases prior to the United States Supreme Court’s seminal Urban Renewal decision in *Berman v. Parker* to historic preservation cases following that decision. This approach will be used to help determine the effect that the *Berman* decision had on the legal status of historic preservation laws. This Thesis hopes to contribute to the existing scholarship by outlining in

⁵ See, e.g., Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 513-14 (1981) (“Low-income interest associations such as the National Urban Coalition fear that rehabilitation in historic districts, leading to steep rent increases, will force low-income tenants to leave their old neighborhoods, without even the benefit of the Uniform Relocation Act payments that once assisted those displaced by urban renewal projects . . .”).

⁶ See Stephanie R. Ryberg, *Historic Preservation’s Urban Renewal Roots: Preservation and Planning in Midcentury Pennsylvania*, 39 J. URBAN HISTORY 193, 194 (2013) (arguing that mid-century Philadelphia planners adopted plans that preserved buildings “not based on a sense of historic value, but rather a pragmatic desire to ease plan implementation”); see also Rose, *supra* note 5, at 509 (“The 1950s and early 1960s urban renewal plans for preservation have a continuing influence in historic district planning.”).

⁷ See, e.g., U.S. CONFERENCE OF MAYORS, SPECIAL COMMITTEE ON HISTORIC PRESERVATION, WITH HERITAGE SO RICH (1966).

detail the field of historic preservation jurisprudence before and after *Berman*. Such an outline will aid in determining whether the legal foundations of urban renewal and historic preservation are inextricably linked.⁸ Finally, this Thesis briefly suggests alternatives to traditional historic preservation zoning that could deliver similar preservationist results while protecting residents and property owners from the potential downsides of zoning based approaches.

⁸ As used in this Thesis, the term “urban renewal” refers specifically to the renewal programs of the mid twentieth century characterized by the condemnation and demolition of properties later redeveloped through public-private partnerships. *See infra* notes 14-26 and accompanying text. Such programs were upheld by the United States Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954). This Thesis is mostly concerned with the legal relationship between historic preservation and urban renewal at the local level. That is, the primary topic discussed is the concept of the police power and general welfare as used to justify both local urban renewal programs and local historic zoning ordinances.

II. BACKGROUND AND LITERATURE REVIEW

Urban renewal and historic preservation programs are frequently considered to be polar opposites.⁹ One seeks to raze and rebuild while the other seeks to preserve. The traditional narrative holds that preservation movements gained traction and support as a result of “heavy-handed” urban renewal programs.¹⁰ While the historic preservation movement may have gained much ground following the implementation, and often failure, of mid-century urban renewal efforts, the traditional narrative for most parts fails to recognize the overlapping legal similarities between the programs and the fact that private historic preservation efforts began in the United States decades before the implementation of the urban renewal programs.

Direct comparative analyses between the two programs, are few; however, work has been undertaken to demonstrate that the traditional narrative cannot explain the whole story. For example, Professor Ryberg has argued that historic preservation was but one tool used by planners undertaking urban renewal.¹¹ Her research has showed that planners in Philadelphia were faced with market constraints and so had to carefully choose when to tear down and when

⁹ “Traditional histories on mid-Twentieth Century urban renewal paint a relatively black-and-white picture. One of the most powerful and entrenched narratives about the era is that demolition prevailed over preservation. Emanating out of this belief, many scholars and practitioners argue that the modern preservation profession developed in direct response to the destructive policies and practices of midcentury city planning.” Ryberg, *supra* note 6, at 193.

¹⁰ Eugenie Ladner Birch & Douglass Roby, *The Planner and the Preservationist: An Uneasy Alliance*, 50 J. AM. PLAN. ASSOC. 194, 199 (1984). Birch and Roby do note that there were successful collaborations between urban renewal and preservation, for example in Philadelphia, but that they “remained a minor part of the total project costs of the Philadelphia [renewal] program.” *Id.* at 198.

¹¹ See Ryberg, *supra* note 6.

to preserve.¹² Although their preservation of structures was not based on a sense of historic value, they consciously used historic preservation as a tool for urban renewal.¹³

Still, the history of both urban renewal and historic zoning is complicated and worth developing before this Thesis proceeds with an analysis of the legal similarities between the two regimes. This review will focus on the history behind each program, the legislative origins of the programs, the goals for the programs, and both positive and negative criticism of the programs. Such a review will help to frame the discussion in Chapter Six of jurisprudence relating to each program.

A. Urban Renewal

Broadly stated, urban renewal is a systematic program of redeveloping an urban system that has fallen into decay.¹⁴ Typically, the program is undertaken as a partnership between public agencies and the private sector.¹⁵ While urban renewal programs had existed in various forms as early as the late Nineteenth Century, the seminal programs in the United States were undertaken during the mid-Twentieth Century.¹⁶ These urban renewal programs were based in large part on trust in the proficiency of professional planners and government officials.¹⁷ The “physical amelioration” of the urban environment was viewed as the solution to various ills that had

¹² *See id.* at 194.

¹³ *Id.*

¹⁴ *See, e.g.,* Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423 (2010).

¹⁵ Stacey A. Sutton, *Urban Revitalization in the United States: Policies and Practices*, UNITED STATES URBAN REVITALIZATION RESEARCH PROJECT (2008).

¹⁶ *See id.* at 27-29.

¹⁷ *Id.* at 28 (“There was a general confidence in government, particularly in its ability to stimulate a weak economy through investment and public works.”).

befallen America's major urban centers.¹⁸ As Altshuler and Luberoff note, urban leaders believed that only "radical surgery" would stem the "death spiral" of their cities.¹⁹ This radical surgery took the form of government sponsored redevelopment plans. Plans were proposed and adopted by city officials in a centralized, rational style of planning.²⁰

i. Brief History

In the United States, Urban Renewal arose in the late Nineteenth and early Twentieth Century as a tool to combat a perceived deterioration in the urban environment.²¹ Urban renewal continues to this day in various forms, notably through economic development programs.²² The specific term "urban renewal," however, most usually invokes the large scale, government sponsored "slum clearance" programs undertaken during the middle of the Twentieth Century. In this form, Urban Renewal was undertaken by local governments which received funding from the federal government.²³

The tool used by local governments to accomplish urban renewal was that of eminent domain. The procedure was relatively straightforward. A locality would simply condemn areas that it deemed blighted and then would either develop the land itself or transfer the land to a

¹⁸ *Id.*

¹⁹ ALAN A. ALTSHULER & DAVID LUBEROFF, MEGAPROJECTS: THE CHANGING POLITICS OF URBAN PUBLIC INVESTMENT 14 (2003).

²⁰ See Sutton, *supra* note 15, at 27; see also MICHAEL P. BROOKS, PLANNING THEORY FOR PRACTITIONERS 81-95 (AICP 2003) (discussing the nature of the centralized rationality planning paradigm).

²¹ See Lavine, *supra* note 14 (discussing the City Beautiful movement in Washington D.C.); see also Sutton, *supra* note 15, at 23-25 (discussing attention paid to the deterioration of the built environment during the early twentieth century).

²² See Lavine, *supra* note 14. (discussing the connection between urban renewal and the justification for economic development in *Kelo v. City of New London*, 545 U.S. 469 (2005)).

²³ See Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 HOUSING POL'Y DEBATE 443, 444-45 (2000); see also Sutton, *supra* note 15, at 23.

private party for development.²⁴ Historically, the application of eminent domain had been limited to scenarios in which the government condemned property and then put it to a public use, such as a government building or a park.²⁵ The use of eminent domain for urban renewal, however, raised the problem that the land condemned was not actually being physically used by the government.²⁶

ii. Goals and Expectations

The Urban Renewal programs undertaken in the mid twentieth century under federal tutelage did not necessarily set out to damage the physical and sociological fabric of America's cities through the destruction of the traditional built environment and the displacement of residents. Rather, the urban renewal programs seemed to have been undertaken with the support of cities and their disadvantaged residents in mind.²⁷ For example, the Federal Housing Act of

²⁴ Sutton, *supra* note 15, at 25 (“Government would play a central role by using eminent domain to assemble the land and provide ancillary infrastructure improvements The land would then be turned over to private developers for rebuilding.”). *See, e.g.*, District of Columbia Redevelopment Act of 1945, 60 Stat. 760 (1946) (Washington D.C.’s urban renewal program).

²⁵ *See, e.g.*, *Kelo v. City of New London*, 545 U.S.469, 521 (2005) (Thomas, J., dissenting) (discussing how the original meaning of the Public Use Clause was that government could take property only when it actually uses that property or gives the public a right to use it).

²⁶ *See* ALTSHULER & LUBEROFF, *supra* note 19, at 14-15 (noting how using eminent domain to this end a few years earlier would have “doubtless” been found unconstitutional). A full analysis of the history behind the doctrine of “public use” and “public purpose” is beyond the scope of this Thesis. However, the analysis contained herein regarding the scope of the police power and the general welfare is closely related to the evolution of the understanding of public use.

²⁷ *See* Teaford, *supra* note 23, at 444 (discussing how a diverse coalition backed Title I of the Housing Act of 1949, especially social welfare leaders and advocates of low and moderate income housing who believed urban renewal would “better the living conditions of the poor”).

1949, which made available federal funds for local renewal projects, provided that there be “a feasible method for the temporary relocation of families displaced from the project area.”²⁸

Urban renewal programs were undertaken with the objective of restoring cities that had fallen into decay.²⁹ Moreover, the programs were often undertaken with the express purpose of assisting impoverished city residents living in, what were deemed, unsanitary conditions.³⁰ For example, dwellings on Vinegar Hill in Charlottesville, Virginia, largely were light wooden structures that lacked indoor plumbing and other modern sanitary features.³¹ By clearing away these older “blighted” units, urban renewal would “increase the stock of decent, affordable dwelling in the central cities.”³² In short, advocates hoped that through urban renewal and “[w]ith the aid of Uncle Sam, cities [would be] cleansed of their ugly past and reclothed in the latest modern attire.”³³

iii. Positive Outcomes and Support

Admittedly, urban renewal programs did generate some positive outcomes, albeit through mechanisms harmful to many. For example, urban renewal did spur the removal of property that,

²⁸ Federal Housing Act of 1949, Pub. L. No. 81-171, § 105(c), 63 Stat. 413, 417 (1949).

²⁹ See Sutton, *supra* note 15, at 23-29; ALTSHULER & LUBEROFF, *supra* note 19, at 14.

³⁰ See Quintin Johnstone, *Federal Urban Renewal Program*, 25 U. CHI. L. REV. 301, 301-06 (1958) (discussing how blight harms cities and residents alike, and arguing that decent low income housing can combat blight); Lavine, *supra* note 14 (discussing the use of federal funding and of renewal programs to clear slums and construct public housing); Teaford, *supra* note 23, at 444 (discussing how urban renewal was seen as a method to better the living conditions of the poor).

³¹ See JAMES ROBERT SAUNDERS & RENAE NADINE SHACKLEFORD, *URBAN RENEWAL AND THE END OF BLACK CULTURE IN CHARLOTTESVILLE, VIRGINIA* 3 (2005) (noting the condition of Vinegar Hill prior to urban renewal).

³² Teaford, *supra* note 23, at 444.

³³ *Id.* at 443.

by many accounts, was actually subpar.³⁴ Under the belief that blight bred blight, cities cleared “substandard” housing in order to provide the opportunity for the emergence of a more modern, healthy urban environment for city residents.³⁵

Teaford notes several successful developments that resulted from urban renewal. Following renewal, Baltimore’s Charles Center employed five thousand more individuals and tax receipts quadrupled, as compared to before renewal.³⁶ The Lincoln Center project in New York helped to transform the Upper West Side of Manhattan into a thriving neighborhood.³⁷ Philadelphia’s Society Hill project resulted in a unique combination of new structures and rehabilitation of existing historic houses.³⁸ As such, property tax receipts for the city increased from \$454,000 annually to \$2.47 million annually.³⁹ Similarly, Chicago’s Hyde Park-Kenwood project utilized a combination of destruction and rehabilitation to preserve the health of the University of Chicago area.⁴⁰ Despite the general success of these projects, Teaford notes that they were often accompanied by the downsides of displacement and removal of minority and low income residents.⁴¹

³⁴ See Johnstone, *supra* note 30, at 301-05 (discussing blight).

³⁵ See *id.* at 301-06 (arguing that the construction of low-income housing “tends to prevent blight”); see also Teaford, *supra* note 23, at 443-45.

³⁶ Teaford, *supra* note 23, at 451.

³⁷ *Id.* at 451-52.

³⁸ *Id.* at 452.

³⁹ *Id.*

⁴⁰ *Id.* at 452-53.

⁴¹ *Id.* at 451-54.

iv. Negative Outcomes and Criticisms

The radical surgery of urban renewal usually took the form of blight clearing through the exercise of eminent domain.⁴² In the process, large numbers of individuals were displaced as city governments condemned privately owned property and transferred it to either city redevelopment authorities or private developers.⁴³ As Lavine notes, “[t]he social impacts of urban renewal were huge, as lower class and often minority families were moved out of center cities to make room for uses that would generate higher tax revenues.”⁴⁴ Moreover, the effect of Urban Renewal on minorities was often so pronounced that the programs were dubbed “negro removal.”⁴⁵ For example, Saunders and Shackelford note how the urban renewal project undertaken by Charlottesville, Virginia to modernize Vinegar Hill destroyed a vibrant minority community.⁴⁶ The program caused the displacement of hundreds of individuals and the disruption of an existing, thriving business community.⁴⁷ Moreover, although demolition had been completed by 1965, renewal efforts were still incomplete nearly twenty years later.⁴⁸

In 1954, the Supreme Court of the United States directly addressed urban renewal programs utilizing eminent domain and declared them legal in *Berman v. Parker*.⁴⁹ As professor Pritchett has noted, “[t]he Supreme Court’s decision in *Berman* affected a dramatic expansion in the government’s powers of eminent domain and provided judicial legitimation for urban

⁴² See, e.g., Sutton, *supra* note 15, at 25

⁴³ See *id.* at 30 (noting that, between 1956 and 1972, 3.8 million residents were displaced by urban renewal and urban freeway construction); Teaford, *supra* note 23, at 445-51 (discussing the displacement caused by urban renewal programs).

⁴⁴ See Lavine, *supra* note 14.

⁴⁵ See Sutton, *supra* note 15, at 30 (discussing the focus and effects of urban renewal and urban freeway construction on black neighborhoods).

⁴⁶ See SAUNDERS & SHACKLEFORD, *supra* note 31, at 1-6.

⁴⁷ *Id.* at 3-4.

⁴⁸ *Id.* at 3-5 (“As late as 1982 seven acres of the Hill remained vacant.”).

⁴⁹ *Berman v. Parker*, 348 U.S. 26 (1954).

renewal efforts.”⁵⁰ The Court’s approval of urban renewal increasingly allowed local governments to widely exercise eminent domain to condemn and transfer private property “in the name of housing, commercial, or industrial development.”⁵¹ Therefore, in addition to displacement, the practice and affirmation of urban renewal had the effect of eroding the protections of private property rights.⁵²

In short, the lasting legacy of urban renewal, despite any successes, is largely one of failure. Jacobs and Paulsen note that some “see this period as one in which planners destroyed vibrant urban communities, facilitated suburban sprawl, and caused protests, freeway revolts, racial animosity, and an anti-planning backlash that persists to today.”⁵³ Indeed, the failures of urban renewal actively continue to this day in the form of new economic development urban renewal programs. For example, in the year 2000, the City of New London, Connecticut, undertook an economic development program utilizing eminent domain to condemn a large section of water front property and transfer it to a private developer.⁵⁴ However, as of February 2014, that property has remained largely vacant and undeveloped.⁵⁵

⁵⁰ Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE LAW & POL’Y REV. 1, 47 (2003).

⁵¹ *Id.* at 48.

⁵² See Harvey M. Jacobs & Kurt Paulsen, *Property Rights The Neglected Theme of 20th-Century Planning*, 75 J. AM. PLAN. ASS’N 134, 137-38 (2009) (discussing the growing power of central planning in the mid-twentieth century).

⁵³ *Id.*

⁵⁴ *Kelo v. City of New London*, 545 U.S.469 (2005).

⁵⁵ See Charlotte Allen, ‘Kelo’ Revisited, WEEKLY STANDARD, Feb. 10, 2014; Alec Torres, *Nine Years after Kelo, the Seized Land is Empty*, NATIONAL REVIEW (Feb. 5, 2014, 6:00 PM), <http://www.nationalreview.com/article/370441/nine-years-after-kelo-seized-land-empty-alec-torres>.

B. Historic Preservation

This Thesis is primarily concerned with historic preservation through municipally enacted historic zoning ordinances. These ordinances are enacted by local governments and serve to preserve the historic character of a neighborhood by prohibiting demolition, construction, repair, or alteration without approval from the city government.⁵⁶

i. Brief History

Historic preservation, generally, can be roughly divided into three schools of thought: “Monumentalism, Aestheticism, and Revitalization.”⁵⁷ In the United States, Monumentalism focuses primarily on the protection and preservation of sites that are deemed important to the history and fabric of the early Republic and its heroes, especially the Founding Fathers.⁵⁸ Monumentalism has at its core a desire to promote the importance of historical principles in the abstract. Historically, Monumentalism was usually undertaken by private organizations.⁵⁹

Aestheticism focuses on the preservation of physical objects and places.⁶⁰ In other words, Aestheticism regarded the physical form of structures, whether monumental or vernacular, as important in and of itself. Aestheticism, therefore, differs from Monumentalism in that Monumentalism can be ambivalent as to the preservation of an actual historic structure.⁶¹ Moreover, Aestheticism relied more on government involvement than Monumentalism. As

⁵⁶ See, e.g., CITY OF RICHMOND, VA., CODE OF ORDINANCES Ch. 114, § 114-930 to -930.9 (2014) (regulations for the City of Richmond’s Old and Historic Districts).

⁵⁷ Todd Schneider, note, *From Monuments to Urban Renewal: How Different Philosophies of Historic Preservation Impact the Poor*, 8 GEO. J. POVERTY LAW & POL’Y 257, 258 (2001).

⁵⁸ *Id.*

⁵⁹ *Id.* at 259 (noting that the “first successful large-scale preservation battle” was waged by the Mount Vernon Ladies Association).

⁶⁰ *Id.* at 260.

⁶¹ See *id.* at 259.

Schneider notes, Aestheticism became increasingly popular in the early twentieth century and led to the designation of local historic districts by municipal governments.⁶²

Revitalization grew out of the foundations of Aestheticism. Where Aestheticism focused on the aesthetics of individual structures or neighborhoods as a public good worthy of preservation and protection, Revitalization saw the larger urban system as a good that needed protection.⁶³ In large part, revitalization efforts focused on the good created by a traditional city system of mixed use districts and varied physical and social fabrics.⁶⁴ Rypkema takes a similar approach and argues that preserving and revitalizing older structures serves a public good by providing affordable housing and more-walkable environments.⁶⁵ Revitalization, therefore, represents a shift in historic preservation. Rather than focusing strictly on the historic character of a structure or site, Revitalization, at least in part, focuses on planning for an urban system's future based on methods that worked in the past.⁶⁶ In this way, revitalization efforts can be viewed as a tool of urban renewal programs.⁶⁷ Indeed, professor Ryberg has argued that mid-Twentieth Century urban renewal programs selectively utilized preservation and Revitalization as a means to achieve successful renewal with limited resources.⁶⁸

Professor Byrne has argued a similar position by noting that historic preservation efforts “frustrate central control of decisionmaking and megaprojects and shield smaller-scaled, diffused

⁶² *Id.* at 261.

⁶³ *See id.* at 261, 266-67.

⁶⁴ *Id.* at 261.

⁶⁵ Donovan D. Rypkema, *Historic Preservation and Affordable Housing: The Missed Connection* (2002).

⁶⁶ *See Schneider, supra* note 57, at 260-61.

⁶⁷ *Id.*

⁶⁸ *See Ryberg, supra* note 6, at 193-97.

redevelopment [; thus] elevat[ing] community and authenticity.⁶⁹ Again, the uses of preservation law seem to have moved away from strictly preserving the built environment towards the broader goal of “mak[ing] the modern city hospitable for contemporary life.”⁷⁰

ii. Goals and Expectations

Succinctly stated, the broad objective of historic preservation is to preserve the built environments in order to secure the cultural history of the nation.⁷¹ The benefits of historic preservation are often described in intangible terms such as the enhancement of “quality of life for people”⁷² and the preservation “of cultural meaning and identity.”⁷³ In other words, historic preservation serves as a link to the past, in order to provide a cultural base for the future.⁷⁴ Moreover, historic zoning in particular, as a tool of historic preservation, is seen as a way for governments to provide tangible benefits to a community through maintained or increased property values as well as municipal income generated through tourism.⁷⁵ Professor Byrne has noted that “[l]ocalities market themselves to developers and visitors by touting their historic

⁶⁹ J. Peter Byrne, *Historic Preservation and its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON LAW REV. 665, 688 (2012).

⁷⁰ *Id.* at 687.

⁷¹ *See, e.g.*, National Historic Preservation Act, 16 U.S.C. § 470(b) (2006).

⁷² Frank B. Gilbert, *Precedents for the Future*, 36 LAW & CONTEMP. PROBS. 311, 312 (1971) (quoting Robert Stipe, Address at the 1971 Conference on Preservation Law (May 1, 1971)); *see also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 107-08 (1978) (quoting Gilbert).

⁷³ Gregory S. Alexander, *The Social Obligation of Norm in American Property Law*, 94 CORNELL L. REV. 745, 796 (2009) (arguing that the benefits of historic structures are essential to cultural meaning and identity, and therefore that private owners should be prevented from tearing down historic structures); *see also* Byrne, *supra* note 69, at 676-77 (discussing Alexander’s argument) (“The cultural heritage conveyed by a community’s historic buildings is a public good, the value of which is not fully internalized in private property rights.”).

⁷⁴ *See* 16 U.S.C. § 470(b)(4).

⁷⁵ *See, e.g.*, Howell, *supra* note 4, at 550 (discussing the link between the preservation of historic buildings, economic revitalization, and tourism).

resources. But most importantly, local historic preservation laws regulate the demolition and alteration of numerous designated historic buildings and sites within many of the most dynamic urban real estate markets [across the country].”⁷⁶

iii. Positive Outcomes and Support

The most obvious positive effect of historic preservation through zoning is that it serves to preserve historic structures and environments, many of which are aesthetically pleasing. While this outcome is tangible and subjective, it is generally considered positive.⁷⁷ The preservation of such districts and structures has been recognized as having benefit to the community at large, helping to ground citizens in a sense of time and place.⁷⁸ Moreover, these historic districts are often more human scaled than modern developments.⁷⁹ Therefore, their preservation helps to preserve a walkable urban environment.⁸⁰

Additionally, Rypkema has noted many economic benefits to historic preservation generally. Leaving aside displacement concerns, the designation of properties as historic generally helps to maintain or raise property values, seemingly because historic districts are

⁷⁶ See Byrne, *supra* note 69, at 665-66.

⁷⁷ See, e.g., Daphna Lewinsohn-Zamir, *The “Conservation Game”: The Possibility of Voluntary Cooperation in Preserving Buildings of Cultural Importance*, 20 HARV. J.L. & PUB. POL’Y 733, 734 (1997) (“The various benefits attributed to the physical, built environment include the cultivation of community solidarity and stability, the advancement of individuals’ orientation and identity, and the encouragement of aesthetic excellence as well as enjoyment.”).

⁷⁸ See *id.*

⁷⁹ See Rypkema, *supra* note 65, at 13 (comparing historic neighborhoods to new urban forms and concluding that existing historic neighborhoods are preferable even to new urbanism, because historic neighborhoods are “real urbanism”).

⁸⁰ See *id.* at 7-8 (discussing the proximity of historic housing to schools, jobs, and public transit).

desirable areas to live.⁸¹ Moreover, Rypkema has noted that rehabilitation can often be more cost-effective than new construction.⁸² The cost effectiveness of rehabilitation can be compounded by the availability of tax abatement or tax credits generally available to historic rehabilitation projects.⁸³ Moreover, it has been argued that rehabilitation and reuse are the “greenest” form of construction.⁸⁴

iv. Negative Outcomes and Criticisms

Perhaps the greatest criticism of historic zoning is that it results in gentrification and displacement.⁸⁵ Gentrification, in and of itself, may not be negative, however, it is closely linked with displacement, which generally is considered negative.⁸⁶ Displacement is considered to occur when individuals involuntarily relocate due to rising rents, taxes, cost of ownership, or even forced government action.⁸⁷ Historic zoning has also seen general resistance from neighborhood associations.⁸⁸ Residents fear that historic preservation laws will lead to the same

⁸¹ See Donovan D. Rypkema, *The (Economic Value) of National Register Listing*, 25 CULTURAL RESOURCE MGMT. 6 (2002); see also Howell, *supra* note 4, at 551.

⁸² See Rypkema, *supra* note 65, at 10.

⁸³ See *id.* at 10-12, 15-16.

⁸⁴ See NAT'L TRUST FOR HISTORIC PRESERVATION, *THE GREENEST BUILDING: QUANTIFYING THE ENVIRONMENTAL VALUE OF BUILDING REUSE* 84 (2011).

⁸⁵ See, e.g., J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 405 (2003) (noting that historic preservation laws are often blamed for setting gentrification in motion, but ultimately arguing that that perception is flawed).

⁸⁶ See generally *id.* at 410-15 (“The federal government has taken the view that displacement from gentrification has never been a serious problem. Advocates for the poor, on the other hand, have long argued that displacement occurs on a large scale and have called for government action to protect low-income residents.”).

⁸⁷ See *id.* at 412 (discussing the causes of displacement within the gentrification context); *supra* notes 43-47 and accompanying text (discussing displacement caused by urban renewal).

⁸⁸ See Phelps, *supra* note 3, at 113 (“Preservationists are increasingly aware of a growing reluctance in many communities against the formation of new local historic districts (LHDs) or other forms of local regulatory preservation restrictions.”).

pain of displacement felt by communities affected by Twentieth Century urban renewal programs.⁸⁹

Another concern regarding historic zoning is that it is fundamentally based on subjective considerations. The determination of the cultural, historic, or aesthetic value of a structure or district is something over which reasonable people may disagree, and therefore it is difficult to apply standards governing the administration of historic zoning.⁹⁰

Historic zoning laws can also be considered to adversely affect certain First Amendment rights.⁹¹ It has been suggested that historic zoning ordinances could abridge First Amendment rights by prohibiting landowners from erecting signs or commissioning art on the exterior of their buildings.⁹²

⁸⁹ See Rose, *supra* note 5 at 513-14.

⁹⁰ See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 138 n.1 (1978) (Rehnquist, J., dissenting) (criticizing the subjective nature of the New York landmark preservation ordinance); see also Eric J. Remington, *Do Subjective Preservation Standards Trump Objective Zoning Standards?*, 7 LAND USE Q. 7, 7-8 (2012) (discussing subjective and objective preservation language in North Carolina law); cf. Eleanor Gorski, *Regulating New Construction in Historic Districts: Contemporary Design*, THE ALLIANCE REVIEW, March/April 2011, at 17-18 (discussing the problems associated with providing for new, contemporary styles of design in historic districts); David Payne, *Charleston Contradictions: A Case Study of Historic Preservation Theories and Policies* (Jan. 1, 2013) (Ph.d. dissertation, Clemson University), available at http://tigerprints.clemson.edu/cgi/viewcontent.cgi?article=2140&context=all_dissertations, (generally discussing the competing theories as to the subjective nature of design and how that nature complicates preservation decision-making); John King, *Re-evaluating S.F. Historic Preservation Framework*, SFGATE (May 1, 2011, 4:00 AM), <http://www.sfgate.com/bayarea/place/article/Re-evaluating-S-F-historic-preservation-framework-2373053.php> (“The dilemma with preservation today is that in an ever-more-subjective world, true believers - or politically adroit cynics - can make the case for almost anything.”).

⁹¹ Timothy L. Binetti, note, *Culture Club or the Clash? Historic Preservation, Aesthetic Uniformity and Artistic Freedom*, 13 DEPAUL-LCA J. ART & ENT. L. & POL’Y 313 *passim* (2003).

⁹² *Id.*

Finally, historic zoning has been noted to lead to “pre-emptive demolition.” Pre-emptive demolition occurs when a building owner discovers that a city is considering historical designation for a building, and then preemptively takes measures to ensure that designation does not occur.⁹³ These measures can range from alterations to remove historic features from the structure to demolition.⁹⁴

C. Comparisons

Scholars have noted similarities between urban renewal and historic zoning. As Lavine notes, the *Berman* decision had far reaching effects in that it established an important precedent that would eventually be used to legitimize historic preservation laws.⁹⁵ Similarly, Allison and Peters have noted that “[t]he *Berman* decision paved the way for historic preservation regulation.”⁹⁶ In *Berman*, the Court used language of aesthetic value to validate urban renewal programs.⁹⁷ Fourteen years later, in *Penn Central Transportation Co. v. City of New York*, the Court again used the language of aesthetics in generally recognizing the validity of historic preservation laws.⁹⁸ Furthermore, Clark has noted that the origins of historic zoning laws in New

⁹³ See Robin Pogrebin, *Preservationists See Through Bulldozers Charging Through a Loophole*, N.Y. TIMES, Nov. 29, 2008, at C1; see also Mark Lamster, *Modernist Masterwork Demolished in Fort Worth*, GUIDELIVE, THE DALLAS MORNING NEWS (June 22, 2013, 1:19 PM), <http://artsblog.dallasnews.com/2013/06/modernist-masterwork-demolished-in-fort-worth.html/>.

⁹⁴ See Pogrebin, *supra* note 93 (“The owner . . . rushes to obtain a demolition or stripping permit from the city’s Department of Buildings so that notable qualities can be removed, rendering the structure unworthy of [historic] protection.”); Lamster, *supra* note 93 (discussing the demolition of a modernist house before preservationists could succeed in defending it).

⁹⁵ Lavine, *supra* note 14.

⁹⁶ ERIC W. ALLISON & LAUREN PETERS, HISTORIC PRESERVATION AND THE LIVABLE CITY 25 (2011); see also Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708, 715 (1963) (discussing the connection between *Berman v. Parker* and aesthetic regulations).

⁹⁷ *Berman v. Parker*, 348 U.S. at 26, 33 (1954).

⁹⁸ See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978); ALLISON & PETERS, *supra* note 96, at 24-25.

York can be found in earlier renewal legislation and the Supreme Court's analysis in *Berman*.⁹⁹

This Thesis will build on this earlier work by directly comparing case law prior to and following *Berman* to determine the effect that the case had on historic zoning regulations.

⁹⁹ See Carol Clark, *Albert S. Bard and the Origin of Historic Preservation in New York State*, 18 WIDENER L. REV. 323 (2012).

III. METHODOLOGY

The fundamental tool of urban renewal is eminent domain. That power was used by localities and their agents to condemn properties deemed blighted, demolish them, and then develop them or transfer them to a private party for development. While eminent domain had been exercised prior to the advent of urban renewal, the Supreme Court specifically endorsed the use of eminent domain for urban renewal purposes in the landmark 1954 case, *Berman v. Parker*.¹⁰⁰ Later, in *Penn Central Transportation Co. v. City of New York*, the Supreme Court upheld historic landmark designation and found that it did not constitute a taking, because it was a valid exercise of a locality's police power.¹⁰¹ In reaching its decision, the Court also recognized the validity of historic zoning regulations in general.¹⁰²

The *Berman* and *Penn Central* cases seem quite different as one upholds the ability of a locality to condemn, take, and demolish private property in order to make way for new development, while the other upholds the ability of a locality to effectively mandate the preservation a privately owned piece of property. Both cases, however, broadly deal with the power of local governments to regulate in furtherance of the "general welfare." An expansive view of what constitutes the general welfare can therefore be used to legally justify either

¹⁰⁰ *Berman v. Parker*, 348 U.S. 26, 33 (1955).

¹⁰¹ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). As discussed below in Chapter Five, the procedural history of *Penn Central* is more complicated. The New York Court of Appeals determined that that case was not about general zoning districts, but rather about the designation of individual structures as landmarks – a point conceded by the plaintiffs. Nonetheless, the majority of the United States Supreme Court, in upholding the designation and finding that no taking had occurred, generally found that landmark designation was similar to historic districting and joined the two concepts. *See infra* notes 283-91 and accompanying text.

¹⁰² 438 U.S. at 129.

government sponsored destruction or preservation, even if against the wishes of individual property owners.

Does such an expansive definition suggest that historic zoning and urban renewal are built on essentially the same legal principle? This Thesis seeks to answer that question by identifying, collecting, and analyzing case law from both before and after *Berman v. Parker*. By engaging in this analysis of case law, this Thesis seeks to explore the legal similarities between the programs in order to contribute to existing and future scholarship that seeks to compare the programs. Moreover, a comparison between the legal justifications for the programs will hopefully demonstrate that justifying police power action with an expansive understanding of the general welfare and the police power can lead to undesirable outcomes, even if such an expansive understanding is based on the laudable intentions of reviving an urban center or preserving historic structures. While there is still ongoing debate over the benefits, costs, and lasting effects of historic zoning, a potential similarity between the underlying legal basis for historic zoning and urban renewal should show that the exercise of the police power for the general welfare may be too dangerous to grant to a city council or planning commission. Even if an expansive reading of the general welfare can be used for the laudable intention of preserving the built cultural heritage of cities, states, and the nation, that same power could quickly be used instead to destroy those properties.

The method used to answer the question posed by this Thesis is primarily doctrinal. Doctrinal research is that “which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and,

perhaps, predicts future developments.”¹⁰³ Moreover, doctrinal research is based on the “black-letter” of the law, and thus synthesizes, compares, and clarifies particular topics based on an analysis of both authoritative legal texts, such as statutes and case law, in addition to secondary sources, such as scholarly commentary.¹⁰⁴ Doctrinal research finds a strong corollary in the qualitative research methodology of the social sciences.¹⁰⁵ Legal rules and regimes are not necessarily made up of quantifiable data, but rather on a set of norms that is both fixed and constantly evolving.¹⁰⁶ Theoretical research seeks to create a “more complete understanding of the conceptual bases of legal principles.”¹⁰⁷ Comparative and historical research describes contrasting legal regimes and contextualizes them within a selected era using social sciences, in this case, Urban and Regional Planning.¹⁰⁸

To undertake this analysis, it was first necessary to identify cases across the United States that dealt with the issue of historic zoning. These cases were then compared with *Berman v. Parker* and analyzed against that case. If the same justification was used in historic zoning cases as *Berman v. Parker*, then inferentially it can be concluded that both historic zoning and urban renewal are based on the same legal foundation. These authoritative sources are analyzed and synthesized using both the doctrinal and theoretical methods to offer a more complete understanding of the development of both historic zoning and urban renewal legal regimes.

¹⁰³ See Terry C. Hutchinson & Nigel Duncan, *Defining and Describing What We Do: Doctrinal Legal Research*, 17 DEAKIN L. REV. 83, 98 (2012); MARTHA MINOW, ARCETYPAL LEGAL SCHOLARSHIP – A FIELD GUIDE, in AALS WORKSHOP FOR NEW LAW TEACHERS (AALS, 2006), available at <http://www.aals.org/documents/2006nlt/nltworkbook06.pdf>.

¹⁰⁴ MIKE MCCONVILLE & WING HONG CHUI, RESEARCH METHODS FOR LAW 3-4 (2007).

¹⁰⁵ Hutchinson & Duncan, *supra* note 103, at 107.

¹⁰⁶ *Id.* at 107-08.

¹⁰⁷ *Id.*

¹⁰⁸ See Minow, *supra* note 103.

Cases were identified by searching the WestlawNext database. A search was made of all state and federal cases prior to November 22, 1954, the date of the *Berman* decision. The query was to find all cases that contained the word “zon***” and any of the following terms: “historic district” “historic preservation” “landmark ordinance.” This search was used to find any case that dealt with any sort of government sponsored historic preservation zoning program. The word zon***, using universal figures, was searched as is so as to allow for the return of any case that may mention, for example, “historic district zoning” but not “historic zones,” or “historic zone” but not “historic zoning.” The general term “historic” was not used in the search query because it would generate too many irrelevant results owing to the common nature of the term.¹⁰⁹

The first search, as described above, generated no results. For purposes of this Thesis, however, it is necessary to determine the state of historic zoning prior to *Berman* in order to determine if *Berman* and urban renewal were fundamentally legally related to historic zoning. Therefore, analogous ordinances in existence, and challenged in the courts, before *Berman* had to be identified. Zoning ordinances had become common practice prior to *Berman*, and zoning on the basis of aesthetics was an issue frequently addressed by the courts as they developed the concept of the general welfare.

Historic zoning has been considered a form of aesthetic zoning; and, therefore, aesthetic zoning provides an analogous form of ordinance prior to *Berman* that can be compared to historic zoning following *Berman*.¹¹⁰ Aesthetic zoning is essentially a zoning practice that bases

¹⁰⁹ The exact syntax of the search was: advanced: (“historic preservation” “historic district” “landmark ordinance”) & zon*** & DA (bef 11-22-1954).

¹¹⁰ See, e.g., *Estate of Neuberger v. Middletown*, 521 A.2d 1336, 1340 (N.J. App. 1987) (citing *MCQUILLAN, MUNICIPAL CORPORATIONS* §25.31 (3d ed. 1986)) (“Historic preservation has been classified as an aspect of aesthetics in zoning.”); see also Julie Van Camp, *Aesthetics*

regulations solely on the outward aesthetic appearance of a structure. Because historic zoning has been considered a form of aesthetic zoning, the term “aesthetic” was added to the query for cases prior to November 22, 1954.¹¹¹ This search one hundred and sixty-seven results from the high courts of thirty-eight states.

Next, essentially the same search was conducted for cases after November 22, 1954 but before June 26, 1978, the date of the *Penn Central* decision. The requirement that results include the search term “historic” was also added to the query, to ensure that results were limited to those that actually dealt with historic ordinances.¹¹² This refinement allowed for a more precise analysis of the effects of *Berman* on historic zoning jurisprudence. If the additional term were not added, the search would have returned many results that did not deal with historic zoning, for example those that dealt only with aesthetic zoning issues related to the First Amendment. This search was undertaken with the latter date restriction in order to identify cases that upheld the validity of historic zoning ordinances prior to the *Penn Central* case. It was necessary to identify these cases separately in order to determine whether the doctrines justifying urban renewal in *Berman* had been used to justify historic zoning, even before the Supreme Court generally

and the law of Historic Preservation, presented to the American Society for Aesthetics (October 23, 1980), available at http://csulb.edu/~jvancamp/ASA_1980.pdf (“The use of legal means to promote and regulate historic preservation is often justified by appeal to aesthetic values . . .”).

¹¹¹ The exact syntax of the search was: advanced: (“historic preservation” “historic district” “landmark ordinance” “aesthetic”) & zon*** & DA (bef 11-22-1954).

¹¹² The exact syntax of the search was: advanced: (“historic preservation” “historic district” “landmark ordinance” “aesthetic”) & zon*** & historic & DA (aft 11-22-1954 & bef 6-26-1978).

addressed historic zoning in *Penn Central*.¹¹³ This search generated forty-nine total results from the high courts of twenty-three states.

Following these searches, the results of cases before and after the *Berman* decision were compared. First, the results were compared to identify state high court decisions that were represented in both groups of cases. This was done for the purpose of identifying states that may or may not have changed their jurisprudence specifically because of the United States Supreme Court's holding in *Berman*. It was important to identify states that may have issued decisions regarding aesthetic and historic zoning both before and after *Berman* in order to determine whether *Berman*, and thus the legal justification for urban renewal, impacted the legal justification for historic zoning. This comparison revealed that the high courts of nineteen states rendered decisions on the issues identified both prior to and following the *Berman* decision.¹¹⁴ This comparison reduced the case lists to ninety-seven cases prior to *Berman* and forty-five cases following *Berman*.¹¹⁵ Next, a doctrinal analysis of these cases was undertaken to develop an overview of the conception of the general welfare and the police power as related to aesthetic and historic zoning in these nineteen states before and after the *Berman* decision.

¹¹³ As discussed below, historic zoning, *per se*, was not a direct issue in *Penn Central*. At issue was a landmark ordinance that provided for the designation of discrete structures as landmarks. Nonetheless, in upholding the landmark ordinance as a valid exercise of the regulatory power, and one that does not necessitate compensation, the Supreme Court generally recognized the constitutionality of historic zoning pursuant to a comprehensive plan. *See Penn Central Transp. Co. v. New York*, 438 U.S. 104, 129-33 (1978); *see also infra* notes 283-91 and accompanying text.

¹¹⁴ The states were Arkansas, California, Connecticut, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

¹¹⁵ Full lists of these cases are included below in Appendices A and B.

A summary of these cases is contained below in Chapters Four and Five, and an analysis follows in Chapter Six. The summaries and analyses are undertaken with the ultimate goal of determining if *Berman*, which laid out the legal justification for urban renewal, marked a definitive change in the concept of the general welfare and the police power, thereby allowing historic zoning to proceed.¹¹⁶

¹¹⁶ A discussion on the scope or propriety of using judicial review to determine what does or does not constitute the general welfare and outer bounds of the police power is beyond scope of this Thesis. Rather, this Thesis seeks simply to analyze how the understanding of the police power and the concept of the general welfare, as developed in case law, underlies a fundamental legal similarity between urban renewal and historic preservation.

IV. JURISPRUDENCE PRIOR TO BERMAN

The initial search for cases decided prior to *Berman* that involved the validity of historic zoning returned no results. The lack of results cannot be read to suggest that no historic ordinances existed prior to the *Berman* decision; however, it can be read to suggest that any such ordinances were not widely challenged. Moreover, it is possible that the search was under inclusive as such ordinances could have been identified by other titles early in the Twentieth Century. Nonetheless, to compare the judicial interpretation of historic zoning before and after *Berman*'s urban renewal decision, cases prior to *Berman* that dealt with issues analogous to historic zoning needed to be identified. To this end, the search term "aesthetic" was added to the search query. "Aesthetic" was chosen because zoning for aesthetic considerations has been analogized to zoning for historic preservation. A search for cases including the term "aesthetic" prior to *Berman* returned ninety-seven cases from the high courts of the nineteen states that also rendered opinions on these zoning issues following *Berman*. Therefore, summaries of the concept of aesthetic zoning and the general welfare in these nineteen states, prior to the *Berman* decision, are contained below.

Overall, an analysis of these cases revealed that the high courts of most of the nineteen states identified refused to recognize aesthetics, alone, as a legitimate exercise of the police power for the general welfare. In other words, the courts would not uphold any ordinance or law that appeared to restrict the use of private property on solely aesthetic grounds. In so doing, the courts repeatedly stated that the only legitimate use of the police power was to regulate property so as to protect public health, safety, morality, or welfare. Importantly, the concept of "welfare"

was, comparatively, narrowly defined so as not to include aesthetics alone.¹¹⁷ Many of these courts, however, did recognize that the aesthetics and beauty of the community was a matter of public interest and could be tangentially related to the exercise of the police power.¹¹⁸ In other words, these courts refused to declare invalid an ordinance that regulated property in the interest of public health or safety, but also had the effect of creating, in the eyes of the city government or justices, a more aesthetically pleasing environment. A more detailed discussion of the relevant aspects of these cases and the implications for the states identified follows below. A brief summary of *Berman v. Parker* is also included below as it is used as the before and after point of reference for jurisprudence discussed in this Thesis.

A. State Summaries

Arkansas

In *Herring v. Stannus*, the Supreme Court of Arkansas determined that the city council did not abuse its discretion by issuing a special permit for a filling station in a zone that prohibited such establishments.¹¹⁹ While the court did not explicitly reach the issue of aesthetics in its holding, however, it did "conced[e] - without deciding - [that the] police power may not be used for purely aesthetic purposes."¹²⁰

California

¹¹⁷ See, e.g., *Barney & Casey Co. v. Town of Milton*, 87 N.E.2d 9, 16 (Mass.1949) (noting that an ordinance may not be upheld on aesthetic grounds alone).

¹¹⁸ See, e.g., *City of St. Louis v. Friedman*, 216 S.W.2d 475, 478 (Mo.1948) (noting that where an ordinance may be upheld on other police power grounds, aesthetic considerations are entitled to some weight).

¹¹⁹ *Herring v. Stannus*, 275 S.W. 321, 325 (Ark. 1924).

¹²⁰ *Id.* at 324.

Two California zoning cases prior to *Berman* specifically state that zoning ordinances that bear no substantial relationship to the public health, safety, morality, or welfare will be struck down as invalid. The Supreme Court of California stated as much in *Feraut v. City of Sacramento*, a case in which a general zoning scheme was upheld despite some spot zoning of businesses.¹²¹ While the court did not reach the issue of “aesthetics alone” zoning, it nonetheless maintained that zoning ordinances must be based on the foundation of protecting public health, safety, morality, or welfare.¹²² Again in *Beverly Oil v. City of Los Angeles*, the Supreme Court of California held that zoning must be related to public health, safety, or welfare.¹²³ In that case, the court upheld a prohibition on certain expansions of an oil drilling operation by noting that oil drilling was specifically declared by law to be detrimental to public health, safety, and welfare.¹²⁴ In short, the court did not uphold the ordinance on the basis of aesthetic sense, but rather on a tangible threat to the general welfare, as described in the code.

Connecticut

Several Connecticut cases tangentially discussed the issue of aesthetics in dicta. In *Town of Windsor v. Whitney*, the Supreme Court of Connecticut upheld a zoning ordinance that established building lines and setback requirements.¹²⁵ The court, however, did not uphold the

¹²¹ *Feraut v. City of Sacramento*, 269 P. 537, 541 (Cal. 1928).

¹²² *Id.* (“It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts.”) (internal quotation marks omitted) (quoting *Miller v. Bd. of Pub. Works*, 234 P. 385 (Cal. 1925)).

¹²³ *Beverly Oil Co. v. City of Los Angeles*, 254 P.2d 865, 869 (Cal. 1953) (en banc).

¹²⁴ *Id.*

¹²⁵ *Town of Windsor v. Whitney*, 111 A. 354, 355-57 (Conn.1920)

ordinance on aesthetic grounds.¹²⁶ Rather, the court analogized the restrictions to those that provide for adequate ventilation and air space, holding that such regulations fall within the scope of traditional police power activity, that is, regulation for the benefit of the public health, safety, or welfare.¹²⁷ The court specifically noted that the building lines tended to “preserve the public health, add to the public safety from fire, and enhance the public welfare by bettering living conditions and increasing general prosperity of the neighborhood.”¹²⁸ Rather than deciding the issue on aesthetic grounds, the court held that the ordinances served traditional police power functions related to protecting public health and safety.

In *Gionfriddo v. Town of Windsor* and *Murphy v. Town of Westport*, the court reached largely similar conclusions. In *Gionfriddo*, the court declared an ordinance prohibiting the display of vehicles for sale to be unconstitutional, stating that aesthetics alone is not enough to justify the prohibition and that such a prohibition did not relate to property value, public health, safety, or welfare.¹²⁹ In *Murphy*, the court remanded the case for lack of facts, but in so doing, noted that, even with a shifting conception of aesthetics and the police power, aesthetics alone could not be used to justify the use of the police power.¹³⁰

¹²⁶ *Id.* The court did, however, discuss the changing conception of aesthetic considerations. *See id.* at 357.

¹²⁷ *Id.* at 357 (“They regulate the air space, light, and ventilation of rooms. . . . Regulations of this character, if reasonable, do not constitute a taking of property.”).

¹²⁸ *Id.*

¹²⁹ *Gionfriddo v. Town of Windsor*, 81 A.2d 266, 268 (Conn. 1951).

¹³⁰ *Murphy, Inc. v. Town of Westport*, 40 A.2d 177, 179-81, 183 (Conn. 1944).

Kansas

In *Ware v. City of Wichita*, the Supreme Court of Kansas upheld a zoning ordinance that provided for the separation of land uses.¹³¹ In upholding the ordinance, the court discussed aesthetic regulations, but did not base its holding on aesthetic considerations alone.¹³² While the court noted that the police power was broad, it ultimately upheld the ordinance on the basis that it provided for the public health, safety, and welfare.¹³³

Louisiana

Prior to *Berman*, the Supreme Court of Louisiana largely seemed to pass on the issue of aesthetic alone zoning regulations. In *New Orleans v. Southern Auto Wreckers*, the court held that an ordinance requiring a certain type of fence around junkyards was invalid.¹³⁴ While the court passed on the aesthetics argument raised at trial, it ultimately struck the ordinance because the particular fence mandated was not necessary for public safety.¹³⁵ The court determined that as long as a property use did “not offend public morals or jeopardize the health and safety of the public,” it was a legitimate use.¹³⁶

¹³¹ *Ware v. City of Wichita*, 214 P. 99, 102 (Kan. 1923).

¹³² *Id.* (discussing the argument that aesthetic considerations “be recognized as sufficient in themselves”).

¹³³ *Id.* at 101-02 (“It cannot be denied, however, that there is good ground for the view that a reasonable zoning ordinance has some pertinent relation to the health, safety, morals, and general welfare of the community.”).

¹³⁴ *City of New Orleans v. S. Auto Wreckers*, 192 So. 523, 527 (La. 1939).

¹³⁵ *Id.* (“This discussion and the decisions cited which touch [aesthetic reasons] have no application here, for the reason that this ordinance is a safety measure.”).

¹³⁶ *Id.*

Similarly, in *State ex rel Civello v. City of New Orleans*, the court upheld an ordinance which prohibited business uses in residential districts.¹³⁷ The court found that, in passing the ordinances, the locality reasonably had public health and safety considerations in mind.¹³⁸ The court did not explicitly state that aesthetic considerations alone either could or could not serve as a justification for the police power. It did, however, note that, while prior precedent suggested aesthetic considerations alone were not sufficient, the general welfare likely encompassed aesthetics.¹³⁹

Thereafter, in *New Orleans v. Levy*, the court considered the validity of a historic district ordinance.¹⁴⁰ The court upheld the ordinance on constitutional grounds, because the Louisiana Constitution had recently been amended to allow for the creation of historic districts.¹⁴¹ The court held that the ordinance was valid pursuant to the Louisiana Constitution, asserting that it properly preserved both the sentimental and commercial values of New Orleans.¹⁴² The court thus seemed to recognize the ordinance's validity, in part, because it promoted tourism, and therefore, the commercial value of the city.¹⁴³ Nonetheless, the court did note in passing that “[p]erhaps esthetic considerations alone would not warrant an imposition of the several restrictions contained in the Vieux Carre Commission Ordinance.”¹⁴⁴

¹³⁷ *State ex rel Civello v. City of New Orleans*, 97 So. 440, 445 (La. 1923).

¹³⁸ *See Id.* at 443-44.

¹³⁹ *See id.* at 444.

¹⁴⁰ *City of New Orleans v. Levy*, 64 So.2d 798 (La. 1953).

¹⁴¹ *Id.* at 799, 802-03.

¹⁴² *Id.* at 802

¹⁴³ *Id.* at 801-03.

¹⁴⁴ *Id.* at 803.

Maryland

In *Maryland Advertising Co. v. Mayor of Baltimore*, the Court of Appeals of Maryland Court held that the city improperly denied the Plaintiff a permit to construct a billboard on a vacant lot on which billboards were not prohibited.¹⁴⁵ The court did not reach the issue of aesthetic regulations for procedural reasons.¹⁴⁶ However, the court did state that the city's action was invalid because it was arbitrary and bore no relation to public health, safety, morals, or welfare.¹⁴⁷

In *Byrne v. Maryland Realty Co.*, the Maryland Court of Appeals held that an ordinance prohibiting the erection of new dwellings unless they were constructed as separate buildings was unconstitutional.¹⁴⁸ The court stated that “[t]he act does not relate to the police power, and its enforcement would deprive the appellee of property rights guaranteed by the Constitution, which cannot be invaded for purely aesthetic purposes under the guise of the police power.”¹⁴⁹ The court reached the same conclusion in *Goldman v. Crowther*, holding that ordinances which bore no relation to public health, safety, morals, or welfare, were void.¹⁵⁰ The court noted that because the ordinances “rest[ed] solely upon aesthetic grounds,” they were invalid.¹⁵¹

¹⁴⁵ *Maryland Advertising Co. v. Mayor of Baltimore*, 86 A.2d 169, 173-74 (Md.1952).

¹⁴⁶ *Id.* (“the decision in the instant case was not based on esthetic grounds”).

¹⁴⁷ *Id.* (quoting *Nectow v. City of Cambridge*, 277 U.S. 183 (1928)) (internal quotation marks omitted) (“[S]uch restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. The action here, bearing no such relation, was arbitrary and invalid and should be reversed.”).

¹⁴⁸ *Byrne v. Maryland Realty Co.*, 98 A. 547, 549 (Md.1916).

¹⁴⁹ *Id.*

¹⁵⁰ *Goldman v. Crowther*, 128 A. 50, 60 (Md.1925).

¹⁵¹ *Id.*

Massachusetts

Prior to the *Berman* decision, the Supreme Judicial Court of Massachusetts routinely held that aesthetic considerations alone were not enough to warrant the exercise of the police power. In *122 Main Street v. City of Brockton*, the Massachusetts court held that an ordinance establishing minimum building heights was invalid because it was unrelated to public health and safety.¹⁵² Particularly, the court found that the ordinance was seemingly based on aesthetic considerations — that structures less than two stories would harm the aesthetic nature of the street.¹⁵³ However, the court explicitly rejected this rationale as a basis for the use of the police power.¹⁵⁴

Again in *Barney and Casey v. Milton*, the court held that an ordinance zoning the plaintiff landowner's property as residential was invalid as applied to that particular property.¹⁵⁵ This case is of particular importance because the high court reversed the decision of the trial judge, specifically because the trial judge upheld the ordinance based on aesthetic considerations alone.¹⁵⁶ The Massachusetts court held that aesthetics alone was not a valid justification for using the police power to abridge property rights.¹⁵⁷

Michigan

In a series of cases from 1943 through 1951, the Supreme Court of Michigan held that ordinances establishing minimum lot sizes or building sizes were invalid exercises of local

¹⁵² *122 Main St. Corp. v. City of Brockton*, 84 N.E.2d 13, 16 (Mass.1949).

¹⁵³ *Id.* at 15-16.

¹⁵⁴ *Id.*

¹⁵⁵ *Barney & Casey Co. v. Town of Milton*, 87 N.E.2d 9, 16 (Mass.1949).

¹⁵⁶ *Id.* at 14-15.

¹⁵⁷ *Id.* at 14-16.

power.¹⁵⁸ Specifically, the court noted that these ordinances were based more on aesthetic considerations than concerns for the public’s health, safety, or welfare.¹⁵⁹ The court noted that neither aesthetic considerations alone nor the desire to protect property values alone was a valid use of the police power.¹⁶⁰ Rather, the government action had to bear some relation to public health, safety, or welfare.¹⁶¹

Missouri

In *City of St. Louis v. Friedman*, the Supreme Court of Missouri upheld the validity of an ordinance that prohibited the operation of junk yards in an industrial zone.¹⁶² The court did, however, note that the decision was not based on aesthetic considerations alone, because aesthetics alone could not justify the use of the police power.¹⁶³ The court, in other words, found the ordinance to be valid because it touched on traditionally recognized police power action. While the court did not explicitly state what justification was used, the language suggests that the court found the ordinance to be a valid exercise of the police power to protect public safety.¹⁶⁴

¹⁵⁸ *Senefsky v. Lawler*, 12 N.W.2d 387 (Mich.1943); *Frischkorn Constr. Co. v. Lambert*, 24 N.W.2d 209 (Mich.1946); *Elizabeth Lake Estates v. Waterford Twp.*, 26 N.W.2d 788 (Mich. 1947); *Hitchman v. Oakland Twp.*, 45 N.W.2d 306 (Mich.1951). These cases are of particular interest as the ordinances at issue could be considered as forms of exclusionary zoning. That is, by requiring a minimum building size throughout the town, lower income individuals may be unable to afford to live in the town. As these cases indicate, prior to *Berman*, these zoning schemes were likely invalid. *Cf. S. Burlington Cnty. N.A.A.C.P. v. Twn. Of Mount Laurel*, 456 A.2d 390, 470-71 & n.62 (N.J. 1983) (five acre lot minimums not necessarily in violation of low income housing obligation; however, such minimums will serve as evidence of facial invalidity for exclusionary zoning).

¹⁵⁹ 12 N.W.2d at 390-91; 24 N.W.2d at 212-13; 26 N.W.2d at 792; 45 N.W.2d at 310-11.

¹⁶⁰ 12 N.W.2d at 390-91; 24 N.W.2d at 212-13; 26 N.W.2d at 792; 45 N.W.2d at 310-11.

¹⁶¹ 12 N.W.2d at 390-91; 24 N.W.2d at 212-13; 26 N.W.2d at 792; 45 N.W.2d at 310-11.

¹⁶² *City of St. Louis v. Friedman*, 216 S.W.2d 475, 478 (Mo.1948).

¹⁶³ *Id.* (“Esthetic values alone are not a sufficient basis for classification, but are entitled to some weight where other reasons for the exercise of the power are present.”).

¹⁶⁴ *See id.*

New Hampshire

In *Sundeen v. Rogers*, the Supreme Court of New Hampshire upheld that validity of a zoning ordinance that established certain set back requirements for auxiliary buildings in residential districts.¹⁶⁵ The landowner challenging the ordinance argued that it was grounded solely in aesthetic considerations.¹⁶⁶ The court, however, rejected this argument and, citing general zoning jurisprudence, found that the setback requirements were in the interest of public health and safety.¹⁶⁷ The court noted that, while aesthetics alone may not be enough to justify the use of the police power, aesthetics could be considered in conjunction with the protection of the public, health, safety, morals, or welfare.¹⁶⁸ In short, the court upheld the ordinance on the basis of public health and safety, not on aesthetics alone.

New York

In *Dowsey v. Village of Kensington*, the Court of Appeals of New York held that an ordinance prohibiting businesses in a residential zone was invalid.¹⁶⁹ The zone in question was located near the entrance to the village, and the ordinance was apparently adopted to ensure that the village frontage would remain aesthetically pleasing.¹⁷⁰ The court was unable to find a justification for the ordinance in the protection of the public health, safety, or welfare.¹⁷¹ Noting

¹⁶⁵ *Sundeen v. Rogers*, 141 A. 142, 145-46 (N.H. 1928).

¹⁶⁶ *See id.* at 144.

¹⁶⁷ *See id.* at 145 (noting that the setbacks decrease the risk of fire and increase traffic safety).

¹⁶⁸ *See id.*

¹⁶⁹ *Dowsey v. Vill. of Kensington*, 177 N.E. 427, 430 (N.Y. 1931).

¹⁷⁰ *Id.*

¹⁷¹ *See id.*

that the ordinance was justified with purely aesthetic reasons, the court found that ordinance was an invalid use of the police power.¹⁷²

North Carolina

In *Appeal of Parker*, the Supreme Court of North Carolina upheld the validity of an ordinance that prohibited the erection of a wall along the street line.¹⁷³ The court did not uphold the ordinance on aesthetic grounds.¹⁷⁴ Rather, the court upheld the ordinance on the basis that it protected public safety.¹⁷⁵ The court noted that safe streets required open and unobstructed views over crossing and intersections.¹⁷⁶ Therefore, the police power could be used to protect public safety by prohibiting the erection of walls along the street line that would create visual obstructions. In short, the court upheld the ordinance on public safety grounds; however, it did note that it would not be inappropriate to give some weight to aesthetic considerations as the ordinance could be upheld on other grounds.¹⁷⁷

Pennsylvania

Prior to the decision in *Berman*, Pennsylvania courts strongly found that property owners could not be deprived of the right to use their property freely for purely aesthetic reasons. In *Appeal of Medinger*, the Supreme Court of Pennsylvania declared an ordinance establishing minimum lot sizes to be unconstitutional.¹⁷⁸ The court stated in strong language that "neither

¹⁷² *Id.*

¹⁷³ *Appeal of Parker*, 197 S.E. 706, 710 (N.C. 1938).

¹⁷⁴ *See id.* at 710-11.

¹⁷⁵ *Id.* at 710.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 711 ("while aesthetic considerations are by no means controlling, it is not inappropriate to give some weight to them").

¹⁷⁸ *Appeal of Medinger*, 104 A.2d 118, 122-23 (Pa.1954).

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.”¹⁷⁹

Similarly, in *Appeal of Lord*, the court found that a zoning board acted improperly when it denied a permit for a landowner to erect a radio tower in a residential district.¹⁸⁰ The court stated that a city cannot use zoning to deprive an owner of the right to use his property because the zoning board believes that what he plans to erect is not artistic or aesthetically pleasing.¹⁸¹ Further, in *Petition of Standard Investment Corp.*, the court found that it was invalid to deny a permit to construct a filling station in a business district for purely aesthetic reasons.¹⁸² The court determined that the ordinance did not relate to the proper scope of the police power to protect public health, safety, or welfare.¹⁸³ Specifically, the court held that to be valid, ordinances “must not be from an arbitrary desire to resist the natural operation of economic laws or for purely aesthetic considerations.”¹⁸⁴

Rhode Island

In *City of Providence v. Stephens*, the Supreme Court of Rhode Island found that apartment homes could be excluded from a residential district on the grounds that the exclusion

¹⁷⁹ *Id.* at 122. The court further noted that “[t]his ordinance flies in the face of our birthright of Liberty and our American Way of Life, and is interdicted by the Constitution.” *Id.* at 123.

¹⁸⁰ *Appeal of Lord*, 81 A.2d 533, 537-38 (Pa.1951).

¹⁸¹ *Id.* at 536

¹⁸² *Petition of Standard Investments Corp.*, 19 A.2d 167, 168 (Pa.1941).

¹⁸³ *Id.*

¹⁸⁴ *Id.* (quoting *Appeal of White*, 134 A. 409, 412 (Pa. 1926) (“[Regulation of private property] must not be from an arbitrary desire to resist the natural operation of economic laws or for purely aesthetic considerations.”)).

would promote public health and safety by lessening the risk of fire and congestion.¹⁸⁵ The court did, however specifically state that it was not upholding the ordinance on aesthetic grounds, noting that “private advantage or purely aesthetic considerations do not supply sufficient basis for the exercise of the police power.”¹⁸⁶ Similarly, in *Sundlum v. Zoning Board of Review*, the court held that a zoning board acted improperly in denying a permit to erect a filling station in a residential district, because the record did not indicate that the station presented a threat to public health or safety.¹⁸⁷ In that case, the court overturned the decision of the zoning board, because the board denied the permit solely on aesthetic grounds.¹⁸⁸ The court reiterated that aesthetic considerations alone cannot justify the use of the police power.¹⁸⁹

Vermont

In the case of *Vermont Salvage Corp. v. Village of St. Johnsbury*, the Supreme Court of Vermont was confronted with a challenge to a law that declared junkyards to be nuisances.¹⁹⁰ While the court discussed general developments in the field of zoning and nuisance law, it would not recognize aesthetic considerations alone to be proper bases for the exercise of the police power.¹⁹¹ Specifically, the court found that a junk yard could not be declared a nuisance by the

¹⁸⁵ *City of Providence v. Stephens*, 133 A. 614, 617-18 (R.I. 1926).

¹⁸⁶ *Id.* at 617.

¹⁸⁷ *Sundlum v. Zoning Bd. of Review*, 145 A. 451, 454-55 (R.I.1929).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 455.

¹⁹⁰ *Vermont Salvage Corp. v. Vill. of St. Johnsbury*, 34 A.2d 188 (Vt. 1943).

¹⁹¹ *Id.* at 192-97.

legislature for purely aesthetic reasons.¹⁹² Similarly, the court noted that zoning ordinances could not be used to prohibit the operation of junk yards for solely aesthetic reasons.¹⁹³

Virginia

The Supreme Court of Virginia decisions displayed a strongly deferential stance towards determinations of lawmakers; however, the court still struck down ordinances that could not be justified by traditional understandings of the police power. In *West Brothers Brick Company v. City of Alexandria*, the court upheld the validity of an ordinance that prohibited further expansion of a brick plant in a residential district.¹⁹⁴ The court showed strong deference to the determinations of the legislature, city council, and planner in finding that the ordinance was related to public health, safety, and welfare.¹⁹⁵ Nonetheless, the court did state that aesthetic considerations alone could not justify police power activity.¹⁹⁶

In *City of Alexandria v. Texas Co.*, the court addressed the validity of an ordinance prohibiting the erection of floodlights on a filling station.¹⁹⁷ The court did not explicitly address aesthetic considerations; however, the court held that ordinance was invalid. The court found that the ordinance did not affect public health, safety, morals, or welfare, and therefore was not a

¹⁹² *Id.* at 197 (“It is well settled that the mere fact that a thing is unsightly and thus offends the aesthetic sense furnishes no valid ground for a declaration by the legislature that it is a nuisance.”).

¹⁹³ *See id.* (“Apparently the same rule applies in this respect as to the power of a municipality to regulate for this reason [aesthetics] alone.”).

¹⁹⁴ *West Bros. Brick Co. v. City of Alexandria*, 192 S.E. 881, 890 (Va.1937).

¹⁹⁵ *See id.* at 889-90.

¹⁹⁶ *Id.* at 885.

¹⁹⁷ *City of Alexandria v. Texas Co.*, 1 S.E.2d 296, 297 (Va.1939).

proper exercise of the police power.¹⁹⁸ In short, the court recognized that ordinances unrelated to the traditional scope of the police power were invalid.

Maine, New Mexico, and Washington

As identified by the search, no cases decided prior to *Berman* by the high courts of Maine, New Mexico, or Washington were relevant to the question posed by this Thesis.¹⁹⁹

B. *Berman v. Parker*

In *Berman v. Parker*, appellants sought to enjoin the condemnation of their property which was located within a Washington D.C. redevelopment zone.²⁰⁰ In seeking an injunction, appellants challenged the constitutionality of the District of Columbia Redevelopment Act of 1945, Washington D.C.'s urban renewal legislation.²⁰¹ The Redevelopment Act provided for the condemnation and transfer of private property for the “the redevelopment of blighted territory in the District of Columbia and the prevention, reduction, or elimination of blighting factors or causes of blight.”²⁰² Further, the Act declared that “the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use.”²⁰³ Following the acquisition and assembly of land, the District of Columbia Redevelopment Land Agency was permitted to sell or

¹⁹⁸ *Id.* at 298-99.

¹⁹⁹ Although there may have been no cases from these states that were relevant to the question posed by this Thesis, these cases are still included below in Appendix A with a brief description suggesting their irrelevance to this Thesis.

²⁰⁰ *Berman v. Parker*, 348 U.S. 26 (1954).

²⁰¹ *Id.* at 28.

²⁰² 60 Stat. 760 § 5 (1946).

²⁰³ *Id.* § 2.

lease the land to private developers who would develop the land in accordance with a general plan adopted by the National Capital Planning Commission.²⁰⁴

Appellants' property, used as a department store, was located within a zone deemed blighted and marked for redevelopment under the Act.²⁰⁵ Appellants' property was condemned pursuant to the Act, but appellants challenged the action, arguing that their property was not blighted and therefore could not be taken.²⁰⁶ Moreover, the appellants further argued, as summarized by the Court, that "[t]o take for the purpose of ridding the area of slums is one thing; it is quite another, . . . to take a man's property merely to develop a better balanced, more attractive community."²⁰⁷

The lower court was sympathetic to this argument, stating that "[o]ne man's land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well-designed."²⁰⁸ Nonetheless, the lower court upheld the constitutionality of the Redevelopment Act by finding that the Land Agency could only condemn property for slum clearance, because slums were "injurious to the public health, safety, morals and welfare."²⁰⁹ The lower court, therefore, essentially upheld the constitutionality of the Act on more traditional public health, safety, and welfare grounds.

²⁰⁴ *Id.* § 6.

²⁰⁵ 348 U.S. at 30-31.

²⁰⁶ *Id.* at 31.

²⁰⁷ *Id.*

²⁰⁸ *Schneider v. District of Columbia*, 117 F. Supp. 705, 724 (D.D.C. 1953); 348 U.S. at

31.

²⁰⁹ 117 F. Supp. at 725.

The lower court remained wary of the proposition that eminent domain could be used for purposes beyond the protection of public health, safety, morals or welfare.²¹⁰ In modifying the lower court's decision, however, the Supreme Court of the United went further.²¹¹ The Supreme Court ultimately determined that even non-blighted property within a development zone could be taken, because such a taking was necessary to achieve the Redevelopment Act's larger purpose of slum and blight clearance.²¹² The Court opined that if an individual owner "were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly."²¹³

In upholding the constitutionality of the Redevelopment Act, the Supreme Court professed deference to the legislature and stated that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."²¹⁴ Although noting that it is "fruitless" to define the scope of the police power, the Court essentially held that a legislature is capable of defining the extent of the police power.²¹⁵ Seemingly because Congress had declared the acquisition and assembly of private property to be a public use, condemnation and subsequent transfer to redevelopment companies was a valid exercise of eminent domain in service to the police power, and was not in violation of the Fifth Amendment. As the Court stated, if "the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."²¹⁶

²¹⁰ *Id.* at 716-19.

²¹¹ 348 U.S. at 35-36.

²¹² *Id.*

²¹³ *Id.* at 35.

²¹⁴ *Id.* at 32.

²¹⁵ *Id.*

²¹⁶ *Id.* at 33.

In determining that the Redevelopment Act was indeed instituted for the public interest, the Court discussed the scope of the police power and the concept of the public welfare. It noted that the preservation of public safety, health, morality, peace, quiet, law and order were more conspicuous examples of the police power.²¹⁷ However, the Court stated that these applications did not delimit the police power.²¹⁸ Asserting that disreputable housing conditions were an ugly sore that robbed a community of its charm, the court found that

[t]he concept of the public welfare is broad and inclusive. . . . The Values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If [Congress] decide[s] that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.²¹⁹

Where the District Court had upheld the constitutionality of the Act on traditional police power grounds, the Supreme Court went further and declared that the police power, and therefore eminent domain, could essentially be used to beautify a community.²²⁰ In its discussion, this Thesis seeks to explore whether this holding in *Berman* served as the basis for upholding historic zoning ordinances. If so, historic zoning, though seemingly opposed to urban renewal, would share fundamental legal ties to urban renewal legislation.

²¹⁷ *Id.* at 32.

²¹⁸ *Id.*

²¹⁹ *Id.* at 33.

²²⁰ *See id.*

V. JURISPRUDENCE FOLLOWING BERMAN

Forty-five state high court decisions were identified by conducting the search for cases following *Berman* but prior to *Penn Central*.²²¹ These cases span across nineteen states that also were identified in the search of cases prior to *Berman*. Therefore, summaries of the concept of historic zoning, aesthetic zoning, and the general welfare in these nineteen states, following the *Berman* decision, are contained below. While reaching mixed conclusions, many of these cases show that state high courts were more likely to uphold historic zoning by using the broad concept of the general welfare and police power derived from the *Berman* decision. The Court of Appeals of Maryland held that regulation could not be used to create aesthetically pleasing results, but could be used to preserve aesthetically pleasing or historic sites;²²² the Supreme Court of Connecticut passed on ruling directly on historic zoning, though noted that it likely was a valid aspect of the general welfare;²²³ the Supreme Court of Pennsylvania noted that aesthetics alone could not serve as the sole basis for zoning, but nonetheless embraced a broad definition of general welfare as proposed in *Berman*;²²⁴ and, the high courts of New Hampshire, New Mexico, and Massachusetts embraced *Berman*'s broad scope of the general welfare and upheld historic zoning ordinances.²²⁵

²²¹ See *supra* Chapter III.

²²² See *infra* notes 232-34 and accompanying text.

²²³ See *infra* notes 227-31 and accompanying text.

²²⁴ See *infra* notes 263-74 and accompanying text.

²²⁵ See *infra* notes 249-52, 253-58, 235-48 and accompanying text.

A brief summary of *Penn Central Transportation Co. v. City of New York* is also included below as the United States Supreme Court’s decision in that case is generally considered of great importance to historic preservation.²²⁶

A. State Summaries

Connecticut

In *Figarsky v. Historic District Commission*, the Supreme Court of Connecticut reviewed the decision of the local historic commission to deny a certificate of appropriateness for demolishing a structure within a historic zone.²²⁷ The court ultimately held that the historic commission properly denied the certificate and upheld the validity of the ordinance at issue.²²⁸ In so doing, the court cited the *Berman* decision and the Massachusetts Supreme Court and found that public welfare includes the preservation of historic areas.²²⁹ Although the court chose to pass on whether aesthetics alone is enough to justify the use of the police power, it noted that the concept of public welfare is very “broad and inclusive.”²³⁰ Further, it did not explicitly state that historic zoning served to protect public health or safety. While passing on the issue of aesthetics

²²⁶ See, e.g., DANIEL R. MANDELKER, LAND USE LAW § 11.33 (5th ed. 2003) (“Since *Penn Central*, which upheld the New York City landmarks preservation law, the courts have accepted the aesthetic and other regulatory purposes served by historic landmark preservation.”).

²²⁷ *Figarsky v. Historic Dist. Comm’n*, 368 A.2d 163, 166 (Conn. 1976)

²²⁸ *Id.* at 171-72.

²²⁹ *Id.* at 169-70 (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954)) (citing *Op. of the Justices*, 128 N.E.2d 557 (Mass. 1955)) (“[T]he preservation of historic areas in a static form serves the amorphous concept of the ‘public welfare.’”)

²³⁰ *Id.* at 170-71 (quoting 348 U.S. at 33). In quoting *Berman*’s language regarding aesthetics, the court seemed to recognize that historic zoning necessarily involved aesthetic considerations. *Id.* at 170. While the court noted that aesthetics alone may not be enough, it did not invalidate the regulations at issue, because they were neither vague nor undefined. *Id.* Moreover, the court “indicated that aesthetic considerations may have a definite relation to the public welfare.” *Id.* at 171 (citations omitted).

alone, it nonetheless seemed to base its decision almost entirely on an expansive understanding of “public welfare” that includes historic and aesthetic considerations.²³¹

Maryland

The search returned no cases decided by the Court of Appeals of Maryland that directly addressed historic zoning. However, some cases addressing billboard regulations were identified. In these cases, the Maryland court struck down local ordinances that prohibited the erection of billboards or painted signs.²³² While a full analysis of the aesthetic implications of the ordinances was not necessary for the court to reach its holdings, it nonetheless stated that aesthetics alone could not justify the use of the police power to restrict the erection of billboards or painted signs.²³³ However, in *Mayor of Baltimore v. Mano Schwartz, Inc.*, the court recognized that aesthetic considerations did play a proper role when used for preservation. The court stated that “the police power may rightly be exercised to preserve an area which is generally regarded by the public to be pleasing to the eye or historically or architecturally significant.”²³⁴

Massachusetts

Following *Berman*, the Supreme Judicial Court of Massachusetts issued opinions that directly covered aesthetic and historic zoning regulations. In *John Donnelly & Sons, Inc. v. Outdoor Advertising Board*, the court upheld the locality’s decision to deny plaintiff’s permit for

²³¹ See *id.* at 169-71.

²³² *Mayor of Baltimore v. Mano Swartz, Inc.*, 299 A.2d 828 (Md.1973); *City of Baltimore v. Charles Center Parking, Inc.*, 271 A.2d 144 (Md.1970).

²³³ See 299 A.2d at 832 (noting that aesthetic goals may only serve an additional purpose if health, morals, or safety are already being served); 271 A.2d at 146-48.

²³⁴ 299 A.2d at 835.

off-premises outdoor advertising signs.²³⁵ The court noted that it is not possible to fix firm limits to the police power, and explicitly concluded “that aesthetics alone may justify the exercise of the police power; that within the broad concept of ‘general welfare,’ cities and towns may enact reasonable bill-board regulations designed to preserve and improve their physical environment.”²³⁶ In reaching this conclusion, the court cited language in *Berman* for the proposition “that the general welfare embraces aesthetic considerations.”²³⁷ Moreover the court noted that “[a]lthough *Berman* involved the use of eminent domain, this expansive view of the general welfare is applicable to the zoning power.”²³⁸ The Massachusetts court thus adopted *Berman*’s entanglement of the police power and eminent domain, effectively recognizing that if a government has authority to act under one power it also has authority to act under the other. Furthermore the court noted that the increased weight given to aesthetic considerations was related to historic zoning.²³⁹

The Massachusetts court also directly addressed the constitutionality of historic zoning in two separate opinions which answered questions posed by the Massachusetts Senate.²⁴⁰ In both

²³⁵ John Donnelly & Sons, Inc. v. Outdoor Adver. Bd., 339 N.E.2d 709, 720-21 (Mass.1975)

²³⁶ *Id.* at 717.

²³⁷ *Id.* at 717 (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

²³⁸ *Id.*

²³⁹ *Id.* at 718 (citing Op. of the Justices to the Senate, 128 N.E.2d 557 (Mass. 1955)) (“In expressing the opinion that the proposed legislation establishing historic districts in the town of Nantucket was constitutional, the court noted the growing tendency to give more weight to aesthetic considerations.”).

²⁴⁰ Op. of the Justices to the Senate, 128 N.E.2d 563 (Mass. 1955) (recognizing the validity of the Beacon Hill historic act); 128 N.E.2d 557 (recognizing the validity of the Nantucket historic act). In these two opinions, the court did not actually uphold the validity of the historic zoning law as applied in a case brought by a plaintiff. The court did, however, generally uphold the validity of such laws in answering questions posed by the Massachusetts Senate.

instances, the court suggested that historic district zoning was constitutional.²⁴¹ The court extensively discussed aesthetic zoning and its relationship to historic zoning.²⁴² The court specifically discussed earlier decisions that held that aesthetic considerations alone could not justify the exercise of the police power, because the police power and zoning must relate directly to public health and safety and less directly to public morals.²⁴³ The court even noted that the proposed historic zoning act could “hardly be said in any ordinary sense to relate to the public safety, health, or morals.”²⁴⁴

However, the court went on to discuss how earlier decisions restricting zoning to situations that addressed public health, safety, or morals were decided prior to the “general acceptance” of extensive zoning restrictions.²⁴⁵ Directly citing *Berman*, the Massachusetts court stated that “[t]here is reason to think that more weight might now be given to aesthetic considerations than was given to them [in the early twentieth century].”²⁴⁶ The court then went on to note how the construction of “incongruous structures” could destroy the historic character of the town.²⁴⁷ Ultimately, based on an expanding conception of the police power and the public welfare, as embraced in *Berman*, the Supreme Court of Massachusetts concluded that the historic district zoning act would be constitutional.²⁴⁸

²⁴¹ 128 N.E.2d at 567 (Beacon Hill); 128 N.E.2d at 562 (Nantucket). The opinion discussing the Beacon Hill district used the same analysis as the opinion discussing the Nantucket district, and referred to the Nantucket opinion without reiterating it. 128 N.E.2d at 567. Therefore, footnotes 221 through 227 will cite to the Nantucket opinion only.

²⁴² 128 N.E.2d at 561-61.

²⁴³ *Id.* at 561.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

²⁴⁷ *Id.* at 562.

²⁴⁸ *Id.*

New Hampshire

Following *Berman*, the Supreme Court of New Hampshire explicitly held that historic zoning was within the scope of the police power.²⁴⁹ In reaching this conclusion, the court analogized historic zoning to aesthetic regulations.²⁵⁰ The court cited the Massachusetts Supreme Court's *Opinion of the Justices to the Senate* for the proposition that aesthetic and historic zoning was within the scope of the police power.²⁵¹ It is important to note that the New Hampshire court cited the *Opinion of the Justices*, because that opinion in turn directly cited to *Berman* for justification to find historic zoning valid.²⁵²

New Mexico

In *Santa Fe v. Gamble-Skogmo, Inc.*, the Supreme Court of New Mexico upheld the conviction of a landowner for violating an ordinance that required only certain windows be used for structures in a historic district.²⁵³ In upholding the conviction, the court generally upheld the validity of the ordinance.²⁵⁴ The court declined to discuss whether aesthetics alone could be the basis for zoning, but did mention that, under the precedent set in *Berman*, this was an accelerating trend.²⁵⁵ Nonetheless, in upholding the ordinance, the court did discuss the importance of aesthetics to historic neighborhoods and the importance of historic neighborhoods

²⁴⁹ *Town of Deering ex rel Bittenbender v. Tibbetts*, 202 A.2d 232, 234 (N.H. 1964) (“That such a purpose is a generally recognized basis for the exercise of the police power is now too well established to be open to question.”) (citation omitted).

²⁵⁰ *See id.* at 234-35.

²⁵¹ *Id.* at 236 (citing *Op. of the Justices to the Senate*, 128 N.E.2d 557, 562 (Mass. 1955)).

²⁵² *See supra* notes 220-28 and accompanying text.

²⁵³ *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13, 19 (N.M. 1964).

²⁵⁴ *Id.* at 18.

²⁵⁵ *See id.* at 17-18 (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

to tourism.²⁵⁶ The court determined, therefore, that historic zoning was a valid exercise of the police power, in part at least because it helped provide for tourism revenue.²⁵⁷ Further, New Mexico Supreme Court discussed the Massachusetts Supreme Court's *Opinion of the Justices* in reaching the conclusion that historic zoning was a valid exercise of the police power.²⁵⁸

New York

In *Lutheran Church v. New York*, the Court of Appeals of New York adjudicated a case in which the plaintiff landowner challenged the designation of its property as a historic landmark.²⁵⁹ The court's ultimate holding was that the designation could not be upheld as a non-confiscatory use of the police power, because the owner was essentially denied all economically viable use of his property under the requirement that the property not be demolished.²⁶⁰ In reaching this holding, it was unnecessary for the court to address the issue of aesthetic or historic zoning.

The dissent, however, sought to uphold the landmark designation and noted that landmark laws, while leaning heavily on economic justifications – for example, that they promote tourism or protect property values – serve the primary purpose of protecting aesthetic and historic properties.²⁶¹ In this discussion, the dissent suggested that perhaps it was time that aesthetics was seen as a valid justification of the police power in and of itself, because “historic

²⁵⁶ *Id.* at 15.

²⁵⁷ *Id.* at 18 (“New Mexico is particularly dependent upon its scenic beauty to attract the host of visitors, the income from whose visits is a vital factor in our economy.”).

²⁵⁸ *Id.* at 17-18 (citing *Op. of the Justices to the Senate*, 128 N.E.2d 557 (Mass. 1955)); *see supra* notes 220-28 and accompanying text.

²⁵⁹ *Lutheran Church in Am. v. City of New York*, 316 N.E.2d 305 (N.Y. 1955).

²⁶⁰ *Id.* at 312.

²⁶¹ *Id.* at 313 & n.4 (Jasen, J., dissenting).

preservation promotes aesthetic values by adding to the variety, the beauty and the quality of life.”²⁶²

Pennsylvania

In *Best v. Zoning Board of Adjustment*, the Supreme Court of Pennsylvania upheld the validity of an ordinance establishing a single family residential zone as applied to a structure with twenty two bedrooms and seven baths.²⁶³ In upholding the ordinance, the court extensively quoted from *Berman* for the proposition that the concept of the general welfare is broad and that it encompasses aesthetics.²⁶⁴ The court also quoted from the Massachusetts Supreme Court’s *Opinion of the Justices to the Senate* for the proposition that historic zoning as well fell within the scope of the general welfare and the police power.²⁶⁵ The court further stated that if the legislature can compel the sale of a property to create a more attractive community, it can certainly regulate property to create a more attractive community.²⁶⁶ Ultimately, the court determined that

not only is the preservation of the attractive characteristics of a community a proper element of the general welfare, but also the preservation of property values is a legitimate consideration since “[A]nything that tends to destroy property values of the inhabitants of the [community] necessarily adversely affects the prosperity, and therefore the general welfare, of the entire [community].”²⁶⁷

²⁶² *Id.*

²⁶³ *Best v. Zoning Bd. of Adjustment*, 141 A.2d 606, 608, 613 (Pa. 1958).

²⁶⁴ *Id.* at 612-13(citing *Berman v. Parker*, 348 U.S. 26, 31-33 (1954)).

²⁶⁵ *Id.* at 611-12 (quoting *Op. of the Justices to the Senate*, 128 N.E.2d 557, 561 (Mass. 1955)).

²⁶⁶ *Id.* at 612.

²⁶⁷ *Id.* at 612-13 (quoting *State ex rel Saveland Park Holding Corp. v. Wieland*, 69 N.W.2d 217, 222 (Wis. 1955)).

In *National Land and Investment Co. v. Kohn*, the Supreme Court of Pennsylvania declared invalid an ordinance that established minimum lot sizes.²⁶⁸ The locality defending the ordinance argued that it was necessary to preserve the historic and aesthetically pleasing, rural environment in the locality.²⁶⁹ The court found, however, that the ordinance was not in the interests of the general welfare because it essentially served to protect the interests of landowners already residing on larger lots within the locality.²⁷⁰ The police power, therefore, could not be used because the ordinance did not relate to public health, safety, or welfare.²⁷¹ In reaching this holding, the court explicitly noted in a footnote that “zoning may not be sustained *solely* on the basis of aesthetic considerations.”²⁷²

In *Shapp v. National Gettysburg Battlefield Tower, Inc.*, the Supreme Court of Pennsylvania found that a state constitutional provision making the state a protector in trust of aesthetic and historic sites in the state was not self-executing, but required further legislation in order to prohibit development near historic sites.²⁷³ While the case does not involve a challenge to the validity of an ordinance, it is nonetheless important to report because the court specifically

²⁶⁸ Nat’l Land & Inv.Co. v. Kohn, 215 A.2d 597, 612-23 (Pa. 1965).

²⁶⁹ *Id.* at 611.

²⁷⁰ *See id.* at 612.

²⁷¹ *See id.* at 606-13. The court, however, discussed how the holding did “not mean that individual action is foreclosed.” *Id.* at 612. The court noted that an individual was still free to “singly or with his neighbors, purchase sufficient neighboring land to protect and preserve by restrictions in deeds or by covenants inter se, the privacy, a minimum acreage, the quiet peaceful atmosphere and the tone and character of the community which existed when he or they moved there.” *Id.* at 612-13 (internal quotation marks omitted) (citation omitted).

²⁷² *Id.* at 610 n.9.

²⁷³ *Shapp v. Nat’l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 595 (Pa. 1973).

stated that through the new constitutional provision, “the Commonwealth has been given power to act in areas of purely aesthetic or historic concern.”²⁷⁴

Virginia

In *Board of Supervisors v. Rowe*, the Supreme Court of Virginia addressed an ordinance that established architectural design review regulations.²⁷⁵ The case is relevant to this Thesis to the extent that the court ultimately found that a locality could not use the police power for solely aesthetic purposes.²⁷⁶ The court’s decision, however, was based largely on the fact that the ordinances were outside of the scope of the pertinent enabling legislation.²⁷⁷ The court specifically noted that the Code of Virginia permitted the creation of historic districts and design guidelines under certain circumstances.²⁷⁸ The ordinance at issue was invalid because it failed to conform to the guidelines of that legislation.²⁷⁹

Washington

In *Department of Ecology v. Pacesetter Construction Co., Inc.*, the Supreme Court of Washington found that the police power could be used to protect aesthetics when it also served to protect against economic loss.²⁸⁰ The court, therefore, passed on deciding whether the police

²⁷⁴ *Id.* at 592.

²⁷⁵ *Bd. of Supervisors v. Rowe*, 216 S.E.2d 199 (Va. 1975).

²⁷⁶ *Id.* at 213.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *See id.*

²⁸⁰ *Dep’t of Ecology v. Pacesetter Constr. Co., Inc.*, 571 P.2d 196, 201-02 (Wash. 1977) (en banc).

power could be invoked for aesthetic considerations alone.²⁸¹ This case was of little relevance to this Thesis as it involved environmental legislation rather than historic zoning.

Arkansas, California, Kansas, Louisiana, Maine, Michigan, Missouri, North Carolina, Rhode Island, and Vermont

As identified by the search, no cases decided after *Berman* by the high courts of Arkansas, California, Kansas, Louisiana, Maine, Michigan, Missouri, North Carolina, Rhode Island, or Vermont were relevant to the question posed by this Thesis.²⁸²

B. *Penn Central Transportation Co. v. City of New York*

Finally, in addition to state courts that addressed the issue of historic zoning, the Supreme Court of the United States addressed the issue on June 26, 1978, in the case of *Penn Central Transportation Co. v. City of New York*.²⁸³ While *Penn Central* is famous for its applications to inverse condemnation and takings analyses, it also served to generally recognize the validity of historic district zoning ordinances and landmark ordinances.²⁸⁴ Before reaching its holding on

²⁸¹ See *id.* at 201.

²⁸² Although there may have been no cases from these states that were relevant to the question posed by this Thesis, these cases are still included below in Appendix B with a brief description suggesting their irrelevance to this Thesis.

²⁸³ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

²⁸⁴ It is useful to note that the lower court had determined that this case was not about general historic district zoning, but rather about the designation of individual structures as landmarks. See *id.* at 138 & n.2 (Rehnquist, J., dissenting). The majority, however, in upholding the designation and finding that no taking had occurred, generally found that landmark designation was similar to historic districting and essentially linked the two concepts. The majority, for example, noted that the landmark designation had been applied to all the structures in New York's thirty one historic districts in addition to four hundred other individual landmarks. See 438 U.S. 104, 134. The majority equated the burdens on these properties to those felt by properties under zoning regulations. *Id.* at 133-34. While the appellants did not challenge the landmark ordinance on the grounds that it was an improper use of zoning, the majority discussed the landmark ordinance within the context of general zoning regulations stating that while the Landmark Ordinance "has a more severe impact on some landowners than on others . . .

the takings issue, the Court cited *Berman* and noted that “States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.”²⁸⁵ The Court also recognized that the landmark ordinance was a valid exercise of the police power, similar to historic zoning, because it “embodie[d] a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.”²⁸⁶

The Court also generally recognized the validity of historic zoning, noting that appellants’ arguments would not stand if New York had encumbered the property with historic district legislation.²⁸⁷ In making this recognition, the Supreme Court approvingly cited *Maher v. City of New Orleans*, a Fifth Circuit case that generally found that *Berman* could be used to justify historic zoning as within the scope of the police power.²⁸⁸

Finally, the majority in *Penn Central* did not find that the landmark ordinance’s requirement to keep property in good repair went beyond the permissible scope of regulatory activity.²⁸⁹ However, such a requirement, as Justice Rehnquist noted in his dissent burdened

. [s]imilarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account.” *Id.*

²⁸⁵ 438 U.S. at 129 (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954)) (other citations omitted).

²⁸⁶ *Id.* at 132.

²⁸⁷ *Id.* at 131 (citing *Maher v. New Orleans*, 516 F.2d 1051 (5th Cir. 1975)) (“Appellants, moreover, also do not dispute that a showing of diminution in property value would not establish a taking if the restriction had been imposed as a result of historic-district legislation.”).

²⁸⁸ *Id.*; see 516 F.2d at 1060, 1063-64, 1067 (“Proper state purposes may encompass not only the goal of abating undesirable conditions, but of fostering ends the community deems worthy.”) (“Although it primarily concerned a taking, *Berman v. Parker* supplies an apt analogy to the present situation.”) (“The Vieux Carre Ordinance was enacted to pursue the legitimate state goal of preserving the “tout ensemble” of the historic French Quarter.”).

²⁸⁹ See 438 U.S. at 137-38.

appellants with “an affirmative duty, backed by criminal fines and penalties.”²⁹⁰ Extending the majority’s rationale Justice Rehnquist opined that where the government desires to preserve private land for public use, “it need not condemn the property but need merely order that it be preserved in its present form and be kept ‘in good repair.’”²⁹¹

²⁹⁰ *Id.* at 140 (Rehnquist, J., dissenting).

²⁹¹ *Id.* at 146 n. 9 (Rehnquist, J., dissenting).

VI. DISCUSSION

Two of the most important tools in a local government's toolkit are the police power and eminent domain. These tools are theoretically distinct from each other; however, court decisions since the beginning of the twentieth century have lessened the barrier between the two powers. In 1954, the United States Supreme Court rendered a decision in *Berman v. Parker* that conflated the outer bounds of the police power as those of eminent domain.²⁹² In that case, the Court essentially determined that a locality may exercise the power of eminent domain for any purpose that it could regulate with the police power.²⁹³ Effectively, the Court expanded and reinterpreted the Fifth Amendment's requirement that eminent domain only be exercised for "public use."²⁹⁴ Rather, in upholding Urban Renewal activity that involved eminent domain, the Court began to expand the concept of public use so as to be coterminous with the police power.²⁹⁵ Within the context of eminent domain however, this expansion presents a problem because, as many courts have noted, the police power should not necessarily have set limitations.²⁹⁶

²⁹² See *Berman v. Parker*, 348 U.S. 26, 32 (1954).

²⁹³ See *id.* ("Once the object is within the authority of Congress, the rights to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.").

²⁹⁴ U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

²⁹⁵ *Id.* at 32-33; see *supra* notes 199-201; see also Lavine, *supra* note 14 (quoting D. Benjamin Barros, *Nothing "Errant" About it: The Berman and Midkiff Conference Notes and How the Supreme Court got to Kelo With its Eyes Wide Open*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 57, 64 & N.38, 66 (Robin Paul Malloy, ed. 2008)) ("[T]he Court's focus was to 'link the permissible scope of eminent domain [to] the broad scope of the police power.' Applying the 'virtually limitless scope of the police power' to the power of eminent domain was consistent with the Court's gradual acceptance of a broad interpretation of the Public Use Clause.").

²⁹⁶ See, e.g., 348 U.S. at 32 ("An attempt to define [the Police Power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts."); *Gorieb v. Fox*, 134 S.E. 914, 916 (Va.1926) ("The extent of this power is difficult to define, but it is elastic and expands

Traditionally, the police power was seen as the power of a government body to pass laws that provide for the public health, safety, morals, and welfare. Courts were hesitant to declare hard limits to the police power, recognizing that changing times and conditions may require a more or less expansive understanding of the power. Nonetheless, for the first half of the Twentieth Century, the police power was understood to have the effective limitation that it must only be exercised for the public health, safety, morals, or welfare; courts were hesitant to expand that limitation, abridging private property rights in the process. While discussing the police power in the *Berman* decision, however, the United States Supreme Court stated that

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.²⁹⁷

The question that this discussion seeks to answer is: Did the Supreme Court's decision in *Berman* lead to the validation of historic zoning ordinances where before they may not have been valid? In short, are the legal justifications for urban renewal espoused by the Supreme Court in *Berman* fundamentally related to the legal justifications for historic zoning?

automatically to protect the public against the improper use of private property to the injury of the public interest.”); *Gen. Outdoor Adver. Co. v. Dep’t of Pub. Works*, 193 N.E. 799, 812 (Mass. 1935) (“These rules and regulations were promulgated in the exercise of the police power. This court has never undertaken to define that power.”); *cf. Op. of the Justices to the Senate*, 128 N.E.2d 557, 561 (Mass. 1955) (“The term public welfare has never been and cannot be precisely defined.”). *But cf. Goldman v. Crowther*, 128 A. 50, 54 (Md. 1925) (“While it is difficult, if not impossible, to define precisely the limits of the police power, there must in the very nature of things be some limit to it, for otherwise the guaranties of written Constitutions would be little more than mere precatory and directory suggestions without force or life, affording to the citizen only a false and illusory protection against the invasion of his rights by the state, and his security would depend, not upon constitutional guaranties, but upon the will of the state in exercising an unlimited police power.”).

²⁹⁷ *Id.* at 33.

C. Overview prior to *Berman*

The initial search for cases relating to historic zoning ordinances prior to *Berman* did not return any results. The lack of results could be due to several factors, or any combination of them. For example, it is possible that historic zoning ordinances were not in widespread use in the years prior to the *Berman* decision. Alternatively, ordinances could have been in use, but may not have been widely challenged. Regardless, the lack of results required that analogous cases prior to *Berman* be identified so as to compare the effects that *Berman* had on the concept of the general welfare and historic zoning in particular. For this reason, cases dealing with aesthetic zoning prior to *Berman* were identified and analyzed. Aesthetic zoning cases were chosen because historic zoning has generally been recognized as a form of aesthetic regulation.²⁹⁸ As outlined above in Chapter Four, fifteen of the nineteen states identified through the search parameters would not recognize zoning on the basis of aesthetic considerations alone.²⁹⁹ One state, however, demonstrated a conflicted view of aesthetic and historic zoning, suggesting that where such regulations also served to promote economic health, they would be valid. The results generated for the three other states were largely irrelevant to the question being posed by this Thesis.³⁰⁰

The cases from the sixteen relevant states revealed a general consensus that aesthetic considerations alone could not serve as the justification for a zoning ordinance.³⁰¹ Some courts went further stating that aesthetics could never serve as a justification for zoning ordinances.

²⁹⁸ See *supra* note 110 and accompanying text.

²⁹⁹ As discussed above, the nineteen states included for analysis and discussion were chosen because they were represented in the search results for cases both prior to and following *Berman*. See *supra* Chapter III.

³⁰⁰ See *supra* note 199 and accompanying text; see also *infra* Appendix A.

³⁰¹ But see *infra* notes 319-24 (discussing the decisions of the Louisiana Supreme Court prior to *Berman*).

Other courts suggested ordinances properly grounded in health, safety, or welfare justifications would not be declared invalid simply because they also touched on aesthetic concerns. Similarly, some courts held that it was proper to consider aesthetic implications, but only if the ordinance could independently be upheld on other grounds. Cases from Massachusetts, New York, Pennsylvania, and Louisiana provided particularly interesting insights into the state of aesthetic zoning prior to *Berman*.

The Supreme Court of Massachusetts, for example, specifically overturned the opinion of the trial judge in *Barney and Casey v. Milton*, because that judge upheld a zoning ordinance on the basis of aesthetic considerations.³⁰² The trial judge had determined that if a district located near the entrance to the town were zoned as commercial, the commercial buildings “may well give one approaching the town a wrong impression of the residential character of the town.”³⁰³ The Supreme Court, however, noted that such an aesthetic consideration could not be used as the basis of a zoning ordinance.³⁰⁴ In a statement that is very relevant to the application of historic zoning later, the Massachusetts Supreme Court further noted that “[r]egard for the preservation of the natural beauty of a neighborhood makes the enactment of a zoning regulation desirable but does not itself give vitality to the regulation.”³⁰⁵

The Court of Appeals of New York made a similar finding in *Dowsey v. Village of Kensington*.³⁰⁶ In that case, the city had adopted a zoning ordinance that zoned nearly the entire

³⁰² *Barney & Casey Co. v. Town of Milton*, 87 N.E.2d 9, 14-15 (Mass.1949).

³⁰³ *Id.* at 14.

³⁰⁴ *Id.* at 14-15

³⁰⁵ *Id.* at 15.

³⁰⁶ *Dowsey v. Vill. of Kensington*, 177 N.E. 427, 430 (N.Y. 1931).

city exclusively as a single family detached residential zone.³⁰⁷ The court found that this ordinance was adopted with the apparent intention “of providing a beautiful and dignified village frontage on the public thoroughfare.”³⁰⁸ While noting that such considerations “need not be disregarded in the formulation of regulations to promote the public welfare,” the court nonetheless held that even the widest extension of the police power could not be used to justify an ordinance with purely aesthetic considerations.³⁰⁹ Thus, the high courts of both New York and Massachusetts specifically held that the police power cannot be used to embrace ordinances that have the sole purpose of providing a more beautiful village frontage.

Similarly, *122 Main Street v. Brockton* dealt with issues that are quite analogous to historic zoning.³¹⁰ In interpreting the contemporary zoning enabling act, the Massachusetts Supreme Court approvingly quoted earlier cases for the proposition that the police power cannot be exercised for purely aesthetic reasons.³¹¹ In this specific case, the court determined that a minimum height ordinance was invalid under the enabling act and prior aesthetic jurisprudence.³¹² In reaching its holding, the court specifically rejected the city’s argument that the ordinance was necessary “to ensure a reasonable permanency to the character of the districts in conformity with its initial establishment.”³¹³ In rejecting that argument, the court stated that “[i]t is not within the scope of the [enabling] act to enact zoning regulations for the purpose of

³⁰⁷ *See id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 430-31.

³¹⁰ *122 Main St. Corp. v. City of Brockton*, 84 N.E.2d 13, 16 (Mass.1949).

³¹¹ *Id.* at 15-16.

³¹² *Id.* at 16.

³¹³ *Id.* at 15.

assisting a municipality to retain or assume a general appearance deemed to be ideal, or to inflate its taxable revenue.”³¹⁴ Further, the court noted that

where legislation seeks to force land to remain vacant unless the owner will erect a structure of at least two stories . . . or will not permit him to remodel an existing structure except under the same conditions, the general benefit to the community must be something more tangible and less nebulous than any supposed advantages which the city has been able to bring forward in this case.³¹⁵

The Pennsylvania Supreme Court similarly found that an ordinance establishing minimum lot sizes was unconstitutional as an invalid use of the police power. In *Appeal of Medinger*, the court strongly declared that neither aesthetic considerations nor the protection of property values nor the protection of the local economy had any relation to promoting the health, safety, morals, or general welfare of a community.³¹⁶ In short, the court denounced the proposition that the police power could be used to deny a property owner rights in his property for purely aesthetic considerations. Moreover, neither aesthetics nor the conservation of economic or property value fell within the scope of the general welfare.³¹⁷ Again in two further cases, the Pennsylvania Supreme Court held that an owner could not be deprived by zoning of the right to either erect a radio tower or construct a filling station, simply because those uses offended the aesthetic sensibilities of others.³¹⁸

The major exception to this general rule comes from a 1953 Louisiana Case in which the Louisiana Supreme Court upheld what was essentially a historic zoning ordinance that preserved

³¹⁴ *Id.* at 16.

³¹⁵ *Id.*

³¹⁶ *Appeal of Medinger*, 104 A.2d 118, 122-23 (Pa.1954).

³¹⁷ *See id.*

³¹⁸ *Appeal of Lord*, 81 A.2d 533, 537-38 (Pa.1951); *Petition of Standard Investments Corp.*, 19 A.2d 167, 168 (Pa.1941).

the appearance of the Vieux Carre district of New Orleans.³¹⁹ The court upheld the ordinance because the Constitution of Louisiana had been amended to specifically provide for its creation.³²⁰ However, the court also noted that the ordinance would tend to promote tourism, and therefore, the commercial value of the city.³²¹ Nonetheless, the court did note in passing that “[p]erhaps esthetic considerations alone would not warrant an imposition of the several restrictions contained in the Vieux Carre Commission Ordinance.”³²² The Louisiana court, therefore, was unique in generally recognizing that such ordinances were within the scope of the police power, prior to *Berman*. In recognizing the validity, however, the court did note that the Louisiana Constitution and the ordinance “recite that preservation is for the public welfare.”³²³ While, therefore, this decision came down prior to *Berman*, it nonetheless did use the same justification for historic zoning as *Berman* did for urban renewal; that is, a broader definition of public welfare.³²⁴

Nonetheless, despite Louisiana’s position, these highlighted cases together demonstrate a general rule that prior to the United States Supreme Court’s decision in *Berman*, aesthetic considerations alone could not be used as the basis for zoning ordinances.³²⁵ Moreover, the cases have interesting parallels to historic zoning, which strongly indicate that historic zoning would

³¹⁹ *City of New Orleans v. Levy*, 64 So.2d 798 (La. 1953).

³²⁰ *Id.* at 799.

³²¹ *Id.* at 801-03.

³²² *Id.* at 803.

³²³ *Id.*

³²⁴ *See supra* notes 200-20 and accompanying text (discussing *Berman v. Parker*).

³²⁵ This rule is deemed general on the basis of the states represented in this Thesis’ discussion and table of cases. Although Massachusetts, New York, and Pennsylvania are highlighted here, the high courts of twelve other states mentioned above reached similar conclusions, as outlined in Chapter Four. The major exception was the Louisiana Supreme Court. It stated that aesthetics alone could not justify the use of the police power, but it did uphold what was essentially a historic zoning ordinance, because it promoted tourism.

have generally been suspect prior to *Berman*.³²⁶ The ordinances at issue in these cases seemed to have the objective of preserving the existing physical environment of the city and prohibiting any land uses that were deemed in opposition to the apparent existing beauty of the cities. The ordinances sought to preserve the appearance of city centers by prohibiting single story structures, to ensure aesthetically pleasing village frontages, to preserve the character of the town as initially existed, or to maintain the general residential character of certain districts. The courts consistently noted that these objectives could not be accomplished through the use of the police power. While the courts noted that these aesthetic considerations could be auxiliary to the primary purpose of the ordinances, they could not serve as the basis.

Considering that many of the invalidated ordinances sought to preserve the existing aesthetic fabric of their jurisdiction, it is likely that courts would have similarly rejected ordinances that were based on preserving historic structures or districts for aesthetic reasons. Moreover, the language used by the Pennsylvania Supreme Court suggests that even had such aesthetic ordinances also served to preserve property values, they would have still been invalid. This further point indicates an early reluctance to extend the police power or the concept of the general welfare so as to include economic considerations. Recognizing a more limited scope for the police power, the court consistently held that regulations must bear some relationship to the public health, safety, or welfare to be valid. Aesthetic considerations did not fall into this rubric.

³²⁶ Again, this conclusion is made on the basis of cases herein identified. Circumstances obviously would vary by state, especially depending on specific enabling legislation. *Cf. infra* notes 319-24 and accompanying text (discussing the state of the law in Louisiana prior to *Berman*). Nonetheless the conclusions drawn here do indicate a general reluctance on the part of courts to extend the police power so as to include aesthetic considerations (and presumably had the issue arisen, historic zoning) alone.

Similarly, it is quite likely that most courts would have held that historic zoning also did not fall into this rubric, as existed prior to *Berman*.

D. Overview following *Berman*

As outlined above in Chapter Five, the search for cases relating to historic zoning ordinances following *Berman* but prior to *Penn Central* returned forty five cases from the high courts of nineteen states that also returned results prior to *Berman*.³²⁷ Nine of the nineteen state high courts identified issued opinions directly applicable to the question posed by this Thesis; the results generated for the ten other states were largely irrelevant to the question.³²⁸

Connecticut recognized a generally broad view of the general welfare and police power, but would not extend it to solely aesthetic considerations.³²⁹ Virginia invalidated design review restrictions, stating that the police power cannot be used for aesthetics alone.³³⁰ Washington found that in an environmental context, the police power could be used to protect aesthetics when it also protected against economic loss.³³¹ New York did not rule directly on the validity of aesthetic or historic zoning regulations, but had a strong dissent that suggested it was time to adopt an aesthetics alone rule.³³² Pennsylvania recognized the validity of historic zoning per the state constitution, and cited *Berman* for the proposition that the concept of the general welfare encompasses aesthetics, but nonetheless would not recognize that aesthetics alone could justify

³²⁷ See *supra* Chapter V.

³²⁸ See *supra* note 282 and accompanying text; see also *infra* Appendix B.

³²⁹ See *supra* notes 227-31 and accompanying text.

³³⁰ See *supra* notes 275-79. This case did not, however, involve a challenge to a historic district ordinance, which the court did recognize was specifically provided for by statute. See *Bd. of Supervisors v. Rowe*, 216 S.E.2d 199, 213 (Va. 1975).

³³¹ See *supra* notes 280-81. As with the Virginia case, the Washington case did not involve a challenge to a historic district ordinance. See *Dep't of Ecology v. Pacesetter Constr. Co., Inc.*, 571 P.2d 196 (Wash. 1977) (en banc).

³³² See *supra* notes 259-62 and accompanying text.

use of the police power.³³³ Maryland held that regulation could not be used to create aesthetically pleasing results, but could be used to preserve aesthetically pleasing or historic sites.³³⁴

Massachusetts, New Mexico, and New Hampshire found historic and aesthetic zoning to be valid exercises of the police power per language in *Berman*.³³⁵ Together, these cases identified reveal a mixed reaction to and use of the Supreme Court's decision in *Berman*, as relates to historic zoning.

The New York case *Lutheran Church v. New York* is somewhat irrelevant to the discussion in this Thesis, because the direct issue was a takings challenge to landmark designation.³³⁶ Therefore, the majority did not need to rule on the general validity of historic zoning to reach its conclusion that a takings had occurred.³³⁷ The case is highlighted here, however, because two dissenters expressed the sentiment that “perhaps it is time that aesthetics took its place as a zoning and Independently cognizable under the police power.”³³⁸ The dissent further noted how such a recognition would “be but a moderate analogical extension” of existing precedent.³³⁹

In *Mayor of Baltimore v. Mano Swartz, Inc.* and *City of Baltimore v. Center Parking*, the Court of Appeals of Maryland generally discussed the validity of aesthetic-based regulations when striking down two separate ordinances relating to the prohibition of billboards and painted

³³³ See *supra* notes 263-74 and accompanying text.

³³⁴ See *supra* notes 232-34 and accompanying text.

³³⁵ See *supra* notes 235-48, 253-58, 249-52 and accompanying text.

³³⁶ *Lutheran Church in Am. v. City of New York*, 316 N.E.2d 305 (N.Y. 1955).

³³⁷ See *id.* at 306-12.

³³⁸ *Id.* at 314 n.4 (Jasen, J., dissenting).

³³⁹ *Id.* (citations omitted).

signs.³⁴⁰ In *Center Parking*, the earlier case, the court found that the near total prohibition of painted signs, but not billboards, was an arbitrary use of the police power.³⁴¹ This decision, however, did not require the court to rule directly on the issue of ordinances based solely on aesthetics.³⁴²

Three years later in *Mano Swartz*, however, the Court of Appeals of Maryland held that where an ordinance has “as its sole purpose the achievement of an aesthetically pleasing result,” it is not within the permissible scope of the police power.³⁴³ The court found that a sign ordinance which established guidelines and embowered a sign commission to enact rules and regulations to ensure the attractiveness of signs was invalid, because it only sought to achieve an aesthetically pleasing result.³⁴⁴ As with earlier cases, the court noted that aesthetic goals may be considered only when the ordinance primarily served other ends traditionally associated with the police power, such as health, safety, morals, and welfare.³⁴⁵

While the court was strict with its aesthetic only zoning language, it went on to discuss the preservation and protection of aesthetically pleasing areas, such as historic districts, even though seemingly unnecessary to the holding.³⁴⁶ The court seemed to distinguish between the ordinance at issue which sought to establish controls for future signage and other ordinances

³⁴⁰ *Mayor of Baltimore v. Mano Swartz, Inc.*, 299 A.2d 828 (Md.1973); *City of Baltimore v. Charles Center Parking, Inc.*, 271 A.2d 144 (Md.1970).

³⁴¹ 271 A.2d at 146-48.

³⁴² *See* 271 A.2d at 147 n. 2 (“Our decision here does not require us to reach the question whether aesthetic considerations alone are sufficient justification for the regulation of outdoor advertising . . .”).

³⁴³ 299 A.2d at 832.

³⁴⁴ *Id.* at 831-33.

³⁴⁵ *Id.* at 832.

³⁴⁶ *Id.* at 832-35.

which sought to preserve historic or aesthetically significant areas.³⁴⁷ Indeed, the court specifically stated that “the police power may rightly be exercised to preserve an area which is generally regarded by the public to be pleasing to the eye or historically or architecturally significant.”³⁴⁸

In *Figarsky v. Historic District Commission*, the Connecticut Supreme Court would not directly hold that aesthetics alone could justify the use of the police power.³⁴⁹ Nonetheless, the court upheld the validity of a historic district ordinance and affirmed the denial of a certificate to demolition a structure within a historic district.³⁵⁰ After quoting from *Berman*, the court determined that “the preservation of an area or cluster of buildings with exceptional historical and architectural significance may serve the public welfare.”³⁵¹ The court also seemed to recognize that historic zoning involved aesthetic considerations. Plaintiffs had argued that the ordinance was improperly “vague aesthetic legislation;” however, the court noted that the historic ordinance’s aesthetic considerations were not in fact vague, because the ordinance laid out specific factors to be considered for the issuance of a certificate of appropriateness.³⁵² The court then went on to note that the full extent of the relationship between the police power and aesthetics was not yet a settled question.³⁵³ Despite its apparent hesitation to recognize the validity of ordinances on aesthetic grounds alone, the court nonetheless upheld the validity of a

³⁴⁷ *Id.* at 835 (“Because the purpose of the Ordinance was not the preservation or protection of something which was aesthetically pleasing, but rather was intended to achieve by regulation an aesthetically pleasing result, with no thought of enhancing the public welfare, we shall not disturb the result reached below [which invalidated the ordinance].”).

³⁴⁸ *Id.*

³⁴⁹ See *Figarsky v. Historic Dist. Comm’n.*, 138 A.2d 163, 170-71 (Conn. 1976).

³⁵⁰ *Id.* at 171-72.

³⁵¹ *Id.* at 169-70 (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

³⁵² *Id.* at 170.

³⁵³ *Id.* at 170-71.

historic ordinance, at least in part, due to language in *Berman* stating that the public welfare encompasses aesthetics and that the legislature has the power to determine that a community should be beautiful.³⁵⁴

The Pennsylvania Supreme Court reached similar conclusions, as to aesthetic zoning, in the cases it decided. In 1965, when invalidating an ordinance establishing minimum lot sizes, the court specifically stated that zoning may not be sustained with solely aesthetic justifications.³⁵⁵ However, in a 1958 case, the court held that the designation of a structure with twenty two rooms and seven baths as single family residential was not an invalid exercise of the police power, because the legislature possessed the power to regulate to create an attractive community.³⁵⁶

In reaching this holding, the court noted that historic zoning had elsewhere been upheld under a broad concept of the general welfare.³⁵⁷ It extended that broad concept of the general welfare to the present case, finding that “the preservation of the attractive characteristics of a community [is] a proper element of the general welfare.”³⁵⁸ In extending the scope of the general welfare and the police power, the court approvingly quoted *Berman* and went on to state that “[i]f the legislature has the power to compel a property owner to submit to a forced sale for the purposes of creating an attractive community, it has the power to regulate his property for such

³⁵⁴ *Id.* at 169-70 (quoting 348 U.S. at 33).

³⁵⁵ *Nat’l Land & Inv. Co. v. Kohn*, 215 A.2d 597, [] n.29 (Pa. 1965). Later, in *Shapp v. National Gettysburg Battlefield Tower, Inc.*, the court did note that the Pennsylvania Constitution had been amended to provide that the people have a right to the “historic and esthetic values of the environment.” 311 A.2d 588, 591 (Pa. 1973) (quoting Penn. Const. Art. 1, § 27). That provision allowed “aesthetic or historic considerations, by themselves, . . . [to be] considered sufficient to constitute a basis for the . . . exercise of [the] police power.” *Id.* at 592.

³⁵⁶ *Best v. Zoning Bd. of Adjustment*, 141 A.2d 606 (Pa. 1958.)

³⁵⁷ *Id.* at 611-612 (citing *Op. of the Justices*, 128 N.E.2d 557,561 (Mass. 1957).

³⁵⁸ *Id.* at 612. Moreover, the court noted that “the preservation of property values is a legitimate consideration.” *Id.*

objectives.”³⁵⁹ With that statement, the court seemed to hold that aesthetic zoning was a proper exercise of the police power. By extension, it would seem that under this language, historic zoning was also proper given that it serves to preserve attractive characteristics of the community. The court ultimately noted that as it was “unable to say that requiring the appellant to use her property in conformance with the provisions of the zoning ordinance would not serve to preserve the attractive characteristics of the community and the property values therein. Therefore, the attack upon . . . the ordinance . . . must fail.”³⁶⁰

Finally, the courts of Massachusetts, New Hampshire, and New Mexico all followed the rationale presented in *Berman* in upholding the validity of historic zoning laws. In *John Donnelly & Sons, Inc.*, the Massachusetts Supreme Court upheld the locality’s decision to deny plaintiff’s permit for off-premises outdoor advertising signs and explicitly concluded “that aesthetics alone may justify the exercise of the police power; that within the broad concept of ‘general welfare,’ cities and towns may enact reasonable bill-board regulations designed to preserve and improve their physical environment.”³⁶¹ The court also directly cited language in *Berman* for the proposition “that the general welfare embraces aesthetic considerations.”³⁶² Further, the court found that while *Berman* discussed the general welfare with reference to eminent domain, the same view could be applied to zoning.³⁶³ In making this determination, the Massachusetts court also cited to an *Opinion of the Justices to the Senate*, noting that it had previously recognized the tendency to give more weight to aesthetic considerations when it had generally determined

³⁵⁹ *Id.* at 612.

³⁶⁰ *Id.* at 613.

³⁶¹ *John Donnelly & Sons, Inc. v. Outdoor Adver. Bd.*, 339 N.E.2d 709, 717 (Mass.1975).

³⁶² *Id.* (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

³⁶³ *Id.*

historic zoning to be constitutional.³⁶⁴ The court thus seemingly recognized a congruous relationship among eminent domain, the police power, aesthetic zoning, and historic zoning.

Moreover, the Massachusetts Supreme Court directly recognized the constitutionality of historic zoning in answering questions posed by the Massachusetts Senate.³⁶⁵ In concluding that historic zoning was within the proper scope of the police power, the court first noted that historic zoning did not relate to public health, safety, or morality.³⁶⁶ Nonetheless, the court continued by stating that aesthetics could be given a stronger consideration in light of *Berman*.³⁶⁷ The court applied the language of *Berman* and reasoned that because “incongruous structures” could destroy the historic character of the town, the police power could be exercised to regulate for the preservation of the historic character.³⁶⁸ In short, the broad concept of the police power and general welfare adopted in *Berman* seemed to strongly influence the Massachusetts Supreme Court that historic zoning was valid.

Likewise, in *Santa Fe v. Gamble-Skogmo, Inc.*, the New Mexico Supreme Court held that an ordinance requiring a certain window size to be used for structures within a historic district was a valid exercise of the police power.³⁶⁹ The court discussed the two *Opinions of the Justices to the Senate*, issued by the Massachusetts Supreme Court and ultimately held that “the Santa Fe historical zoning ordinance [was] within the term ‘general welfare.’”³⁷⁰ Interestingly, the court

³⁶⁴ *Id.* at 718 (citing *Op. of the Justices*, 128 N.E.2d 557 (Mass. 1955)).

³⁶⁵ *See Op. of the Justices to the Senate*, 128 N.E.2d 563 (Mass. 1955) (Beacon Hill historic act); 128 N.E.2d at 557 (Nantucket historic act).

³⁶⁶ 128 N.E.2d 557, 561 (“The proposed act can hardly be said in any ordinary sense to relate to the public safety, health, or morals.”).

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 561-62.

³⁶⁹ *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13, 18-19 (N.M. 1964).

³⁷⁰ *Id.* at 16-17.

seemed to distinguish historic zoning from purely aesthetic zoning and thus found it unnecessary to determine whether aesthetic considerations alone could justify the exercise of the police power, as suggested by *Berman*.³⁷¹ The court did, however, recognize the importance of aesthetic considerations to historic zoning and suggested that, because the historic ordinance in question had comprehensive architectural control requirements, the ordinance was not arbitrary or unreasonable.³⁷² Therefore, while it attempted to distinguish historic and aesthetic zoning, the court nonetheless discussed the strong relationship between the two and ultimately upheld the historic ordinance in general accordance with the opinions issued by the Massachusetts Supreme Court, which in turn relied largely on *Berman* in upholding the constitutionality of historic zoning ordinances.³⁷³

Similarly, the New Hampshire Supreme Court upheld the validity of a local regulation that, in order to maintain the atmosphere of the town, prohibited the erection of structures within a quarter mile of the Town Common without prior approval from the town board.³⁷⁴ The regulation in question, therefore, was very analogous to standard historic zoning practices that generally require a certificate of appropriateness prior to the construction, alteration, or demolition of structures within certain districts.³⁷⁵ In upholding the regulations, the New Hampshire Supreme Court recognized that the purpose of “preserving the value of the historic buildings about the common” was a valid basis for the exercise of the police power and “too well

³⁷¹ *See id.* at 17-18.

³⁷² *Id.* at 17 (“[Defendants] ignore the fact that the window pane requirement is only one of very many details of the historical architectural style . . . which the ordinance seeks to protect and preserve.”)

³⁷³ *See supra* notes 240-48 and accompanying text.

³⁷⁴ *Deering ex rel. Bittenbender v. Tibbetts*, 202 A.2d 232, 233 (N.H. 1964).

³⁷⁵ *See, e.g.*, CITY OF RICHMOND, VA., CODE OF ORDINANCES Ch. 114, § 114-930 to - 930.9 (2014) (regulations for the City of Richmond’s Old and Historic Districts).

established to be open to question.”³⁷⁶ The court was hesitant to sustain the regulation solely upon aesthetic considerations; however it did recognize that the preservation of the attractiveness of a community fell within the general welfare.³⁷⁷ It further noted that the regulation was not invalid because it was motivated in part by aesthetic and historic preservation considerations.³⁷⁸ Ultimately, the court upheld the ordinance, approvingly cited from the Massachusetts Supreme Court’s *Opinion of the Justices to the Senate*, and noted that the town would not be able to maintain its atmosphere if “incongruous” structures were permitted near the Town Common.³⁷⁹ Again, by following the rationale laid out in *Opinion of the Justices to the Senate*, the court essentially followed the rationale established in *Berman*. In short, a common nexus among cases upholding historic or aesthetic zoning regulations is that they relied on the broad concept of the general welfare and police power as laid out in *Berman*.

E. Comparison

Following *Berman* but prior to *Penn Central*, the high courts of Connecticut, Pennsylvania, Maryland, Massachusetts, and New Hampshire all began to change their opinion on aesthetic zoning (and by extension historic zoning) following *Berman*. Furthermore, the New Mexico Supreme Court, which did not rule on aesthetic zoning prior to *Berman*,³⁸⁰ upheld a historic zoning ordinance based on the *Berman* rationale. While it is perhaps improper to lay the

³⁷⁶ *Id.* at 234.

³⁷⁷ *Id.* at 234-35 (“The beauty of a residential neighborhood is for the comfort and happiness of the residents and it tends to sustain the value of property in the neighborhood. It is a matter of general welfare like other conditions that add to the attractiveness of a community and the value of residences there located.”) (“In the case before us it is unnecessary to rely solely upon aesthetic considerations to sustain the exercise of the power invoked. We think it reasonably plain that more than aesthetics is involved.”).

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 236 (citing *Op. of the Justices*, 128 N.E.2d 557, 562 (Mass. 1955)).

³⁸⁰ At least in the cases identified by the search conducted herein. *See supra* Chapter III.

validation of historic zoning solely at the feet of *Berman*, the cases discussed herein clearly show that *Berman* had a strong effect on both aesthetic and historic zoning.

The jurisprudence prior to *Berman* indicates that until roughly the midcentury, there was a strong consensus that the police power could not be used for aesthetic purposes, and by extension likely could not be used for solely historic zoning purposes. The only major exception was found in Louisiana. There, the state high court upheld what was essentially a historic zoning ordinance prior to *Berman*, noting that it tended to promote tourism in addition to protecting the attractiveness of the community.³⁸¹ Nonetheless, the court seemed hesitant to declare that aesthetic considerations alone could justify the use of the police power.³⁸²

Following *Berman*, however, courts began to routinely uphold aesthetic and historic zoning regulations. In so doing, they usually cited *Berman*'s determination that public welfare is a broad concept, that public welfare includes aesthetic values, and that the police power can be used "to determine that the community should be beautiful as well as healthy."³⁸³ As noted above, the courts of at least five states even went so far as to shift away from precedent prior to *Berman* and to generally adopt a broad definition of the general welfare that was inclusive of aesthetics and historic preservation. Even the United States Supreme Court adopted *Berman*'s language in generally recognizing the validity of historic zoning and landmark ordinances in *Penn Central*.³⁸⁴ Therein, the Court cited *Berman* and noted that "States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and

³⁸¹ See *supra* notes 321-26 and accompanying text.

³⁸² See *id.*

³⁸³ *Berman v. Parker*, 348 U.S. 26, 33 (1954).

³⁸⁴ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978).

desirable aesthetic features of a city.”³⁸⁵ The Court then recognized that the New York landmark ordinance was a valid exercise of the police power, similar to historic zoning, because it “embodie[d] a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.”³⁸⁶ Therefore, it is safe to conclude that *Berman* did work to provide a justification for aesthetic and historic zoning.

Although urban renewal programs had been in place for several years prior to *Berman*, it was the United States Supreme Court’s decision in that case that placed the ultimate stamp of legal approval on urban renewal programs. Through its holding, the Court determined that the use of eminent domain to condemn both blighted property and unblighted property that was situated within a redevelopment zone was a valid use of eminent domain.³⁸⁷ In so doing, however, the Court intertwined the limitations of eminent domain with those of the police power.³⁸⁸ The Court further determined that the police power was broad and could be used to provide for an aesthetically pleasing, beautiful community.³⁸⁹ Thereafter, courts adopted that language in upholding aesthetic and historic zoning statutes. The broad scope of the general welfare and the police power was used to uphold both urban renewal programs and historic zoning ordinances. Therefore, it would seem that there are indeed fundamental legal similarities between the two programs.

³⁸⁵ *Id.* (citing 348 U.S. at 33).

³⁸⁶ *Id.* at 132.

³⁸⁷ 348 U.S. at 35-36.

³⁸⁸ *See id.* at 32-33.

³⁸⁹ *Id.*

F. Further Implications

The jurisprudential comparison between urban renewal, through *Berman*, and historic zoning has raised further interesting implications for local regulations and planning strategies beyond historic zoning and urban renewal. A major implication of historic zoning, and aesthetic zoning in general, is the tension between such regulations and the free speech provisions of the First Amendment to the United States Constitution.³⁹⁰ Both zoning strategies, by nature, restrict property owners from freely altering the exterior of their properties. For example, under such regulations, an owner may be unable to commission artwork for the side of the regulated building without first obtaining a certificate of appropriateness from the local zoning board. Likewise, if a property owner wishes to express himself through erecting a structure with a certain architectural style or altering his existing structure to a new style, he may likewise be required to first seek a certificate of appropriateness. If the artwork or architectural style proposed by the landowner is deemed incompatible with the historic nature of the district, his First Amendment speech rights could be infringed.³⁹¹

A further implication of this jurisprudential research is the potential for comparison among urban renewal tactics, historic zoning, aesthetic zoning, and other zoning regulations that move beyond the scope of simple Euclidean zoning. Traditional Euclidean style zoning first arose, theoretically, to combat nuisances before they began by separating, for example, industrial

³⁹⁰ U.S. CONST. amend. I (Congress shall make no law . . . abridging the freedom of speech”).

³⁹¹ For a discussion of the potential for conflict between historic district ordinances and the First Amendment, *see Binetti, supra* note 91. Further research and literature review is necessary to identify First Amendment challenges to historic or aesthetic zoning; however, it is important to note that an expanding scope of the police power will necessarily cause tension with explicitly protected rights as jurisdictions seek to expand their regulatory sphere.

from residential land uses.³⁹² However, zoning for aesthetics and historic districts pushed zoning beyond the traditional nuisance prevention model. The analysis comparing historic zoning and aesthetic zoning to urban renewal can thus provide insights into other zoning methods that go beyond Euclidean zoning. The strongest comparison to draw is probably to form based zoning.

Form based zoning is a zoning strategy that seeks to regulate the physical environment beyond simply separating land uses.³⁹³ Form based zoning goes further by regulating heights, setbacks, facades, and outdoor spaces for the sake of creating an aesthetically pleasing physical environment, in addition to one that is generally pedestrian friendly and human-scaled. Especially given the influence of new urbanism and popularity of planning for walkable, human-scaled environments, it is important to determine how exactly the police power is being justified to advance these goals.

Form based zoning is necessarily related to aesthetic zoning, and tangentially related to historic zoning, for example where it may be used to help recapture the historic “feel” of a given urban area. As with historic zoning, form based zoning has the laudable objective of creating a visually pleasing and pragmatic, human centered urban environment. However, to the extent that form based zoning is based on an expansive understanding of the police power, it is legally related to the unpopular urban renewal programs of the Twentieth Century.

Finally, the expanding conception of the general welfare and the police power raises the threat that eminent domain could be used to condemn and transfer property in order to develop

³⁹² See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926) (noting that the law of nuisances can inform the proper extent of regulatory activity) (noting that the exclusion of industrial uses from residential zones can tend to prevent the creation of nuisances).

³⁹³ See generally Patricia E. Salkin, *Squaring the Circle on Sprawl: What More Can We Do? Progress Toward Sustainable Land Use in the States*, 16 WIDENER L.J. 787, 833-34 (2007) (discussing the regulations and objectives of form based codes).

aesthetically pleasing, historically authentic, or walkable environments. This concern arises from the United States Supreme Court's determination in *Berman* that the scope of eminent domain and the police power are essentially coterminous. As courts shift to an expansive definition of the general welfare and an expansive understanding of the police power, it is possible that the use of eminent domain could follow suit. If this is the case, cities will essentially relive urban renewal programs, the difference being that now they would seek to create more traditional urban environments rather than modern environments. Whatever the environment sought, however, the use of eminent domain to achieve those objectives will necessarily result in displacement of city residents who live in the development zones.³⁹⁴

Moreover if, as the *Berman* court stated, eminent domain is merely a means to an end and is permissible essentially whenever police power action is permissible, the Fifth Amendment to the United States Constitution would effectively be dead letter. If the police power should continue to expand in scope to encompass more subjective regulations, such as form based regulations, it is only logical to deduce that the use of eminent domain could also be expanded to facilitate the creation of certain urban forms. Or, expanding on Justice Rehnquist's concern in *Penn Central*,³⁹⁵ legislatures could merely require the repair or renovation of structures in conformance with certain urban design codes. In such an instance, results could possibly prove even worse than those generated by urban renewal programs. Such requirements could cause displacement, because, to avoid possible penalties, lower income homeowners in historic or urban design districts would be forced to relocate if they were unable to keep a property in good

³⁹⁴ Indeed, the United States Supreme Court addressed an analogous situation in *Kelo v. City of New London*. 545 U.S. 469 (2005). There, the Court found that eminent domain could be used to condemn and transfer land to a private developer in order to generate revenue, revitalize the downtown, and "make the City more attractive." *See id.* at 474-75.

³⁹⁵ *See supra* notes 289-91 and accompanying text.

repair or in compliance with form based codes. In such a situation, based on the majority holding in *Penn Central*, these dislocated individuals would possibly not even receive the compensation that they would have received had they been dislocated by an urban renewal project.

Divorced from the limitations of an earlier understanding of the police power and a pre-*Berman* eminent domain jurisprudence, the law making bodies of state or local governments could effectively exercise near total control over private property within their jurisdictions. Such an outcome would likely create results even more detrimental than those of mid-Twentieth Century urban renewal, especially given that regulating for aesthetics alone is inherently subjective and much less concrete than even regulating for the abatement of blight as was the case with urban renewal legislation.

It is not impossible to imagine a return to such earlier jurisprudence in states that subsequently expanded the scope of the police power in accordance with *Berman*. Still, such a return could possibly encounter problems if these states had constitutional or statutory provisions specifically declaring that aesthetic or historic zoning fell within the scope of the police power.³⁹⁶ In such an instance, deferential courts would likely be unable to return to a pre-*Berman* scope of the police power without evidence of a conflicting constitutional or statutory provision.

³⁹⁶ A comprehensive analysis of provisions declaring that historic or aesthetic zoning falls within the proper exercise of the police power is beyond the scope of this Thesis; however, a survey of those provisions could prove useful to further research in determining whether a return to pre-*Berman* jurisprudence is possible.

VII. POTENTIAL ALTERNATIVES TO HISTORIC ZONING

While historic zoning may seem relatively benign and have admirable objectives, this research has indicated that historic zoning has strong underlying legal ties to the relatively unpopular urban renewal programs of the Twentieth Century. A locality can choose to protect its historic sites or to condemn and redevelop districts; whatever the choice, however, the underlying authority to do so derives from an expansive scope of the police power. It is important to recognize that such an expansive scope may be used to either preserve or destroy, and that either option may result in negative consequences such as displacement in addition to any positive outcomes. Given that an expansive police power may be used with laudable intentions but result in negative outcomes, it may be wise to return to an earlier, more limited understanding of the power so as to avoid the potential for revival of urban renewal or further erosion of an owner's security in his property.³⁹⁷

If courts returned to an earlier, limited understanding of the police power, however, could historic structures and districts still be preserved? As many have noted, the preservation of historic structures does provide benefit to the community, but is it possible to capture that benefit without resorting to regulations that restrict owners in the use of their property and raise the specter of urban renewal? A few alternatives that could achieve the benefits of historic zoning without the negative threats are discussed below.³⁹⁸

³⁹⁷ As noted above in Chapter Six, such a return may necessitate amendments to existing statutory or constitutional provisions, depending on the jurisdiction in question. *See supra* note 396 and accompanying text.

³⁹⁸ These suggestions are meant only to highlight possible alternatives. Further research and literature review is required to determine whether these options have been extensively undertaken, and if so, if they have been successful.

A. Private Preservation

Perhaps the simplest alternative to historic zoning is to encourage the voluntary preservation of historic sites by private organizations. Indeed, there is precedent for this strategy. Prior to the advent of historic zoning, private groups formed to protect the nation's vulnerable historic sites. The earliest, and perhaps most famous, example is the Mount Vernon Ladies Association's preservation of Mount Vernon. After both the Virginia and federal governments declined to, this wholly private organization purchased Mount Vernon in order to repair it and preserve it for posterity.³⁹⁹ Moreover, in the mid-Twentieth Century, the Association purchased lands adjacent to Mount Vernon in order to preserve in perpetuity the views from the plantation.⁴⁰⁰ A comprehensive private restoration and preservation effort was also undertaken in Williamsburg, Virginia by the Rockefeller Family and continuing with the non-profit Colonial Williamsburg Foundation.⁴⁰¹ The private actors obtained title to historic sites in and around Williamsburg in order to restore and preserve a district that had fallen into disrepair.⁴⁰² The entire site now operates as a living history museum open to the public.⁴⁰³

A criticism of solely relying on grand private preservation efforts undertaken by philanthropic organizations could be that such efforts only represent the Monumentalism style of

³⁹⁹ See Phelps, *supra* note 3, at 117; NORMAN TYLER ET AL., HISTORIC PRESERVATION AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE 29-30, 60 (2d ed. 2009); Ann Pamela Cunningham, Phoebe Apperson Hearst, and Frances Payne Bolton, GEORGE WASHINGTON'S MOUNT VERNON, <http://www.mountvernon.org/content/ann-pamela-cunningham-phoebe-apperson-hearst-and-frances-payne-bolton> (last visited Apr. 28, 2014).

⁴⁰⁰ See Pamela Cunningham, Phoebe Apperson Hearst, and Frances Payne Bolton, *supra* note 399.

⁴⁰¹ See Phelps, *supra* note 3, at 118-19; see also *The History of Colonial Williamsburg*, COLONIAL WILLIAMSBURG FOUNDATION, <http://www.history.org/Foundation/cwhistory.cfm> (last visited Apr. 28, 2014).

⁴⁰² See *The History of Colonial Williamsburg*, *supra* note 401.

⁴⁰³ See *id.*

historic preservation. That is, only sites of great cultural or historic value are preserved, and the protection of general vernacular structures in old and historic districts is not ensured. Such a criticism would raise questions as to the nature and extent of historic preservation in general. This concern, however, could largely be mitigated by recognizing that private preservation need not rely solely on the large scale efforts by philanthropic organizations. Private preservation can also occur spontaneously by property owners who seek to preserve the character of their structures or neighborhoods, either individually or collectively. Such strategies are discussed below.

B. Easements⁴⁰⁴

An easement is a non-possessory interest in land that grants certain rights to either use or prohibit certain uses of the land in question. Easements were a Common Law device that predated organized preservation movements; however, they are applicable to preservation purposes. While easements exist at Common Law, many states have adopted statutes that specifically permit the creation of a device known generally as a conservation easement, which can be used to preserve historic sites or open spaces. Such easements are generally freely transferable and serve to restrict or prohibit alterations to land in perpetuity. The terms of individual easements will vary; however, they generally entitle the easement holder to review of plans to repair or alter structures on the encumbered land. Moreover, the easements can usually bring tax benefits to the individual whose land is encumbered in the form of deductions, credits, or abatements.

⁴⁰⁴ For a more complete discussion of easements in a historic preservation context, *see* Phelps, *supra* note 3, at 143-48.

The primary benefits to historic preservation through easements are that no coercion is involved and the easements generate tax benefits. Land owners are essentially free to negotiate for the extent of the easement; however, to obtain the tax benefits, the easement must meet certain requirements. In the historic preservation context, an easement could be applied only to the façade of a historic structure, prohibiting the owner from altering the façade, but allowing him to freely alter the interior.⁴⁰⁵

Easements, however, do present their own problems within the preservation context.⁴⁰⁶ First, the easements are usually perpetual. The easements, therefore, would bind future owners of the land who never negotiated for, or received direct benefit from, the easement. Second, the approval process for repairs or alterations could prove to be just as cumbersome under a conservation easement as under a traditional zoning device. This is especially true if the holder of the easement is either a government entity or a quasi-public entity, potentially bound by constitutional and statutory requirements. Third, easements are capable tools for ensuring the preservation of a discrete property; however, their use in protecting whole historic districts is limited and would involve higher transaction costs as each owner in a district would need to individually transfer an easement.

A full discussion of the consequences of and strategies regarding easements is beyond the scope of this Thesis. Nonetheless, it is possible to imagine revisions to conservation easement

⁴⁰⁵ For a discussion of the economic implications of façade easements, see Kimberly Winson-Gdeideman & Dawn Jourdan, *Historic Façade Easements and Single-Family Home Value: A Case Study of Savannah, Georgia (USA)*, 4 INT’L J. HOUSING MARKETS & ANALYSIS 6 (2011).

⁴⁰⁶ See, e.g., Benny L. Kass, *Preservation Easement May Have More Teeth Than Government’s Historic Districts*, REALTY TIMES (Nov. 18, 2013, 1:32 PM), <http://realtymtimes.com/consumeradvice/homeownersadvice1/item/26642-20131119-preservation-easement-may-have-more-teeth-than-governments-historic-districts>.

statutes and tax law that could serve to ameliorate these problems. First, tax rules could be altered to allow non-perpetual or rolling term easements to receive tax benefits. Moreover, state codes could be amended to specifically allow the transfer of easements to wholly private, non-profit entities in an attempt to avoid the potential pit fall of de facto zoning presented by public or quasi-public ownership of easements.⁴⁰⁷

C. Voluntary Preservation Associations

Finally, the preservation of historic structures and neighborhoods could also be accomplished through the use of neighborhood homeowners associations.⁴⁰⁸ Essentially, the owners of properties in a given neighborhood could freely choose to form a non-profit neighborhood association and agree to be bound by the restrictions, bylaws, and rulings of the association.⁴⁰⁹

The principle is similar to that of standard homeowners associations often found in neighborhoods constructed by a common developer. Within the context of historic preservation, however, the associations could form in existing neighborhoods and serve the sole function of

⁴⁰⁷ This is a simplified discussion of possible revisions to easement laws. Further research and literature review would be helpful in elaborating on their potential or hazards.

⁴⁰⁸ Phelps has discussed a similar type of alternative to historic zoning, dubbed a “voluntary local historic district.” *See Phelps, supra* note 3, at 149-52.

⁴⁰⁹ This suggestion raises issues regarding covenants and perhaps closely-held corporate membership. It is important to note that there are a variety of requirements to the validity and enforcement of covenants as well as to closely-held corporate formation and membership. A full discussion of such requirements is beyond the scope of this Thesis. The home owners’ association suggestion is presented here in the abstract. In a future work, further analysis attempting to create a solid framework for the creation of such a body would be quite useful. Some questions to ask are: How is membership addressed? Are property owners free to opt-out of the association at a later time? Will restrictions on the property run with the land and bind future owners, or will the restrictions be removed when the property is sold? Could there be an arrangement wherein the association enacts bylaws that affect properties of members, but members only agree to adhere to those bylaws through a separate contract on a term basis?

providing for the common preservation of the historical character and aesthetic of the neighborhood. The association would be formed by property owners within a given neighborhood, and would only bind those properties whose owners are association members. That is, all owners in a neighborhood would be free to either opt into or remain independent from the association's bylaws. Precedent for such an association exists. For example, the Code of Texas specifically contemplates the creation of such associations, styled "historic neighborhood preservation associations."⁴¹⁰

As with easements, the primary benefit to the voluntary preservation association alternative is that it enables individual property owners to freely choose whether or not to encumber their property with restrictions. Unlike easements, however, the creation of a neighborhood association responsible for historic preservation could help to enable the protection of whole neighborhoods rather than mere collections of discrete properties.

The voluntary preservation association alternative also has the virtue of truly facilitating local, grass roots decision-making. Within the traditional historic zoning framework, neighborhoods and properties can generally be designated as historic and encumbered by regulatory requirements or process without the express consent of affected property owners.⁴¹¹ The use of neighborhood associations, however, whose membership would be optional to each property owner within the neighborhood, empowers individual citizens to choose if the benefits of preserving historic character for their properties and their neighborhood outweigh the costs. Furthermore, when owners find the need to repair, rebuild, or otherwise alter their property, they

⁴¹⁰ See 11 TEX. PROP. CODE ANN. § 208 (West 2013).

⁴¹¹ That is to say that affected residents do not typically have a 'veto' power over zoning ordinances enacted by a city council.

would not need to traverse the costly “red tape” of city hall.⁴¹² Rather, owners would engage directly with fellow neighborhood residents in seeking authority to act.⁴¹³

As historic preservation has laudable objectives and is fairly popular, at least in the abstract, there is no reason to think that property owners would summarily reject rules that maintained the historic character of their properties and neighborhood, especially if they had a strong and effective say in adoption and enforcement of the rules. Indeed, many home owners already agree to voluntarily accept restrictions on their property in the form of traditional homeowners associations. A voluntary preservation association could result in the protection of, or increase in, property values found with official historic designation, without an accompanying governmental regulatory framework.⁴¹⁴

Finally, the voluntary preservation association alternative could be combined with the use of conservation easements. In such a scenario, the association would not necessarily enact

⁴¹² For example, in the City of Richmond, Virginia, “[a] certificate of appropriateness shall be required for all alterations to a building, structure, or site which is subject to a public view.” CITY OF RICHMOND, VA., CODE OF ORDINANCES Ch. 114, § 114-930.6(f) (2014). While the actual first time application for a COA does not require payment of a fee, the applicant is required to submit twelve physical copies of all required supporting documentation in addition to a digital copy. *See* City of Richmond Commission of Architectural Review, Application Submission Requirements, *available at* http://www.richmondgov.com/content/CommissionArchitecturalReview/forms/CAR_SubmissionApplicationRequirements.pdf. Required supporting documentation may include: site plans, sections, or elevations; a materials list; a colors list; and historic documentary evidence. *See id.* For a discussion on the negative effects of red tape on urbanism in general, *see* Andres Duany, *The Pink Zone: Why Detroit is the New Brooklyn*, CNN MONEY (Jan. 30, 2014, 10:09 PM), <http://features.blogs.fortune.cnn.com/2014/01/30/the-pink-zone-why-detroit-is-the-new-brooklyn/>.

⁴¹³ It is not unreasonable to conclude that individual property owners and the neighborhood as a whole would have more complete information than city hall, and therefore better decision-making capabilities, when determining what should or should not be done in their neighborhood.

⁴¹⁴ *See supra* note 81 and accompanying text.

restrictions to ensure the preservation of members' historic properties. Rather, members could donate historic conservation easements on their property to the association. The primary benefit to enabling the neighborhood association to hold the easement is that the process for seeking permission to alter or repair a property would, theoretically, be simpler than if the easement were held by a public or quasi-public agency. Furthermore, as the neighborhood association would be the body approving the alterations or repairs, decision-making would be kept at the most local level, empowering residents in the process and ideally encouraging participation in the decision-making process.⁴¹⁵

There are, however, potential downsides to the voluntary association alternative. First, there could be some initial difficulty in forming the association. Formation of a homeowners association is often undertaken at or around the time of the initial development of the neighborhood.⁴¹⁶ Similarly, the ability of the association to provide for the preservation of the entire neighborhood could be thwarted by individual property owners who did not want to restrict their use of their property.⁴¹⁷ The potential that some owners would not join the association, thus thwarting full comprehensive protection of the neighborhood, will always be a potential downside due to the voluntary nature of the association. However, direct economic

⁴¹⁵ To ensure that the residents, through the neighborhood association, are always in fact the individuals making the determinations, the easements could be made non-transferrable to third parties.

⁴¹⁶ For example, when selling properties to the initial residents, the developer includes covenants in the deeds that provide for membership in and adherence to bylaws of a homeowners association.

⁴¹⁷ This problem could be considered as a "free rider problem." That is, if most of the neighborhood agreed to restrictions that preserved the overall historic character, a single hold out property owner could receive any potential benefits, such as general community attractiveness or even property value protection, without paying for that benefit himself by similarly agreeing to encumber his own property. *See Phelps, supra* note 3, at 149 & n.214 (noting that voluntary historic districts could face the classic free-rider problem).

incentives could be tailored to help address this problem. A possible strategy to mitigate these downsides could be for local governments to provide a property tax abatement or for the state and federal governments to provide an income tax deduction or credit for owners who join the association and agree to be bound by the restrictions and bylaws. Such incentives could help to encourage neighborhood residents to in fact form and join a neighborhood preservation association.

A further potential downside to voluntary associations is the threat of existing members leaving the association, thereby presenting difficulties to enforcement of a common neighborhood preservation scheme. If an owner could simply leave the association when he desired to pursue an alteration or repair against the association's common scheme, enforcement would be near impossible. This potential downside could, however, be addressed with traditional contractual obligations and remedies. Depending on the terms of the association's articles of incorporation or bylaws, an injunction or other action for breach of contract could hypothetically be brought against the leaving member.

While the voluntary preservation association alternative has potential downsides and will not be able to fully recreate the effect of historic zoning regulations, any such downsides must be weighed against the beneficial aspects of deregulation and voluntary preservation. The encouragement of private, voluntary preservation allows citizens, both individually and collectively through neighborhood associations, to conduct their own evaluation of the costs and benefits of preservation. Allowing citizens the ability to make such determinations themselves has the virtue of empowering individuals and neighborhoods in addition to that of encouraging decision-making at the most local level.

Keeping this decision-making power local and decentralized among the many residents of a neighborhood, whether individually or through collective voting through a neighborhood association, will also likely facilitate adaptation to the change in neighborhood conditions over time. Neighborhoods are organic, and a change in conditions is inevitable as residents move in or out, demographics shift, attitudes change, local employment opportunities rise or fall, and the needs and desires of residents change.

Any wise preservation strategy should be prepared to address such a change in conditions. Similarly, strategies must recognize that preservation will ultimately be a multi-generational issue as the underlying land may remain static, but residents and their desired land uses will not. Providing for truly local decision-making empowers those most sensitive to the needs and changing conditions of their community to preserve or adapt historic structures as necessity demands, without first seeking approval from a centralized third-party that may lack such sensitivity. Ultimately, the voluntary preservation association alternative protects against the underlying threats of urban renewal that the legal justifications for historic zoning present. It also, however, encourages the preservation of historic structures while providing the added benefit of empowering neighborhood residents to determine for themselves when changing conditions necessitate alteration and adaptation.

VIII. CONCLUSION

This Thesis has attempted to demonstrate that there is a fundamental connection between the underlying legal principles of historic zoning and urban renewal. To that end, the jurisprudence involving historic zoning before and after the seminal urban renewal case of *Berman v. Parker* has been collected and analyzed. As the initial search used herein did not identify cases involving historic zoning prior to *Berman*, the search was expanded to include cases involving aesthetic zoning, which is closely related to historic zoning.⁴¹⁸

An analysis of the jurisprudence indicated that prior to *Berman* courts were more likely to adopt a limited view of the police power and the concept of the general welfare. Specifically, the high courts of fourteen of the nineteen states identified would generally strike down ordinances that sought to regulate solely for aesthetic purposes. In so doing courts noted that the exercise of the police power must relate to public health, safety, morals, or welfare. The courts recognized the value of aesthetics, but would not find that aesthetics alone provided a justifiable grounding in health, safety, morals, or welfare. Given the close relationship between aesthetic zoning and historic zoning, it generally seems as though courts would have also been reluctant to recognize zoning for purely historic purposes prior to *Berman*. For example, in 1949 the Supreme Court of Massachusetts stated that “[r]egard for the preservation of the natural beauty of a neighborhood makes the enactment of a zoning regulation desirable but does not itself give vitality to the regulation.”⁴¹⁹

In 1954, the Supreme Court of the United States issued an opinion in *Berman v. Parker*. In that case, the Court generally upheld the validity of comprehensive urban renewal programs,

⁴¹⁸ See *supra* Chapter III; see also *supra* note 110 and accompanying text.

⁴¹⁹ *Barney & Casey Co. v. Town of Milton*, 87 N.E.2d 9, 15 (Mass.1949).

the programs that were later recognized to have quite negative consequences.⁴²⁰ The Court upheld urban renewal programs by essentially determining that the power of eminent domain and the police power were coterminous. In making this determination, the Court also noted that the scope of the police power was very broad and that the concept of the public welfare encompassed aesthetics. Therefore, the Court stated that legislatures had the power to determine that their communities be beautiful as well as safe. With that language, the Court effectively expanded the scope of the police power.

Thereafter, an analysis of the jurisprudence following *Berman* indicated that courts were more likely to uphold aesthetic or historic zoning ordinances. Specifically, the high courts of five states seemed to move away from their positions prior to *Berman* and instead cited *Berman* for the proposition that aesthetic and historic zoning were valid exercises of the police power. For example, in a 1955 opinion, the Supreme Court of Massachusetts cited *Berman* and noted that “[t]here is reason to think that more weight might now be given to aesthetic considerations than was given to them [in the early twentieth century].”⁴²¹ It then noted that, because construction of “incongruous structures” could destroy the historic character of the town, historic zoning ordinances fell within the scope of the police power.⁴²²

The research undertaken pursuant to this Thesis focused on the inquiry as to the jurisprudential connection between urban renewal and historic zoning. It ultimately indicated that there is a connection between the two programs. The cases identified by the search in this Thesis ultimately indicated that *Berman* had an impact on the acceptance of aesthetic and historic

⁴²⁰ See *supra* Chapters II, IV.B.

⁴²¹ Op. of the Justices to the Senate, 128 N.E.2d 557, 561 (Mass. 1955).

⁴²² *Id.* at 562.

zoning. Therefore, it seems as though historic zoning and urban renewal share fundamental legal roots. That is, both programs are based in an expansive understanding of the police power.

The identification, collection, and analysis of cases here, will hopefully serve future research by assisting in further analyzing the connections between not only historic zoning and urban renewal, but also among aesthetic zoning in general, form based zoning, the police power, eminent domain, and conflicts between zoning and the rights protected by the First Amendment.⁴²³

Given that the legacy of urban renewal is largely negative, and that historic zoning can be shown to share a legal connection to urban renewal, this Thesis also broadly suggested several alternatives to traditional historic zoning practices. These alternatives focused on options that empowered individual residents and owners to personally make historic determinations for themselves and their neighborhoods.⁴²⁴ Under these alternative systems of preservation, the planner's role becomes one of advocacy, support, and facilitation, rather than of centralized decision-making. Likewise, the land-use attorney's role becomes one of crafting the legal protections sought by citizens and neighborhoods, without resorting to regulatory practices and legal theories that raise the negative threats of urban renewal. By reorienting historic preservation away from zoning practices based on the same legal principles that justified urban renewal and towards alternatives that encourage and enable both individual and collective grass roots decision-making, it could be possible to achieve the beneficial aspects of historic preservation without the threats inherent to urban renewal programs.

⁴²³ *See supra* Chapter VI.F.

⁴²⁴ *See supra* Chapter VII.

Appendix A

Table of Cases, decided prior to *Berman v. Parker*, for the nineteen states identified

Arkansas

Herring v. Stannus, 275 S.W. 321 (Ark. 1924) (“conceding - without deciding – [that the] police power may not be used for purely aesthetic purposes”).

Powell v. Taylor, 263 S.W.2d 906 (Ark. 1954) (holding that funeral homes may be barred from residential areas because the continuous suggestion of death destroys the comfort and repose of home ownership).

California

Feraut v. City of Sacramento, 269 P. 537 (Cal. 1928) (holding that zoning ordinances must be based on the foundation of protecting public health, safety, morality, or welfare).

City of Beverly Hills v. Brady, 215 P.2d 460 (Cal. 1950) (en banc) (holding that a physician did not violate a residential zoning ordinance by employing secretaries and publishing medical pamphlets in a residential zone).

Beverly Oil Co. v. City of Los Angeles, 254 P.2d 865 (Cal. 1953) (en banc) (upholding a prohibition on certain expansions of an oil drilling operation by noting that oil drilling was specifically declared by law to be detrimental to public health, safety, and welfare).

Connecticut

Town of Windsor v. Whitney, 111 A. 354 (Conn.1920) (upholding setback requirements on the basis of public health, safety, and welfare).

State v. Kievman, 165 A. 601 (Conn.1933) (licensing of junk yards) (“The situation presented does not require us to decide whether æsthetic considerations alone would be sufficient to warrant regulation or restriction.”).

Murphy, Inc. v. Town of Westport, 40 A.2d 177 (Conn. 1944) (noting that aesthetics alone cannot serve to justify the use of the police power).

Langbein v. Bd. of Zoning Appeals, 67 A.2d 5 (Conn. 1949) (certificate of occupancy to use property as a day school).

Gionfriddo v. Town of Windsor, 81 A.2d 266 (Conn. 1951) (finding that aesthetics alone cannot justify the prohibition on the display of vehicles for sale).

Kansas

Ware v. City of Wichita, 214 P. 99 (Kan. 1923) (upholding zoning ordinances providing for the separation of land uses, because such ordinances protect the health and safety of the public) (discussing the shifting nature of aesthetic regulations, but not holding that aesthetics alone can justify the use of the police power).

Heckman v. City of Independence, 274 P. 732 (Kan. 1929) (upholding zoning ordinance that prohibited service station in residential zone).

City of Wichita v. Schwertner, 286 P. 266 (Kan. 1930) (residential zoning of land previously held for use as a cemetery did not prohibit the land from being used for cemetery purposes in the future).

Asmann v. Masters, 98 P.2d 419 (Kan. 1940) (finding that a dance hall is not a nuisance per se, but that it can become one under certain circumstances).

Louisiana

State *ex rel* Civello v. City of New Orleans, 97 So. 440 (La. 1923) (upholding an ordinance that prohibited businesses in residential districts, because such ordinances affected public health and safety, in addition to aesthetics) (noting precedent that aesthetic considerations alone cannot justify use of the police power; however, discussing how the general welfare likely encompasses aesthetics).

State *ex rel* Giangrosso v. City of New Orleans, 106 So. 549 (La. 1925) (upholding ordinance separating land uses, because it promoted public health and safety).

State *ex rel* Palma v. City of New Orleans, 109 So. 916 (La. 1926) (upholding ordinance separating land uses, because it promoted public health and safety).

State *ex rel* Dema Realty Co. v. McDonald, 121 So. 613 (La. 1929) (upholding ordinance separating land uses, because it promoted public health and safety) (holding that the continued operation of a business in violation of a zoning ordinance constitutes a public nuisance).

City of New Orleans v. S. Auto Wreckers, 192 So. 523 (La. 1939) (a property use that does “not offend public morals or jeopardize the health and safety of the public” is legitimate).

City of New Orleans v. Levy, 64 So.2d 798 (La. 1953) (upholding a historic zoning ordinance under a broad scope of public welfare, because it preserved the character of the city, thus tending to promote tourism) (noting, however, that aesthetics alone could not likely justify the ordinance).

Maine

Inhabitants of York Harbor Village Corp. v. Libby, 140 A. 382 (Me. 1928) (upholding zoning ordinance that excluded private camping grounds, because such uses tend to affect public order and sanitation).

Maryland

Cochran v. Preston, 70 A. 113 (Md.1908) (upholding maximum height restrictions, because they tend to protect the public from the danger of fire) (but noting that the police power cannot be used to impair private property rights solely for aesthetic purposes).

Stubbs v. Scott, 95 A. 1060 (Md.1915) (city building inspector could not deny a building permit for a store simply because there were no other stores in the area) (recognizing that the police power cannot be used to merely improve the aesthetic appearance of a neighborhood).

Byrne v. Maryland Realty Co., 98 A. 547, 549 (Md.1916) (holding unconstitutional an ordinance prohibiting the erection of new dwelling houses unless they are constructed as separate buildings) (“The act does not relate to the police power, and its enforcement would deprive the appellee of property rights guaranteed by the Constitution, which cannot be invaded for purely aesthetic purposes under the guise of the police power.”).

Osborne v. Grauel, 110 A. 199 (Md.1920) (upholding the denial of a permit to construct a garage nearby to residences and recognizing that garages “increase the danger of fire”) (but noting that the police power cannot be used for solely aesthetic purposes).

Goldman v. Crowther, 128 A. 50 (Md.1925) (extensively documenting the contemporary state of zoning law) (holding that ordinances that bear no relation to public health, safety, morals, or welfare are void) (holding that aesthetic concerns alone cannot justify the exercise of the police power and the infringement of property rights).

R.B. Const. Co. v. Jackson, 137 A. 278 (Md.1927) (upholding zoning ordinances establishing setback requirements, because they tend to reduce the risk of fire and promote health).

Nw. Merchs. Terminal v. O’Rourke, 60 A.2d 774 (Md.1948) (private action by taxpayers to enforce zoning ordinance with regard to neighboring property) (“In order to impose restrictions some valid exercise of the police power must be proven. But such power is invoked for the protection of the property restricted and not to give protection to surrounding property.”) (citation omitted) (internal quotation marks omitted).

Maryland Advertising Co. v. Mayor of Baltimore, 86 A.2d 169 (Md.1952) (finding that a restriction on billboards was not related to public health, safety, morals, or welfare and, therefore, was arbitrary and invalid).

Massachusetts

Welch v. Swasey, 79 N.E. 745 (Mass. 1907) (finding restrictions on maximum building heights valid, because they promote public safety from fire) (but noting that such ordinances cannot be upheld “for a mere aesthetic object”).

In re Op. of the Justices, 127 N.E. 525 (Mass.1920) (opining that zoning on the basis of land use is a valid exercise of the police power to promote public health and safety) (but noting that aesthetic considerations alone cannot serve as the basis of the police power).

Ayer v. Cram, 136 N.E. 338 (Mass.1922) (upholding maximum height restrictions, because they could diminish the risk of fire) (but noting that use of the police power cannot be based on aesthetic considerations alone).

Gen. Outdoor Adver. Co. v. Dep’t of Pub. Works, 193 N.E. 799 (Mass.1935) (discussing constitutional provision allowing regulation of billboards along public ways) (holding that such regulations are valid, because they “promote safety of travel upon the highways”) (aesthetic considerations alone do not justify use of police power).

Town of Lexington v. Govenar, 3 N.E.2d 19 (Mass.1936) (prohibition of commercial signs in a residential zone) (noting that “doubtless esthetic considerations play a large part” in the prohibition of such advertisements; however, reaching the holding based on the separation of land uses and the promotion of public health, safety, and welfare).

Town of Burlington v. Dunn, 61 N.E.2d 243 (Mass.1945) (town by law restraining the removal of top soil) (noting that aesthetics may be considered in conjunction with other considerations).

122 Main St. Corp. v. City of Brockton, 84 N.E.2d 13 (Mass.1949) (“It is not within the scope of the act to enact zoning regulations for the purpose of assisting a municipality to retain or assume a general appearance deemed to be ideal, or to inflate its taxable revenue.”).

Circle Lounge & Grill v. Bd. of Appeal, 86 N.E.2d 920 (Mass.1949) (private action to prevent the issuance of a permit to construct a restaurant on nearby land).

Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9 (Mass.1949) (“Regard for the preservation of the natural beauty of a neighborhood makes the enactment of a zoning regulation desirable but does not itself give vitality to the regulation.”).

Michigan

James S. Holden Co. v. Connor, 241 N.W. 915 (Mich. 1932) (upholding an ordinance establishing setbacks on public health and safety grounds) (but noting that aesthetic considerations alone cannot justify the police power).

Perry Mount Park Cemetery Ass’n v. Netzel, 264 N.W. 303 (Mich.1936) (private action to enjoin the operation of a salvage yard on unrestricted neighboring land) (“[M]ere esthetics is beyond the power of the court to regulate, especially in a case like this where both parties are in business for profit.”).

Wolverine Sign Works v. City of Bloomfield Hills, 271 N.W. 823 (Mich.1937) (holding that a prohibition of billboards that “did not at all interfere with any highway use or view” was invalid) (“Esthetics may be an incident but cannot be the moving factor.”).

Senefsky v. Lawler, 12 N.W.2d 788 (Mich.1943) (holding that minimum lot size requirements are invalid exercises of the police power and noting that aesthetics alone cannot serve as the basis of the police power).

1426 Woodward Ave. Corp. v. Wolff, 20 N.W.2d 217 (Mich.1945) (upholding the prohibition of signs overhanging public rights of way) (noting that cities may choose how to regulate, improve, and control its streets) (distinguishing invalid regulations pertaining to signs on private property).

Frischkorn Constr. Co. v. Lambert, 24 N.W.2d 209 (Mich.1946) (holding that minimum lot size requirements are invalid exercises of the police power and noting that aesthetics alone cannot serve as the basis of the police power).

Elizabeth Lake Estates v. Waterford Twp., 26 N.W.2d 788 (Mich. 1947) (holding that minimum lot size requirements are invalid exercises of the police power and noting that aesthetics alone cannot serve as the basis of the police power).

Hitchman v. Oakland Twp., 45 N.W.2d 306 (Mich.1951) (holding that minimum lot size requirements are invalid exercises of the police power and noting that aesthetics alone cannot serve as the basis of the police power).

Foster v. Genesee Cnty., 46 N.W.2d 426 (Mich.1951) (dismissing a complaint to enjoin the construction of an animal shelter under the theory that it could constitute a nuisance in the future).

Missouri

City of St. Louis v. Galt, 179 Mo. 8 (Mo. 1903) (upholding an ordinance requiring the removal of flowers considered to be “weeds,” because weeds tend to disrupt the public health).

City of St. Louis v. Dreisoerner, 147 S.W. 998 (Mo.1910) (holding that an ordinance prohibiting the operation of manufacturing machinery within six hundred feet of a park was unconstitutional as a taking without compensation) (“[The police power] cannot sanction the confiscation of private property for aesthetic purposes.”).

In re Kansas City Ordinance No. 39946, 252 S.W. 404 (Mo.1923) (en banc) (upholding an ordinance that regulated the construction and setback of structures, but that provided compensation for the ensuing diminution in value) (generally analogizing the restrictions at issue to height restrictions that tend to protect public safety and comfort).

State ex rel Penrose Inv. Co. v. McKelvey, 256 S.W. 474 (Mo.1923) (en banc) (holding that zoning ordinances that bear no relation to public health, safety, or welfare are void and unconstitutional) (noting that the police power cannot be used for purely aesthetic purposes) (“[T]he necessity for the existence of civil government lies in the protection it affords to the rights of the individual.”).

City of St. Louis v. Evraiff, 256 S.W. 489 (Mo.1923) (en banc) (holding that zoning ordinances that bear no relation to public health, safety, or welfare are void and unconstitutional) (finding that the police power may not rest on aesthetic considerations alone).

State *ex rel* Oliver Cadillac Co. v. Christopher, 298 S.W. 720 (Mo.1927) (en banc) (upholding a zoning ordinance that segregated land uses, because it promoted public health and safety).

Blind v. Brockman, 12 S.W.2d 742 (Mo.1928)(upholding prohibition on soft drink stands for public safety reasons) (distinguishing cases that involve the use of the police power for purely aesthetic purposes).

City of St. Louis v. Friedman, 216 S.W.2d 475 (Mo.1948) (upholding an ordinance that prohibited junk yards in an industrial zone).

Leffen v. Hurlbut-Glover Mortuary, Inc., 257 S.W.2d 609 (Mo.1953) (private action to enjoin operation of funeral home in allegedly residential district) (remanded to determine whether district was in fact zoned as business or for funeral homes).

New Hampshire

Sundeen v. Rogers, 141 A. 142 (N.H. 1928) (noting that aesthetics alone cannot justify the use of the police power, but upholding a set back ordinance on the basis of public health and safety).

New Mexico

Town of Gallup v. Constant, 11 P.2d 962 (N.M. 1932) (affirming the grant of an injunction to restrain construction and compel removal of wooden structures within fire limits) (ordinance upheld on public safety grounds).

New York

Wulfsohn v. Burden, 150 N.E. 120 (N.Y. 1925) (upholding ordinances establishing setbacks and maximum heights on public health and safety grounds) (noting that aesthetics may be considered as auxiliary to more sufficient justifications for police power activity).

Eaton v. Sweeny, 177 N.E. 412 (N.Y. 1931) (the burdens of zoning “must be equally distributed”) (city cannot use zoning to beautify property adjacent to a park if such zoning renders property valueless).

Dowsey v. Vill. of Kensington, 177 N.E. 427 (N.Y. 1931) (declaring invalid an ordinance enacted with apparently the sole objective of beautifying the village frontage).

Perlmutter v. Greene, 182 N.E. 5 (N.Y. 1932) (upholding the administrative act of a state officer regarding the construction of a highway that blocked the view of certain billboards) (distinguishing laws that regulate billboards on private property).

Mid-State Adver. Corp. v. Bond, 8 N.E.2d 286 (N.Y. 1937) (noting that an ordinance prohibiting the construction of off-site advertising billboards anywhere within city limits was void) (the court did not decide this case on aesthetic grounds).

Baddour v. City of Long Beach, 18 N.E.2d 18 (N.Y. 1938) (upholding ordinance that divided land uses by prohibiting boarding house in single family residential zone) (noting that ordinances compelling obedience to restrictive covenants in deeds are valid, even if they involve incidental aesthetic considerations) (noting that aesthetic considerations are not “wholly without weight”).

North Carolina

Turner v. City of New Bern, 122 S.E. 469 (N.C. 1924) (holding that the police power can be used to prohibit the operation of certain businesses in certain districts) (noting that a locality cannot use the police power for purely aesthetic purposes without paying just compensation).

MacRae v. City of Fayetteville, 150 S.E. 810 (N.C. 1929) (“[A gasoline station] might be to some an ‘eyesore,’ but the law does not allow aesthetic taste to control private property, under the guide of police power.”).

Town of Wake Forest v. Medlin, 154 S.E. 29 (N.C. 1930) (finding that a filling station may be prohibited in residential zones, because of the “possibility of public injury”).

Appeal of Parker, 197 S.E. 706 (N.C. 1938) (upholding an ordinance prohibiting walls along the street line on the basis of public safety).

Pennsylvania

Appeal of White, 134 A. 409 (Pa. 1926) (holding that certain setback requirements were invalid, because they were unrelated to public safety, health, morals, or general welfare) (“[Regulation of private property] must not be from an arbitrary desire to resist the natural operation of economic laws or for purely aesthetic considerations.”).

Appeal of Ward, 137 A. 630 (Pa.1927) (upholding zoning ordinance providing for the separation of business and residential uses).

Appeal of Ligget, 139 A. 619 (Pa.1927) (upholding the exclusion of advertising signboards from residential districts) (but noting that zoning regulations cannot be justified by solely aesthetic considerations) (but noting that zoning may not be sustained on aesthetic considerations alone).

Appeal of Kerr, 144 A. 81 (Pa.1928) (upholding setback restrictions related to public health, safety, morals, or welfare).

Walnut & Quince Streets Corp. v. Mills, 154 A. 29 (Pa.1931) (finding that a city may use aesthetic considerations in municipal control over *public* property) (analogizing the municipal determination of what signs private parties may place on public property to the municipal choice of what trees to plant in public parks).

Walker v. Delaware Cnty. Trust Co., 171 A. 458 (Pa.1934) (denying an injunction to prohibit the operation of a gas station in a commercial zone, because the use does not constitute a nuisance).

Petition of Standard Investments Corp., 19 A.2d 167 (Pa.1941) (finding that to be valid ordinances must not be based arbitrarily on aesthetic considerations).

Overbrook Farms Club v. Zoning Bd. of Adjustment, 40 A.2d 423 (Pa.1945) (upholding the grant of a permit to operate a rabbi's office and synagogue in a residential zone that also expressly allowed the operation of church and church offices).

Application of Devereux Foundation, 41 A.2d 744 (Pa.1945) (overturning a variance to operate a home for mentally deficient children in a residential zone, because petitioner did not provide enough evidence to support the grant of a variance).

Belovsky v. Redevelopment Auth., 54 A.2d 277 (Pa.1947) (upholding redevelopment law that allowed private parties to invest in public projects in redevelopment areas acquired by eminent domain) (noting in passing that "aesthetic objectives are not sufficient to justify the exercise of the power of eminent domain").

Appeal of Crawford, 57 A.2d 862 (Pa.1948) (Board of Adjustment abused discretion by refusing to grant variance for setback requirements).

Katzman v. Anderson, 59 A.2d 85 (Pa.1948) (refusing to enforce a deed restriction that had become impractical due to changing conditions).

Appeal of Lord, 81 A.2d 533 (Pa.1951) (declaring that a zoning board may not deny a permit simply because it finds the intended use to be unaesthetic).

Appeal of Medinger, 104 A.2d 118 (Pa.1954) (declaring that aesthetic reasons alone cannot justify use of the police power and invalidating an ordinance establishing minimum lot sizes).

La Rue v. Weiser, 106 A.2d 447 (Pa.1954) (refusing to enforce a sixty-three year old deed restriction that had become impractical due to changed neighborhood conditions).

Silverco, Inc. v. Zoning Bd. of Adjustment, 109 A.2d 147 (Pa.1954) (upholding denial of variance to operate live cattle and hide storage business in an industrial district, because petitioner did not sustain his burden of evidence).

Rhode Island

City of Providence v. Stephens, 133 A. 614 (R.I. 1926) (finding that apartment homes may be excluded from a residential district on the grounds that the exclusion would promote public health and safety by lessening the risks of fire and congestion) (but noting that the police power cannot be based on purely aesthetic considerations).

Sundlun v. Zoning Bd. of Review, 145 A. 451 (R.I.1929) (finding that a city acted improperly in denying a permit to erect a filling station in a residential district, because the record did not indicate that the station was a threat to public health or safety) (noting that mere aesthetic objections to the station could not justify denial of the permit).

Prata Undertaking Co. v. State Bd. of Embalming & Funeral Directing, 182 A. 808 (R.I. 1936) (statute setting requirements for licensure of undertaking businesses).

Nutini v. Zoning Bd. of Review, 82 A.2d 883 (R.I.1951) (affirming action of zoning board granting permit to operate a dental office in a residential zone).

Vermont

Vermont Salvage Corp. v. Vill. of St. Johnsbury, 34 A.2d 188 (Vt. 1943) (finding that zoning ordinances could not be used to prohibit the operation of junk yards for purely aesthetic reasons).

Virginia

Eubank v. City of Richmond, 67 S.E. 376 (Va. 1910) (finding that setback requirements are not unconstitutional, because they serve “the interest of public health, public morals, and public safety”).

Gorieb v. Fox, 134 S.E. 914 (Va.1926) (noting the unsettled extent of the police power) (finding that ordinances separating land use and establishing setbacks are valid “if passed in the interest of the health, safety, comfort, or convenience of the public, or for the promotion of the public welfare, when not unreasonable”).

Martin v. City of Danville, 138 S.E. 629 (Va.1927) (upholding an ordinance regulating the location of filling stations) (displaying deference to legislative determinations and noting that because the ordinance was not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,” it was not unconstitutional).

West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881 (Va.1937) (upholding a prohibition on brick plants in a residential district, but noting that aesthetic considerations alone cannot justify use of the police power).

City of Alexandria v. Texas Co., 1 S.E.2d 296 (Va.1939) (holding that ordinances must relate to public health, safety, morals, or welfare).

Washington

State *ex rel* Seattle Title Trust Co. v. Roberge, 256 P. 781 (Wash. 1927) (upholding single family residential districts that only allow construction of philanthropic homes for children or the elderly when two thirds of nearby property owners consent).

King Cnty. v. Lunn, 200 P.2d 981 (Wash. 1948) (injunction to prohibit individual from operating a restaurant out of his home in a residential district).

Summary

State High Court	Based on the cases identified, prior to <i>Berman</i> , could aesthetics alone serve as the justification for exercise of the police power?
Arkansas	No
California	No
Connecticut	No
Kansas	No
Louisiana	Probably not, however, economic considerations together with a preservation objective would likely have been valid
Maine	-
Maryland	No
Massachusetts	No
Michigan	No
Missouri	No
New Hampshire	No
New Mexico	-
New York	No
North Carolina	No
Pennsylvania	No
Rhode Island	No
Vermont	No
Virginia	No
Washington	-

Appendix B

Table of Cases, decided after *Berman v. Parker* but before *Penn Central Transportation Co. v. City of New York*, for the nineteen states identified

Arkansas

Yarbrough v. Arkansas State Highway Comm'n, 539 S.W.2d 419 (Ark. 1976) (delegation of authority to State Highway Commission to enter into agreements with the United States Secretary of Transportation).

Quapaw Quarter Ass'n Inc. v. City of Little Rock Bd. of Zoning Adjustment, 546 S.W.2d 427 (Ark. 1977) (holding that a city ordinance could not be repealed or altered by a resolution).

California

Bozung v. Local Agency Formation Comm'n, 529 P.2d 1017 (Cal. 1975) (en banc) (application of the California Environmental Quality Act to the annexation of land to the locality).

Urban Renewal Agency v. California Coastal Zone Conservation Comm'n, 542 P.2d 645 (Cal. 1975) (en banc) (exemption of locality from the requirements of the Coastal Zone Conservation Act).

Connecticut

City of New Haven v. Pub. Utils. Comm'n, 345 A.2d 563 (Conn. 1974) (standing to appeal Public Utilities Commission's authorization for constructing overhead power lines).

Figarsky v. Historic Dist. Comm'n, 368 A.2d 163 (Conn. 1976) (finding that "public welfare" includes the preservation of historic areas).

Kansas

Bd. of Park Comm'rs v. Bd. of Cnty. Comm'rs, 480 P.2d 81 (Kan. 1971) (exemption of certain city property from ad valorem taxes by county).

Louisiana

Probst v. City of New Orleans, 337 So.2d 1081 (La. 1976) (suit to recover ad valorem taxes paid under protest due to contested assessments).

Maine

Thomas v. Zoning Bd. of Appeals, 381 A.2d 643 (Me. 1978) (vested rights in a rezoning case).

Maryland

Bd. of Cnty. Comm'rs v. Brown, 253 A.2d 883 (Md. 1969) (sufficiency of evidence needed to grant a special exception to a county zoning ordinance).

People's Counsel, Pub. Serv. Comm'n v. Pub. Serv. Comm'n, 270 A.2d 105 (Md.1970) (necessity to obtain a certificate from the Public Service Commission prior to constructing an generating station).

City of Baltimore v. Charles Center Parking, Inc., 271 A.2d 144 (Md.1970) (noting that aesthetics alone could not justify the use of the police power to restrict the erection of billboards or painted signs).

Mayor of Baltimore v. Mano Swartz, Inc., 299 A.2d 828 (Md.1973) (“[T]he police power may rightly be exercised to preserve an area which is generally regarded by the public to be pleasing to the eye or historically or architecturally significant.”).

Trainer v. Lipchin, 309 A.2d 471 (Md.1973) (finding that rezoning was not available for a petitioner who was not deprived of all reasonable use of his property as presently zoned).

Mayor of Annapolis v. Anne Arundel Cnty., 316 A.2d 807 (Md.1974) (city sought to enjoin county from demolishing county structure located in historic district).

Massachusetts

Op. of the Justices to the Senate, 128 N.E.2d 557 (Mass. 1955) (finding that the police power could be used to preserve historic districts).

Op. of the Justices to the Senate, 128 N.E.2d 563 (Mass. 1955) (finding that the police power could be used to preserve historic districts).

Massachusetts Comm'n Against Discrimination v. Colangelo, 182 N.E.2d 595 (Mass.1962) (discriminatory rental practices).

McNeely v. Bd. of Appeal, 261 N.E.2d 336 (Mass.1970) (sufficiency of evidence to grant a variance).

John Donnelly & Sons, Inc. v. Outdoor Adver. Bd., 339 N.E.2d 709 (Mass.1975)(declaring that the general welfare includes aesthetic considerations).

Gumley v. Bd. of Selectmen, 358 N.E.2d 1011 (Mass.1977) (discussing the considerations and procedures that a historic district commission must follow when issuing a certificate of appropriateness) (case does not involve a challenge to the historic zoning ordinance).

Island Props., Inc. v. Martha's Vineyard Comm'n, 361 N.E.2d 385 (Mass.1977) (application of regulatory controls in land and water protection act to subdivision plans previously approved).

Michigan

Petition of Highway US-24, in Bloomfield Twp., Oakland Cnty., 220 N.W.2d 416 (Mich. 1974) (highway condemnation proceeding).

Sabo v. Twp. of Monroe, 232 N.W.2d 584 (Mich. 1975) (finding that the construction of a mobile-home park on residentially zoned land was reasonable) (finding that otherwise valid zoning regulations are not invalid because they were enacted prior to the adoption of a master plan).

Missouri

City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969) (upholding a zoning ordinance that served to preserve the character and distinction of a neighborhood, but that provided compensation for the ensuing diminution in value).

New Hampshire

Town of Deering *ex rel* Bittenbender v. Tibbetts, 202 A.2d 232 (N.H. 1964) (holding that historic zoning is within the scope of the police power).

New Mexico

City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13 (N.M. 1964) (holding that historic zoning is within the scope of the police power).

New York

Lutheran Church in Am. v. City of New York, 316 N.E.2d 305 (N.Y. 1955) (finding that the denial of all economically viable use of a property constitutes a taking).

Conley v. Town of Brookhaven Zoning Bd. of Appeals, 353 N.E.2d 594 (N.Y. 1976) (upholding the issuance of a variance to subdivide a parcel).

Charles v. Diamond, 360 N.E.2d 1295 (N.Y. 1977) (action against city and state officials to issue permits to develop sewer system and connections).

Penn Central Transp. Co. v. City of New York, 366 N.E.2d 1271 (N.Y. 1977) (upholding the New York Landmark Ordinance).

North Carolina

Allred v. City of Raleigh, 178 S.E.2d 432 (N.C. 1971) (holding that rezoning is not valid when it is based only on “special arrangements” with the owner of a particular parcel).

Pennsylvania

Best v. Zoning Bd. of Adjustment of City of Pittsburgh, 141 A.2d 606 (Pa. 1958) (noting that a community can regulate property to create a more attractive environment).

Nat'l Land & Inv.Co. v. Kohn, 215 A.2d 597 (Pa. 1965) (noting that aesthetics alone cannot justify the use of the police power).

Shapp v. Nat'l Gettysburg Battlefield Tower, Inc., 311 A.2d 588 (Pa. 1973) (noting that a new state constitutional provision granted Pennsylvania the authority “to act in areas of purely aesthetic or historical concern”).

Rhode Island

Hayes v. Smith, 167 A.2d 546 (R.I. 1961) (finding that the zoning board of review was justified in reversing a decision of the historic district commission) (case does not involve a challenge to the historic zoning ordinance).

Op. to the House of Representatives, 208 A.2d 126 (R.I. 1965) (finding that a statute delegating authority to provide for historic zoning is likely constitutional). This opinion did not contain a discussion as to why the statute was constitutional, because the court determined that it did not have authority to issue an advisory opinion on this matter. *See id.*

Boggs v. Zoning Bd. of Review, 264 A.2d 923 (R.I. 1970) (discussing procedural, advertisement, and notice requirements for appeals taken to the zoning board of review).

Corrado v. Providence Redevelopment Agency, 370 A.2d 226 (R.I. 1977) (discussing the procedural and appraisal aspects of condemnation).

Vermont

In re Barker Sargent Corp., 313 A.2d 669 (Vt. 1973) (finding that a sanitary landfill would not result in pollution in violation of environmental law).

Virginia

Bd. of Supervisors v. Rowe, 216 S.E.2d 199, 213 (Va. 1975) (invalidating certain architectural design review regulations) (finding that a locality cannot use the police power for solely aesthetic considerations) (recognizing that the Virginia Code did authorize certain localities to adopt historic districts under certain restrictions).

Virginia Historic Landmarks Comm'n v. Bd. of Supervisors, 230 S.E.2d 449 (Va. 1976) (finding that the State Historic Landmark Commission's designation of a historic district for the Virginia Landmarks Register was not subject to judicial review).

Washington

Leschi Imp. Council v. Washington State Highway Comm'n, 525 P.2d 774 (Wash. 1974) (en banc) (environmental impact of highways).

Swift v. Island Cnty., 552 P.2d 175 (Wash. 1976) (environmental impact of subdivision development).

Dep't of Ecology v. Pacesetter Constr. Co., Inc., 571 P.2d 196 (Wash. 1977) (en banc) (finding, in an environmental law context, that the police power can be used to protect aesthetics when it also served to protect against economic loss).

Summary

State High Court	Based on the cases identified, following <i>Berman</i> , could aesthetics or historic concerns alone serve as the justification for exercise of the police power?
Arkansas	-
California	-
Connecticut	Passed on the issue of solely aesthetic regulations, but upheld the validity of a historic district ordinance and recognized a broad scope of the general welfare
Kansas	-
Louisiana	-
Maine	-
Maryland	Where regulations sought to create aesthetically pleasing results, rather than to preserve or protect something which is aesthetically pleasing, the regulations will be invalid.
Massachusetts	Yes
Michigan	-
Missouri	-
New Hampshire	Yes
New Mexico	Yes
New York	Passed on the issue of aesthetics, because the primary issue in the case was as applied confiscatory takings; however, the dissent discussed how it may be appropriate to adopt the position that aesthetics alone is enough
North Carolina	-
Pennsylvania	Strongly mixed decisions recognizing the validity of aesthetic and historic zoning, but still holding that aesthetics alone cannot justify use of the police power
Rhode Island	-
Vermont	-
Virginia	No, aesthetics alone are not enough; however, the court noted that design regulations would have been valid if they were in compliance with the Code of Virginia
Washington	Aesthetics considerations will suffice if the ordinance also protects against economic loss

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