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SPEAKING BRIEFLY: THE FIRST AMENDMENT & HISTORIC PRESERVATION

J. Graham Corriher*

"Charges filed after underwear removed"1 read the headline of The Salisbury Post in late July 2010. The cryptic title exposed the public to a controversy within the local art community that had played out the preceding week. Clyde,2 the owner of a local art gallery, had taped a pair of white double extra-large men’s briefs3 to the window of his gallery in protest of his neighbor, Robert Crum, the owner of the adjacent gallery. The two had been in a dispute over the ownership rights to an alley separating their buildings. Clyde, who used the alley as a means of access to his gallery, was upset at Crum for erecting a decorative fence and installing other ornamental objects, effectively prohibiting Clyde from using the alley.4 What the underwear protest was explicitly meant to say is surely debatable, but it clearly meant to convey Clyde’s displeasure at his neighbor’s action.

Late one night,5 several days after the underwear was displayed, Anne Cave, director of the Rowan Arts Council6 and close friend of

* Juris Doctor Candidate, University of North Carolina School of Law, 2012.
2. Previously known as Clyde Overcash, Clyde legally dispensed with his last name and now is “just Clyde.” Interview with Clyde, Owner and Operator, Off Main Art Gallery and the Salisbury Confederate Civil War Prison in Salisbury, N.C. (Aug. 25, 2010).
3. To be sure, Clyde never wore the briefs; they were purchased solely for use in the protest piece. Id.
5. Notes from Courtroom, supra note 4.
6. Anne Cave has since resigned from her position as director. Scott Jenkins, Art council leader at forefront of Clyde underwear episode resigns, SALISBURY POST, Feb. 10, 2011, available at http://www.salisburypost.com/News/021011-anne-cave-resigns-qcd. The Rowan Arts Council is a body designated by the County
Robert Crum, removed the underwear from Clyde's window. After unsuccessfully demanding that the underwear be returned, Clyde went to the magistrate's office and swore out a criminal complaint alleging the larceny of the briefs by Ms. Cave. The provocative incident created a frenzy of editorials, letters to the editor, and Salisbury Post articles.


7. See Interview with Clyde (Aug 25, 2010), supra note 2; Notes from Courtroom, supra note 4.
8. Notes from Courtroom, supra note 4.
9. See Smith, Charges filed after underwear removed, supra note 1. In North Carolina, any judge, magistrate, or clerk of court can issue a warrant for arrest as long as the warrant is supported by probable cause and the circumstances of the offense are relayed to the issuing official by affidavit, oath, or affirmation. See N.C. GEN. STAT. § 15A-304 (2009). Private citizens may seek a warrant from one of these officials for wrongs done to them.

After the charges had been filed, Clyde erected a new, more elaborate display: a clothesline that stretched the length of the alley from which he hung more men’s underwear, from boxers to briefs to boxer-briefs. Whatever the initial pair of underwear was meant to convey, the new display aimed to say it louder. To direct passersby to his display, Clyde fashioned a sign emblazoned with the title of his newest creation, “Underwear Alley,” from paper, permanent markers, twine, and duct tape. Above the sign, he attached another pair of white double-extra large men’s briefs to a flagpole. Shortly after erecting the sign, Clyde received a complaint from the city zoning administrator, who explained that since his gallery was within a historic district, his sign was in violation of the city zoning ordinance because he had failed to obtain a certificate of appropriateness (COA) from the Salisbury Historic Preservation Commission (HPC). Clyde suspected his neighbor, July 30, 2010, available at http://www.salisburypost.com/News/073010-web-underwear-art-qcd; Underwear caper case continued, SALISBURY POST, Aug. 26, 2010, available at http://www.salisburypost.com/Crime/082610-Underwear-case-continued-qcd.

13. According to Clyde, only men’s underwear sent the appropriate message. See Letter to the Editor, A matter of taste, supra note 11; Letter to the Editor, Underwear, art & legal abuse, supra note 11; Letter to the Editor, Underwear gender gap: Can art be pink and purple?, supra note 11.

14. The sign at issue is a piece of 8-by-11-inch white paper. At the top of the sign is painted an upside-down heart-shaped wreath. Protruding from the tops of the heart-shaped wreath and connecting the two “chambers” is a rainbow made of various shades of highlighters. The design was formerly stationery of some sort and Clyde flipped the paper upside-down to create his new sign. The bottom of the sign, comprising half the sheet of paper, reads “Underwear Alley” in black permanent marker. The sign is attached to the front of the brick art gallery by twine and duct tape. The twine is attached to the top of the sign and wrapped around a flagpole bracket. The silver duct-tape is applied to the top and bottom of the sign. Photograph of “Underwear Alley” sign (Aug. 25, 2010) (on file with author); Interview with Clyde (Aug. 25, 2010), supra note 2.

15. Id.
noticeably not amused by the whole affair,16 initiated the complaint with the city.17 Clyde applied for a COA and was denied.18

Personal vendettas, private warrants, and theoretical debates on the nature of art aside, at the heart of this matter is historic district regulations and their tension with First Amendment guarantees of freedom of speech. This Note examines the ongoing controversy in Salisbury through the lens of a municipality’s power to regulate matters of speech and expression, taking into account both state and national trends regarding such challenges to municipal regulations, the procedural and policy considerations that underlie the regulations, and the bodies through which they are enforced.

This Note is divided into six parts. First, it provides background regarding Clyde, his decision to put underwear on display, and the response of the local government and community to both the “Underwear Alley” display itself and the sign directing passersby to the display. In Part II, the Note describes the related litigation, including the criminal complaint, subsequent trial, verdict, and community response. Next, in Part III, the Note addresses the larger context of historic preservation and aesthetic regulations. From there, the focus is narrowed to the authority of municipal powers to create and regulate historic districts in North Carolina, the nexus between Salisbury’s Zoning Ordinance and Historic Preservation Commission, and the adjudicatory and enforcement powers of the municipality. Part IV presents an analysis of the case law involving challenges to municipal aesthetic regulations, specifically

16. When I (the author) personally visited the display to take photographs, two unidentified people appeared at the backdoor of Mr. Crum’s gallery (at the end of the alley) and asked me to leave. Their tone made it clear they were not appreciative of the attention the display was receiving.

17. Salisbury’s Land Development Ordinance gives any person the right to file a written complaint whenever a violation is alleged to have occurred. SALISBURY, N.C., LAND DEVELOPMENT ORDINANCE ch. 17, § 1 (2008), available at http://www.ci.salisbury.nc.us/lm&d/zoning/intro.html.

18. Minutes from Historic Preservation Commission for the City of Salisbury Regular Meeting, at 10, Sept. 9, 2010, available at http://www.ci.salisbury.nc.us/lm&d/hpc/2010%20Minutes/September92010%20(2).pdf. Instead of pursuing any legal challenge, Clyde framed the same paper sign that was denied a COA by the HPC and placed it back on the front of his gallery. He has received no further complaints from the zoning administrator about the “new” sign. Interview with Clyde (Nov. 1, 2010), supra note 4.
those involving protest speech and historic districts, including a
discussion of where those challenges have succeeded or failed, and an
examination of the reasoning behind the courts’ decisions. Part V
presents a comparison of successful and failed challenges of other
municipal aesthetic regulations to issues raised by Clyde’s display. In
doing this, the discussion will address the present controversy more
broadly, and outside the constructs of Salisbury’s municipal ordinances.
This Note concludes by returning to the Salisbury Historic Preservation
Commission’s response to the underwear protest sign, arguing that the
controversy was wrongly decided, and explaining why the composition
and power structure of historic preservation commissions create risks of
arbitrary infringement of citizens’ First Amendment rights.

I. THE CONTROVERSY

Clyde owns Off Main Art Gallery in the historic district of
downtown Salisbury, North Carolina. The controversy began in the
summer of 2010 and took several forms: Clyde’s dispute with Mr. Crum
over ownership of the alley; Clyde’s (and subsequently the State of
North Carolina’s) dispute with Ms. Cave over the removal of the
underwear installed in protest of Mr. Crum’s actions; and, finally, the
dispute between Clyde and Salisbury’s Historic Preservation
Commission regarding the appropriateness of the “Underwear Alley”
sign. This Note is most concerned with the connection between the
message of the “Underwear Alley” display itself and the sign announcing
its existence. Specifically, whether regulation of the sign in any way
diminishes the message conveyed in the display and, if diminished,
whether the municipal regulation of the sign infringed upon Clyde’s First
Amendment rights.

19. Interview with Clyde (Aug. 25, 2010), supra note 2.
20. This is not the first time Clyde has clashed with the City of Salisbury. His
Confederate Civil War Prison has been cited by the city for ordinance violations
concerning vegetative overgrowth. He has also voiced his complaints about drug-
trafficking that occurs in and around his home as well as the lights from a new
parking lot abutting his home that keep him awake at night. Interview with Clyde
(Aug. 25, 2010), supra note 2.
21. See Ford, Panel says no to Clyde’s underwear sign, supra note 12.
Community response to the display and the surrounding publicity varied from indignation to glowing support. Salisbury Post reporter Emily Ford summed up the art community’s response best when she reported: “Some say the incident has fueled a deeply rooted division that already existed in Salisbury’s art community — a division not between fine art and folk art or artists and hobbyists, but between those who support Clyde and those who don’t.” The city and state were more deliberate in their responses. The HPC conducted a hearing denying the sign more than a month after the controversy began and Cave was required to appear in Rowan County District Court to answer larceny charges more than three months after the removal of the first underwear display.

After the Historic Preservation Commission denied Clyde’s application for a Certificate of Appropriateness, he considered appealing on procedural grounds, but ultimately decided to forego this option. Instead, Clyde focused his energy on preparing for the criminal trial against Cave. In private warrant court, the district court where this trial was held, the state brings the case against a criminal defendant. Much of the time, the state’s case is based solely on the testimony of the

22. It has been reported by Clyde that Retired Superior Court Judge Larry G. Ford said he would have the magistrate that approved the private warrant fired. Interview with Clyde (Aug. 25, 2010), supra note 2.
23. Hall, Art, and news, is in the mind of the beholder, supra note 12.
24. Ford, More than underwear at heart of art discussions, supra note 12.
25. Minutes from HPC Meeting, supra note 18. According to the state statute, the city has 180 days to conduct a hearing regarding local ordinances. N.C. GEN. STAT. § 160A-400.9 (2009).
27. The Historic Preservation Commission requires Certificates of Appropriateness for additions, alterations, and various other changes to historic properties, including signs and art. See SALISBURY, N.C., PRESERVATION ORDINANCE art. XVIII, § 18.09 (2008), available at http://www.ci.salisbury.nc.us/lm&d/hpc/HPC.html. Without a COA, the sign was in violation of the City’s Zoning Ordinance. In short, Clyde’s sign was illegal.
28. Interview with Clyde (Nov. 1, 2010), supra note 4. However, the HPC seemed to be on solid ground procedurally. One member abstained, another considered not making a determination at all, but nothing irregular existed. Minutes from HPC Meeting, supra note 18, at 8.
person who swore out the warrant. Because of this peculiarity in North Carolina law, and the tendency of these cases to devolve into a shouting match, the court has colloquially come to be known, at least in Rowan County, as “fight court.”

II. THE CRIMINAL TRIAL, IN BRIEF

On November 1, 2010, Courtroom 1 in the Rowan County courthouse bustled with the day-to-day matters of criminal court. The assistant district attorney called the calendar, defense attorneys continued clients’ cases, some defendants entered pleas and others made first appearances via video from the adjacent jail. Most of the conversation in the lawyers’ lounge centered on the next day’s election, and few people noticed Clyde, quietly sitting on the last row, folder in hand, watching the methodical cogs of the justice system turn. Seated across the courtroom, and a few rows on front of Clyde, was Anne Cave, the director of the Rowan Arts Council, the woman accused of taking Clyde’s underwear. At the close of first appearances, the assistant district attorney called the defendant, Ms. Cave, and Clyde, the state’s only witness, to the front of the courtroom. The underwear trial was underway.

Clyde took the stand and recounted the events that caused him to take out the private warrant. His story was more colorful than the accounts in newspapers but had little factual variance. A fact noticeably absent from media coverage but prominent in Clyde’s testimony was the purpose behind the initial underwear display — the initial display of the single, white, men’s size double-extra large Hanes briefs taped to the window. Clyde testified he fashioned the display to protest an ownership dispute between himself and the owner of another gallery adjacent to his building, across the alley — the same alley that later became “Underwear Alley.”

30. The following account is taken from the author’s own personal observations of the courtroom and the proceedings that day. State of North Carolina v. Anne Cave, No. 10-CR-54894 (N.C. Dist. 19C Nov. 1, 2010).
31. While the ownership dispute of the alley was ongoing, Clyde’s neighbor erected a gate, and decorated the alley with brick chips and vegetation. Clyde used to
Ms. Cave also testified. She admitted taking the briefs, saying she did so because a high school intern at Mr. Crum's gallery complained about being "creeped out" by the display, and had a "meltdown" about the underwear one morning. Cave's testimony did not go further to explain the intern's meltdown, but with no other facts to establish the reason for the intern's reaction, it is unlikely for any reasonable person, including a high school intern, to have a "meltdown" after seeing new men's briefs taped to a window. Ms. Cave seemed to be trying to establish a justification defense for the removal, but the justification was unreasonable. Important for this discussion is the fact that a prima facie case of larceny, that is, stealing underwear with no defense, was established during the trial. In North Carolina, the "essential elements of larceny are that defendant (1) took the property of another and (2) carried it away (3) without the owner's consent (4) with the intent to deprive the owner of the property permanently." During trial, the following facts emerged from the Ms. Cave's testimony: (1) She admitted to taking Clyde's briefs; (2) she admitted taking them back to her own studio, where she did not initially know what to do with them; (3) she admitted not having Clyde's consent to take the underwear, consistent with the events that followed; and (4) she claimed to have finally decided to decorate the underwear and write on them the phrase "art brings us together."

In closing, defense counsel argued Ms. Cave's case on the basis of three defenses. The first was that the underwear was a spite fence, and she was justified in taking them down. The second justification defense was that the underwear was damaging to the psyche of the intern. The third was that there was a lack of intent to permanently deprive Clyde of the briefs since she decorated the underwear and eventually planned on returning them. The defendant's purpose in testifying was questionable, and the closing argument provided no answer. Defense counsel, based on

park in the alley but could no longer gain access because of the gate. A subsequent court order instructed the neighbor to remove the "improvements." Interview with Clyde (Nov. 1, 2010), supra note 4.

32. See supra note 30.
34. See supra note 30.
his arguments, tried to highlight what many viewed as the absurdity and pettiness of the issue. The visiting judge, Davidson County District Court Judge Ron Penry, noticeably perplexed and somewhat annoyed by this seemingly inconsequential squabble, offered no explanation and ended the matter with a summary verdict: Not guilty. 35

Many times throughout the trial, laughter echoed through the courtroom.36 The comedic nature of the trial escaped no one, including the judge. The judge undoubtedly knew the state had satisfied each of the elements of the offense beyond a reasonable doubt. Yet the judge, who again offered no explanation for the verdict, seemed to dismiss the matter as de minimis. 37 Whatever the judge’s rationale or authority, his decision had implications beyond the criminal trial. The defendant, as mentioned earlier, was the director of the Rowan Arts Council, a body designed “[t]o provide opportunities for Rowan County organizations, individuals, and activities that advocate arts and culture.”38 The Council receives

35. For more information on the trial, see Shelley Smith, In brief, ‘Not Guilty’ of underwear theft, supra note 26.
36. A few examples of the sound-bite friendly trial: (1) Clyde testified that the defendant “Told me I should be spanked.” (2) In response to a question on cross-examination about the monetary value of the briefs taken, Clyde answered, “They’re priceless, sir.” (3) The defendant, claiming to have attempted to contact Clyde about the offensive briefs, testified “I left three messages on his telephone and when I went to his house, I was attacked by his chicken!” (4) Ms. Cave testified that after a heated telephone conversation with Clyde following the underwear removal, and after she told him that she would not return the briefs, he responded that he would put “fifty rubbers on the window.” Notes from Courtroom, supra note 4.
37. While noticeably absent from the criminal law code in North Carolina, the concept of de minimis does exist in civil trials, where the court can dismiss “an action based upon a wrong which constitutes only a trifling invasion of the plaintiffs’ rights or results in only trifling damage.” Mosley v. Nat’l Fin. Co., Inc., 243 S.E.2d 145, 148 (N.C. Ct. App. 1978) (overruled on other grounds). Because of the wide discretion exercised by trial judges, and the fact that the state is barred from appealing these acquittals, the de minimis “tool” is effective in criminal trials even though it is not often used. De minimis acquittals, however, are beyond the scope of this Note. For more on the de minimis “defense,” see Douglas Husak, The De Minimis “Defense” to Criminal Liability (Nov. 20, 2009) (paper presented at workshop sponsored by the Kadish Center for Morality, Law & Public Affairs, University of California-Berkeley School of Law), available at http://www.law.berkeley.edu/files/De_Minimis2_DHusak.pdf.
funding from the State of North Carolina to promote the arts throughout the county.39 The acquittal on a larceny charge from the director of an arts council with funding from the State because she disagreed with the content of the art, calling it "offensive,"40 is concerning, especially since the council is tasked with dispersing state funding to promote the arts. It is unclear whether Ms. Cave was acting in her official capacity as director at the time of the taking; had she been, it would raise the question of whether this rises to the level of the state censoring art on the basis of content. Whether a state-funded organization is constitutionally permitted to take down a piece of art for legitimate reasons is very much in doubt, and is the focus of much of the remainder of this Note. What seems unquestionably unconstitutional is the organization’s director removing a piece of art for illegitimate reasons; this is particularly pertinent to the Salisbury incident if the director indeed was acting in her official capacity.

III. THE POWER TO REGULATE

In 1966 Congress enacted the National Historic Preservation Act41 and created a procedure through which historic sites could be designated and granted protection from detrimental action including, but not limited to, alterations and demolition.42 In 1989 North Carolina enacted similar legislation43 and extended to municipalities44 the power not only to protect historic districts and sites from governmental action but also to protect these sites from private action.45 The state statute does

40. See supra note 30.
42. Id.
44. The term "municipality" is defined to include both cities and counties. §160A-400.2.
45. §160A-400.1. The statute reads:
The historical heritage of our State is one of our most valued and important assets. The conservation and preservation of historic districts and landmarks stabilize and increase property values in their areas and strengthen the overall economy of the State. This Part authorizes cities and counties of the State
not grant unfettered discretion to local bodies, and other sections of this same chapter give local bodies a guideline for historic preservation and regulation.\textsuperscript{46} Historic districts act as a kind of supplement to a municipality's extant zoning ordinances,\textsuperscript{47} providing additional substantive and procedural regulations to those zoning requirements.\textsuperscript{48} In order to gain this additional municipal control in North Carolina, establishment of a Historic Preservation Commission\textsuperscript{49} is required by statute; the statute reads in pertinent part:

Before it may designate one or more landmarks or historic districts, a municipality shall establish or designate a historic preservation commission. The municipal governing board shall determine the number of the members of the commission, which shall be at least three, and the length of their terms, which shall be no greater than four years. A majority of the members of such a commission shall have demonstrated special interest, experience, or education in history, architecture, archaeology, or related fields. All the members shall reside within the territorial jurisdiction of the municipality as established pursuant to G.S. 160A-

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\item within their respective zoning jurisdictions and by means of listing, regulation, and acquisition:
\item (1) To safeguard the heritage of the city or county by preserving any district or landmark therein that embodies important elements of its culture, history, architectural history, or prehistory; and
\item (2) To promote the use and conservation of such district or landmark for the education, pleasure and enrichment of the residents of the city or county and the State as a whole.
\end{itemize}

\textit{Id.}

\textsuperscript{46} See \textsection\ 160A.

\textsuperscript{47} Municipalities are authorized to establish zoning ordinances by N.C. GEN. STAT. \textsection\ 160A-381 (2009).


\textsuperscript{49} N.C. GEN. STAT. \textsection\ 160A-400.7 (2009).
360. The commission may appoint advisory bodies and committees as appropriate. 50

The statute does not require a HPC to be formed, and it is not the only type of body permitted by statute; however, it is the one adopted by the City of Salisbury, and the focus of this Note. 51 Within its jurisdiction, 52 the Commission has the power to designate historic properties and districts, purchase property, conduct educational programs, and negotiate with owners. 53 This Note is concerned with the Commission’s additional powers to “[r]estore, preserve and operate historic properties” 54 and “[r]eview and act upon proposals for alterations, demolitions, or new construction within historic districts.” 55 Much of the commission’s authority is exercised through the issuance or denial of certificates of appropriateness for alterations planned on any historic property. 56 The statute regarding COA reads in pertinent part:

From and after the designation of a landmark or a historic district, no exterior portion of any building or other structure (including masonry walls, fences, light fixtures, steps and pavement, or other appurtenant features), nor above-ground utility structure nor any type of outdoor advertising sign shall be erected, altered, restored, moved, or demolished on such landmark or within such district until after an application for a certificate of appropriateness as to exterior features has been submitted to and approved by the preservation commission. The municipality shall require such a certificate to be issued by the commission prior to the issuance of a building permit or other permit

50. Id.
52. “[The Salisbury HPC’s jurisdiction] include[s] the City of Salisbury and the extraterritorial jurisdiction area of the city as shown on the official zoning map and atlas of the city.” Id. at § 18.05.
54. Id.
55. Id.
56. §160A-400.9.
granted for the purposes of constructing, altering, moving, or demolishing structures, which certificate may be issued subject to reasonable conditions necessary to carry out the purposes of this Part. A certificate of appropriateness shall be required whether or not a building or other permit is required.\textsuperscript{57}

The statute also requires municipalities to establish guidelines by which to judge the appropriateness of alterations and rules and procedures for determining issuance or denials of COA, including hearings and appeals procedures.\textsuperscript{58}

As mentioned previously, the designation of historic districts supplements the extant municipal zoning ordinances; this scheme is in operation in Salisbury. Therefore, enforcement of HPC decisions, including denials of COA, occurs through the city’s zoning administrator.\textsuperscript{59} In effect, violation of HPC decisions is no different than violation of any zoning ordinance violation, and the Salisbury Zoning Ordinance authorizes civil penalties of up to $250 per day, misdemeanor criminal conviction and accompanying fine, as well as equitable, injunctive, and abatement relief.\textsuperscript{60} Violation of zoning ordinances is important for this discussion, but more important is the power of the HPC to regulate signs to further its goal of historic preservation, and the broader municipal power to regulate aesthetics in promotion of the general welfare.\textsuperscript{61} Historic preservation, in general, is on solid footing since the United States Supreme Court handed down its decision in \textit{Penn Central Transportation Company v. City of New York}.\textsuperscript{62} Regulation of aesthetics outside the context of historic preservation, on the other hand,

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\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{60} \textbf{SALISBURY, N.C., LAND DEVELOPMENT ORDINANCE} ch. 17, § 3 (2008), available at http://www.ci.salisbury.nc.us/lm&d/zoning/intro.html.
\item \textsuperscript{61} \textbf{N.C. GEN. STAT.} §160A-381 (2009).
\item \textsuperscript{62} 438 U.S. 104 (1978).
\end{itemize}
has taken a more laborious route to recognition; as a result, its footing is less firm.

A. Historic Preservation is a Permissible Governmental Purpose: Penn Central Transportation Company v. City of New York

Penn Central Transportation Company owned Grand Central Terminal in New York City, which was designated as a “landmark site” and contracted to have a multi-story office complex built atop the terminal. After being denied permission to go forward with the building, Penn Central challenged New York’s Landmark Preservation Law, arguing that the designation of Grand Central as a landmark site was a taking in violation of the Fifth and Fourteenth Amendments. In denying Penn Central’s claim, the Court unequivocally endorsed historic preservation as a valid governmental purpose, saying, “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 . . . preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.” However ringing the Court’s endorsement of historic preservation as a permissible governmental goal, Edward H. Ziegler is quick to clarify, in Rathkopf’s The Law of Zoning and Planning, that “these enactments are still subject to a host of other legal limitations applicable to other use controls: the fifth amendment prohibition against the ‘taking’ of private property without just compensation and the first amendment freedom of speech guarantees, to name only two.”

63. See Rathkopf & Rathkopf, supra note 48, at § 16:2.
64. Penn Central, 438 U.S. at 104.
65. Id.
66. Id. at 129 (citations omitted).
68. Id. at § 19.3.
B. Municipal Aesthetics Regulations Gaining Recognition

Municipal aesthetics regulations outside the context of historic districts have developed much more slowly over the past century. First, courts followed the "early-period doctrine," where regulation on the basis of aesthetics was not recognized as a legitimate government purpose. Courts in the "middle-period" began to recognize aesthetics as a legitimate governmental factor as long as another, legitimate public purpose was present. Now, at least in a majority of jurisdictions, courts follow the "modern doctrine," where aesthetics is recognized as a legitimate government purpose in its own right. North Carolina, after State v. Jones, joined the majority of jurisdictions in adopting the "modern doctrine." However, the North Carolina Supreme Court was careful not to "grant blanket approval of all regulatory schemes based upon aesthetic considerations" and adopted a balancing test, saying, "the diminution in value of an individual's property should be balanced against the corresponding gain to the public from such regulation." In addition to the fact that the court instituted this test instead of expressly allowing aesthetic regulations carte blanche, it is important to note that this case arose from a conviction for violating a statute requiring a fence to be erected around a junkyard. It seems that even though the court explicitly endorsed the "modern view" of aesthetic regulation, it applied the middle-view, allowing aesthetic regulation when another legitimate public purpose, namely, abating a nuisance, was present. Therefore the "modern view," at least in North Carolina, amounts to a balancing of the reasonableness of the regulation, which seems to make it susceptible to a challenge when the infringement of a fundamental First Amendment right is involved. Whatever view the North Carolina Supreme Court

69. For a more in-depth summary, see Rathkopf & Rathkopf, supra note 48, at § 16:2.
70. Id. at § 16:3.
71. Id. at § 16:4.
72. Id. at § 16:5.
73. 290 S.E.2d 675 (N.C. 1982).
74. Id. at 681.
75. Id.
76. Id. at 676.
77. See Rathkopf & Rathkopf, supra note 48, at § 16:6.
adopted regarding aesthetic regulation outside the context of historic districts, it is on less firm footing than the United States Supreme Court's endorsement of historic preservation as a legitimate governmental goal.

C. Salisbury's Power to Regulate Aesthetics in Historic Districts

To distill the points previously made and apply them to the controversy at hand, the City of Salisbury has a legitimate government interest in regulation of aesthetics in the name of historic preservation. It very likely also has a legitimate government interest in regulation on the basis of aesthetics alone, both inside and outside historic districts, though this latter interest is much less certain. Both of these interests, however, are subject to legal and constitutional limitations and challenges; in the Salisbury controversy, the First Amendment protections for freedom of speech and expression may limit the enforceability of aesthetic regulations even when they further a legitimate government interest.

IV. FIRST AMENDMENT CHALLENGES TO MUNICIPAL REGULATIONS

First Amendment challenges to municipal regulations have been mounted with varying success. Courts try to interpret ordinances and regulations so as to avoid constitutional problems, and they have done so in this arena by finding problems with standing, by finding that the

78. See, e.g., Burke v. City of Charleston, 139 F.3d 401, 403 (4th Cir. 1998) (dismissing artist's constitutional challenge of historic preservation guidelines because artist lacked standing); Bd. of Managers of Soho Int'l Arts Condo. v. City of N.Y., No. 01 Civ. 1226 (DAB), 2004 WL 1982520, at *11 (S.D.N.Y. Sept. 8, 2004) (finding Landmarks Preservation Law constitutional because it was “enacted for purposes wholly unrelated to speech”). But see, e.g., City of Ladue v. Gilleo, 512 U.S. 43, 58-59 (1994) (holding that municipal sign ordinance violated resident's free speech rights); Bowden v. Town of Cary, ___ F. Supp. 2d ___, 2010 WL 5071613, at *15 (E.D.N.C. Dec. 7, 2010) (holding that town's sign ordinance was impermissibly content-based and unconstitutional as-applied to citizen’s protest sign painted on the front of his residence); Lusk v. Vill. of Cold Spring, 475 F.3d 480, 487 (2d Cir. 2007) (holding municipal sign ordinances unconstitutional as applied to plaintiff).

79. Burke,139 F.3d at 403.
municipality’s regulation was content-neutral, thereby triggering a lower level of judicial scrutiny, or content-based, triggering strict scrutiny, or by finding the municipal regulation to serve a valid governmental purpose. Most applicable to the current controversy are the following three cases in which courts have faced the issue of whether municipal aesthetic regulations are permissible in the face of First Amendment challenges to their validity: People v. Stover arose outside the context of a historic district but involved a clothesline protest strikingly similar to Clyde’s; the United States Supreme Court weighed in on municipal sign regulations in City of Ladue v. Gilleo, a case which also arose outside the context of a historic district; and Lusk v. Village of Cold Spring, a Second Circuit case that arose within a historic district and addressed the precise controversy at issue in Clyde’s case — the balance of First Amendment rights and municipal aesthetic regulations. Each case will be taken in turn.

A. People v. Stover

Peopeople v. Stover arose out of a First and Fifth Amendment challenge to the constitutionality of a municipal ordinance prohibiting the erection of clotheslines in front or side yards in the city of Rye, New York. Every year that tax rates remained unchanged, the appellants in People v. Stover protested the tax assessments by erecting a clothesline in their yard from which they hung, among other things, rags and underwear. The city passed the ordinance after the sixth year of the Stovers’ protest. In denying the challenge, the Court of Appeals of New York concluded that “reasonable legislation designed to promote [aesthetics] is a valid and permissible

84. Id.
86. 475 F.3d 480 (2d Cir. 2007).
88. Id.
89. Id. at 273.
exercise of the police power.”\textsuperscript{90} In reaching its conclusion to the Fifth Amendment challenge, the court quoted the language Justice Douglas had used to explain the public purpose of using eminent domain to eradicate blight in the majority opinion of\textit{Berman v. Parker}.\textsuperscript{91}

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.... If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.\textsuperscript{92}

The court’s denial of the Stovers’ claim on First Amendment freedom of speech grounds lacked the linguistic power of Justice Douglas’ Fifth Amendment argument. Instead, the court explained “[a]lthough the city may not interfere with nonviolent speech, it may proscribe conduct which incites to violence or works an injury on property.”\textsuperscript{93} In doing this, the court seemed to be using the “middle-period” aesthetics-plus test, concluding that the aesthetic regulation was valid because it was coupled with economic concerns, and, it would seem, crime-prevention concerns. The majority opinion went on to explain that “the defendants were not privileged to violate [the ordinance] by choosing to express their views in the altogether bizarre manner which they did.”\textsuperscript{94} The court was noticeably disdainful of the petitioner’s clothesline, saying “[i]t is obvious that the value of their ‘protest’ lay not in its message but in its offensiveness.”\textsuperscript{95}

\begin{itemize}
\item \textsuperscript{90} \textit{Id.} at 275.
\item \textsuperscript{91} 348 U.S. 26 (1954). As part of an urban redevelopment project, Washington, D.C. sought to condemn a non-blighted piece of property within a larger area that Congress had determined to be blighted. \textit{Id.} at 28-31.
\item \textsuperscript{92} \textit{Stover}, 191 N.E.2d at 275 (quoting\textit{Berman}, 348 U.S. at 33).
\item \textsuperscript{93} \textit{Id.} at 276.
\item \textsuperscript{94} \textit{Id.} at 277.
\item \textsuperscript{95} \textit{Id.}
\end{itemize}
The dissent espoused more concern for the petitioner's rights, both in the realm of private property and freedom of speech, and used language equally as powerful as Justice Douglas in *Berman*, and especially relevant to the controversy at hand, stating:

> This ordinance is unrelated to the public safety, health, morals or welfare except insofar as it compels conformity to what the neighbors like to look at. Zoning, important as it is within limits, is too rapidly becoming a legalized device to prevent property owners from doing whatever their neighbors dislike. Protection of minority rights is as essential to democracy as majority vote. In our age of conformity it is still not possible for all to be exactly alike, nor is it the instinct of our law to compel uniformity wherever diversity may offend the sensibilities of those who cast the largest numbers of votes in municipal elections. The right to be different has its place in this country. The United States has drawn strength from differences among its people in taste, experience, temperament, ideas, and ambitions as well as from differences in race, national or religious background. Even where the use of property is bizarre, unsuitable or obstreperous it is not to be curtailed in the absence of overriding reasons of public policy. The security and repose which come from protection of the right to be different in matter of aesthetics, taste, thought, expression and within limits in conduct are not to be cast aside without violating constitutional privileges and immunities. This is not merely a matter of legislative policy, at whatever level. In my view, this pertains to individual rights protected by the Constitution.  

The dissent went on to foreshadow the seemingly endless ways aesthetic reasons could be used to espouse the views of the majority, at the expense of minority rights. It concluded with a conciliatory approach

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96. *Id.* at 278 (Van Voorhis, J., dissenting).
to aesthetics and zoning, saying "that extensions of categories of local legislation for purely aesthetic purposes should be defined and limited, and, if they are to be enlarged, it should not be under reasoning which sets no ascertainable bounds to what can be done or attempted under this power."  

The majority's opinion, at least on First Amendment freedom of speech grounds, seemed overly infected with personal opinion as to the tastefulness of the protest sign in question, going so far as to allude to its propensity to incite violence. The dissent supported an approach recognizing the fundamental rights at issue in matters of speech and property and argued that any municipality infringing on these rights is well advised to do so with caution. The two views in Stover highlight the tension apparent when aesthetic interests of a municipality conflict with personal rights of the municipality's citizens. The United States Supreme Court finally determined that the tension was too great and decided to weigh in on the matter in the case that follows.

B. City of Ladue v. Gilleo

In City of Ladue v. Gilleo, the Supreme Court was asked to consider the constitutionality of a municipal ban on all residential signs that did not fall into one of ten exceptions. Gilleo erected several signs at her residence protesting United States involvement in the Persian Gulf War. After the city claimed the signs were in violation of a city ordinance and denied Gilleo's petition for a variance, Gilleo challenged the ordinance as a violation of her First Amendment right to free speech. In affirming the lower courts' determination that the enforcement of the ordinance did in fact violate Gilleo's First Amendment rights, the United States Supreme Court recognized the city's interest in minimizing visual clutter and its ability to promote

97. Id. at 279.
99. See id. Examples of exceptions to the blanket sign prohibition mentioned in the Court's opinion include for sale and for rent signs, on-site commercial and organization signs, and signs warning of danger. Id. at 52.
100. Id. at 45.
101. Id. at 45-46.
aesthetics through the police power.\textsuperscript{102} However, the Court found that this interest was overcome by the residents' interest in free speech through erecting signs on their own property.\textsuperscript{103} The Court reasoned that the ordinance nearly prohibited an entire form of communication that did not have an adequate alternative, explaining: "Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."\textsuperscript{104} The Court also noted:

\begin{quote}
A special respect for individual liberty in the home has long been part of our culture and our law.... Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views.\textsuperscript{105}
\end{quote}

At the end of the Court's opinion, it addressed the argument that the ban on residential signs is permissible because of the city's interest in maximizing real estate values by reasoning that a resident's self-interest in maintaining property values adequately addresses the city's concerns.\textsuperscript{106} The Court also took issue with the total ban on residential signs by saying "more temperate measures could in large part satisfy Ladue's stated regulatory needs without harm to the First Amendment rights of its citizens."\textsuperscript{107}

\textit{Gilleo}, although involving regulation of property in a residential, non-historic district, is important to this analysis because the Court discussed the type of sign at issue in the Salisbury incident, including the size of the sign and material used to create it. The Court took special issue with the fact that the city was completely banning such an innocuous sign and infringing on the First Amendment rights of its citizens to protest the government, where those rights are at their zenith, in the name of minimizing visual clutter. The next case relies heavily on

\begin{flushright}
\begin{footnotes}
102. \textit{Id}. at 58.
103. \textit{Id}.
104. \textit{Id}. at 57.
105. \textit{Id}. at 58 (citation omitted).
106. \textit{Id}.
107. \textit{Id}.
\end{footnotes}
\end{flushright}
Gilleo in applying these principles to residential historic district properties.

C. Lusk v. Village of Cold Spring

Lusk v. Village of Cold Spring\(^\text{108}\) arose out of a First Amendment free speech challenge to the Village of Cold Spring’s municipal ordinances; the ordinances restricted Lusk from displaying protest signs outside his historic district residence without a permit.\(^\text{109}\) On several occasions, Lusk used spray painted plywood signs to protest the Village for allowing construction to proceed on a waterfront condominium.\(^\text{110}\) The city issued Lusk a “Violation Notice” charging him with two counts of violating a municipal code that made it “unlawful for any owner or person occupying property located within the [Historic] District to [m]ake, permit or maintain any alteration to any improvement located within the District unless the Historic District Review Board has previously issued a Certificate of Economic Hardship or a Certificate of Appropriateness.”\(^\text{111}\) The violation also alleged posting signs without review by the Planning Board and an allegation that the aggregate size of all the signs was too big.\(^\text{112}\) Chapter 64 of the Village ordinances gives the review board the power to grant or deny applications for COA based on factors including “general design... scale in relation to the property ... texture and materials ... visual compatibility ... and the importance of architectural or other features to the historic significance of the property.”\(^\text{113}\) The Second Circuit addressed two questions arising in the context of Chapter 64 of the Village of Cold Spring’s historic district regulations: first, whether the review board’s approval period was an invalid prior restraint on free speech; and second, whether the reviewing standards pursuant to Chapter 64 were invalid as vesting too much discretion in the review board.

The court reviewed the licensing scheme employed by the village in regard to historic district certificates of appropriateness. It

\(^{108}\) 475 F.3d 480 (2d Cir. 2007).
\(^{109}\) Id. at 481.
\(^{110}\) Id. at 481-82.
\(^{111}\) Id. at 482.
\(^{112}\) Id.
\(^{113}\) Id. at 484 (citing COLD SPRING VILLAGE CODE § 64-7(A)(2)).
began by defining and analyzing the history and purpose of the courts’ disapproval of prior restraints, concluding that

Chapter 64 is constitutionally invalid. It is one of the typical attributes of prior restraints – that Chapter 64 acts to ‘freeze’ the speech of the plaintiff and others like him who reside in the Historic District and who wish to use signs to convey message, ‘at least for the time’ it takes them to obtain a COA . . . that we find to be at the heart of the ordinance’s invalidity.

The court went on to discuss the Supreme Court’s analysis in Gilleo, ultimately concluding that the type of sign at issue in this case was similar to the type in Gilleo, and that the village “‘almost completely foreclose[d] a venerable means of communication that is both unique and important’ . . . at least pending Review Board approval.” The court’s prior restraint analysis focused on the possibility of a criminal conviction for violating the sign ordinance. The court seemed especially concerned that the reason for speaking might pass while a citizen is awaiting approval, effectively either prohibiting too much speech altogether or putting the speaker at risk of committing a crime, and determined that the licensing scheme provided in Chapter 64 was “constitutionally infirm.”

Unfortunately for the purposes of this Note, the court passed on the second question of whether the Chapter 64 standards vested too much discretion in the review board. Here the court took a quote from Forsyth County v. Nationalist Movement, to began its analysis of the restrictions at issue in Lusk, saying, “To curtail [the risk of suppressing a certain viewpoint], a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow,

114. Id. at 487 (quoting Neb. Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976)) (citation omitted).
115. Id. at 491 (quoting City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994)) (citation omitted).
116. Indeed, Lusk plead guilty to violating the municipal ordinance. Id. at 482-83.
117. Id. at 492.
118. Id. at 493.
objective, and definite standards to guide the licensing authority."^{120} The Lusk court continued by acknowledging that although the Chapter 64 reviewing standards could be used by a reviewing official to suppress a message or messenger that he or she disagreed with,^{121} the statute was equally amenable to a constitutional construction where subjective factors were not impermissibly considered.^{122} From here, the court "[h]appily" adopted the constitutional construction and avoided overturning the Chapter 64 standards.^{123}

The opinion ended by acknowledging the potential for abuse of Chapter 64 standards and left "for another day the determination of whether, in a particular case, the ordinance’s approval authority has been used improperly on the basis of the message rather than the medium."^{124} Although the pertinent question was indeed "left for another day," the court was helpful in sharpening the focus of First Amendment challenges to municipal historic district regulations. It seemed to suggest that these challenges would succeed or fail based on the ability of the challenger to prove not that an entire scheme was invalid (Lusk’s answer to that question was “no.”), but that: (1) the reviewing standards allowed the possibility of subjectivity; and (2) subjectivity was the motivating factor. These are indeed high hurdles over which challengers must leap.

V. APPLICATION OF FIRST AMENDMENT CHALLENGES TO THE SALISBURY INCIDENT

In order to analyze the applicability of the Salisbury controversy to previous First Amendment challenges to municipal regulation, it is first necessary to address the threshold matter of whether Clyde’s “Underwear Alley” protest had First Amendment protection, and whether the sign directing passersby to the protest had similar First Amendment protection. The first subsection will argue that “Underwear Alley” was protected speech. From there, this section will analyze the structure of the Salisbury Historic Preservation Commission (HPC) and

120. Lusk, 475 F.3d at 493.
121. Id. at 495.
122. Id.
123. Id. at 496.
124. Id.
the framework within which COA applications are made and either issued or denied, including what factors the HPC is permitted to consider. The focus will then shift to how the standards were applied in Clyde’s case, and whether there is any evidence of impermissible factors being taken into account.

A. First Amendment Protection of “Underwear Alley” and Accompanying Sign

Courts have recognized municipal interests in regulations regarding both historic preservation and aesthetics, and these principles rest on firm ground.125 However, the strength of these interests diminishes depending on the strength of the competing interests, namely, the constitutional rights of municipal citizens.126 It is therefore necessary to first establish that “Underwear Alley” and its accompanying sign had First Amendment free speech protections.

Initially cryptic about the purpose of the first underwear display and the second installment, “Underwear Alley,”127 Clyde finally admitted at trial128 that the underwear was taped to the window in protest of his neighbor, Robert Crum, who claimed possession of the alley that separated their art galleries.129 Although it seems fairly certain that the display would have had First Amendment protection had it been solely a

125. See discussion supra Section III.
126. See RATHKOPF & RATHKOPF, supra note 48, at § 19:3.
127. The media naturally seized upon the dispute once Clyde pressed charges. The controversy then sparked a debate as to what constitutes art. See, e.g., Ford, More than underwear at heart of art discussions, supra note 12; Ford, Talks on art coincide with play, latest escapade, supra note 12; Ford, Clyde channels Blackmer display years ago, supra note 12; Hall, Art, and news, is in the mind of the beholder, supra note 12. Clyde seemed happy to leave his true motives hidden. See Ford, More than underwear at heart of art discussions, supra note 12; see also Morgan Fogarty, Underwear Controversy in Salisbury: Art or Eye Sore?, FOX CHARLOTTE, Aug. 3, 2010, http://www.foxcharlotte.com/news/local/Underwear-Controversy-in-Salisbury-Art-or-Eye-Sore-99912079.html.
128. See supra notes 30-31 and accompanying text; discussion supra Section II. There was never any civil litigation regarding the underwear. The only hearings on the issue were the criminal trial and the HPC hearing where Clyde was denied a COA. See supra note 18 and accompanying text.
129. See Interview with Clyde (Aug. 25, 2010), supra note 2; Notes from Courtroom, supra note 4.
The protest message does not have to be explicit to maintain this protection considering Clyde’s neighbor at whom the underwear protest was directed (and anyone else familiar with their dispute) would clearly understand the underwear’s message.¹³²

Since the display itself had First Amendment protection, it follows that this protection extended to the sign announcing the display’s existence. The sign labeling and directing passersby to “Underwear Alley” was as integral to the display as the underwear itself. Speaking without an audience does not seem to be the protection the First Amendment’s drafters envisioned, and taking away the “Underwear Alley” sign, as the HPC effectively did, is similar to allowing citizens to speak, but not allowing those speakers to gather listeners.¹³³

The HPC seized on the sign announcing the display’s existence. It is here that the municipal regulations began to come into tension with Clyde’s First Amendment right to send to his neighbor whatever unpleasant message the underwear conveyed. Before this Note can examine whether the HPC’s denial of Clyde’s COA violated his First

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¹³⁰ See Berger v. Battaglia, 779 F.2d 992, 1000 (4th Cir. 1985).

¹³¹ See, e.g., id. at 1001 (stating that the right to protest a speaker peaceably has as much First Amendment protection as the right to engage in the speech in the first place); see also Coal. To Protest Democratic Nat’l Convention v. City of Boston, 327 F. Supp. 2d 61, 69 (D. Mass. 2004), aff’d sub nom. Bl(a)ck Tea Soc’y v. City of Boston, 378 F.3d 8 (1st Cir. 2004) (“Protest speech falls squarely within the protection of the First Amendment’s guarantees of freedom of speech and assembly”).

¹³² See Texas v. Johnson, 491 U.S. 397, 404 (1989) (flag burning) (“In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.”) (internal citation and quotations omitted); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (student arm bands); Brown v. Louisiana, 383 U.S. 131 (1966) (sit-in demonstration).

¹³³ See Charles F. Gormly, Note, The United States Information Agency Domestic Dissemination Ban: Arguments for Repeal, 9 ADMIN. L.J. AM. U. 191, 209-10 (1995) (arguing that the United States was a driving force behind the Universal Declaration of Human Rights which extends freedom of expression to include the right to have listeners and hearers).
Amendment rights, it is necessary to review the structure of the HPC and the parameters within which it operates.

B. Salisbury’s Historic Preservation Commission

Salisbury’s Historic Preservation Commission is appointed by the city council and composed of nine city residents, at least five of whom must demonstrate a special interest in history or preservation. The Commission has the responsibility of, among other things, designating historic districts and approving or denying certificates of appropriateness. Salisbury’s Historic Preservation Commission charter has adopted the North Carolina statutory language regarding certificates of appropriateness verbatim. The following criteria were added for the commission to consider in its evaluation of whether the proposed alterations, additions, or demolitions are “congruous with the historic aspects of the designated landmark or district” and, ultimately, whether a certificate of appropriateness should be granted:

(a) Building height. (b) Walls. (c) Proportion of width to height of the total building façade. (d) Proportion, shape, positioning, location, pattern and sizes of any elements of fenestration. (e) Spacing of buildings, defined as the distance between adjacent buildings. (f) Building materials. (g) Surface textures. (h) Color. (i) Expression of architectural detailing. (j) Roof shapes. (k) Scale.

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134. The ordinance establishing the HPC reads in part:

The Commission shall be a nine-member commission appointed by the City Council. A majority of the members of the commission shall have demonstrated special interest, experience or education in history, architecture, archaeology or related fields; and all the members shall reside within the territorial jurisdiction of the City of Salisbury, the limits of which are shown on the official zoning map or atlas of the City of Salisbury, North Carolina.


135. Id. at § 18.08.

136. Id. at § 18.09.

137. Id. at § 18.10.
(I) Orientation of the building to the street. (m)
Ground cover or paving. (n) Signs. (o) Exterior
lighting and appurtenant features.\(^{138}\)

In addition to these criteria, the Salisbury ordinance references
design guidelines that the Commission must also take into
consideration.\(^{139}\) The design guidelines pertinent for this Note concern
both signs and art. The sign guidelines read in pertinent part:\(^{140}\)

2. Signs should be compatible with the
architectural character of the building in size, scale,

\(^{138}\) Id.

\(^{139}\) Id. at § 18.07; see also Historic Preservation,
http://www.ci.salisbury.nc.us/lm&d/historic/historic.html (last visited Apr. 14,
2011). The historic preservation website provides links to Salisbury’s residential and
non-residential design guidelines. Id.

\(^{140}\) The omitted parts of the sign guideline read:

1. Retain and preserve signage that is original or is important
in defining the overall historic character of a building . . . 4.
Whether they are wall-mounted, freestanding, affixed to
awnings, or placed on the sidewalk, signs should be placed in
locations that do not obscure any historic architectural features
of the building or obstruct any views or vistas of Salisbury’s
historic downtown. . . 6. Wall-mounted signs on friezes,
lintels, spandrels, and fascias over storefront windows should
be of an appropriate size and fit within these surfaces 7.
Projecting signs: Should be carefully designed to reflect the
character of the building and be compatible with other adjacent
signage. Should have visually appealing elements such as
shapes, painted or applied letters; two or three dimensional
icons, etc. should be considered. Mounting hardware should be
an attractive and integral part of the sign design. May be
constructed of a variety of materials including wood, metal,
appropriate plastics and composites. 8. Install freestanding
signs appropriately, such as on well-landscaped ground bases
or low standards. 9. Signs illuminated from within are
generally not appropriate. Lighting for externally illuminated
signs should be simple and unobtrusive and should not obscure
the content of the sign or the building façade.
materials and style. If possible, base new sign designs on historic documentation such as old photographs. 3. Use traditional materials commonly found on turn-of-the-century commercial buildings such as wood, metal, or stone or use modern materials that have the appearance of traditional . . . 5. Wall signs should be flush-mounted on flat surfaces and done in such a way that does not destroy or conceal architectural features or details. 141

The relevant art guidelines read in pertinent part: "Location: 1. Artwork should be appropriately-scaled for the intended space. 2. Landscaping, seating, interpretive signage and other improvements to enhance the setting and the viewing experience are encouraged . . . . Materials: 5. Durable materials intended for exterior application should be used." 142

The Salisbury HPC Guidelines are strikingly similar to the Chapter 64 standards at issue in *Lusk v. Village of Cold Spring*, 143 with one possible difference being that the relevant guidelines in Clyde’s case pertained to non-residential property, where it was unclear in *Lusk* whether the Village of Cold Spring distinguished between residential and non-residential guidelines. 144 It is also important to note that unlike the scheme at issue in *Lusk*, where civil and criminal penalties were assessed as soon as the signs were erected, the Salisbury scheme for violation of zoning ordinances does not take effect, at least civil and criminal penalties do not begin to accrue, until a ruling by the HPC on an application for COA has been made. 145 It follows that the Salisbury scheme is at least somewhat less suspect that the scheme at issue in *Lusk*.

141. *Id.*
142. *Id.* at 62.
143. 475 F.3d 480 (2d Cir. 2007).
145. See discussion *supra* Section III.
Regardless of the constitutionality of the scheme within which the HPC operates, the HPC still retains discretion in interpreting the guidelines similar to the Review Board’s interpretation of the Chapter 64 standards in *Lusk*. The Second Circuit addressed the existence of subjective review, and the possibility of abuse, in the review board’s procedures; but, where there were two possible interpretations of the guidelines — one which rendered the guidelines constitutional and one which rendered them unconstitutional — the court construed the ordinance in favor of the Village and adopted the constitutional interpretation. The court left open the possibility of future challenges to the ordinance, noting that the determination of whether the standards were interpreted in an impermissibly subjective manner would be determined on a case-by-case basis. The next section discusses whether the HPC’s analysis of Clyde’s sign was impermissibly subjective.

C. Was the Salisbury HPC’s Review Impermissibly Subjective?

Assuming the guidelines are permissible the Historic Preservation Commission still has the discretion to determine how these guidelines apply to Clyde’s sign. To fall within the parameters of the historic preservation ordinance, the city zoning administrator first had to determine that Clyde’s sign required a certificate of appropriateness. It then falls on the HPC to decide whether or not the sign is “congruous with the historic aspects of the designated landmark or district.”

Though the historic preservation ordinance lists criteria to consider when

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146 475 F.3d at 496; see discussion supra Part IV.C.
147 *Lusk*, 475 F.3d at 496.
148 There was mention that the Historic Preservation Commission may be called upon to review the appropriateness of the art installment itself (the clothesline of men’s underwear along the alley) but the only mention of “Underwear Alley” was when the city planner commented, “I don’t think the City regulates clotheslines of underwear.” E-mail from Emily Ford, Reporter, *SALISBURY POST*, to J. Graham Corriher (Sept. 29, 2010, 14:08:47 EDT) (on file with author).
149 The guidelines must be assumed permissible in the Second Circuit after *Lusk*. Of course, North Carolina is not bound by Second Circuit precedent.
150 Minutes from HPC Meeting, supra note 18, at 8.
determining appropriateness, the list is largely unhelpful because it simply lists "signs," as a factor that should be considered. Thus, it is necessary to make this determination from the Historic Preservation Commission’s design guidelines for signs and art.

i. The Historic Preservation Commission’s application of the design guidelines

The first guideline requires original signage to be preserved and does not apply to Clyde’s case. The second guideline requires signs to be “compatible with the architectural character of the building in size, scale, materials and style.” The HPC seized upon this requirement during the deliberation phase of Clyde’s hearing. One of the Historic Commission members said the sign “can be evaluated by scale” and summarily decided the “scale is too small for the building.” She went on say “the style is not in keeping with what is typically seen as an informational size art-wise, or appropriateness for the building.” It is apparent that whether the scale is too small or too large, or whether the style is or is not appropriate, are decisions that are completely within the discretion of the HPC. The guidelines do not provide measurements within which signs must fall, nor do they provide examples to guide the HPC in determining what is too small, too large, or not in keeping with what is typical. Despite the HPC deliberation on the basis of scale, scale was not mentioned in the motion to deny the sign. Instead, the HPC focused on “materials,” reasoning in its motion that the paper sign

152. Id.
153. NON-RESIDENTIAL GUIDELINES, supra note 140, at 55-56, 62-63.
154. Id. at 55.
155. Minutes from HPC Meeting, supra note 18, at 9-10. HPC hearings give interested parties the chance to testify under oath and give the public the chance to speak out in support or opposition. Following this, the commission deliberates the decision on the record before making motions to approve or deny requests.
156. Id. at 9.
157. Id.
158. Id.
159. Id.
160. Id. at 10.
was not appropriate because it "[lacked] consistency with other informational signs in the historic district."\textsuperscript{161}

The HPC also focused on the third requirement, requiring use of "traditional materials commonly found on turn-of-the-century commercial buildings such as wood, metal, or stone ... 
\textsuperscript{162} Since the sign was made out of paper, and not one of the three materials listed in the requirement, the commission determined that "the proposed change is not consistent with the requirement for permanent materials commonly found in the historic districts."\textsuperscript{163} However, permanency is not a requirement found in the guidelines. Prior to the hearing, the zoning administrator ruled that the sign qualified as an "informational sign."\textsuperscript{164} This is important because the only regulations beyond those found in the design guidelines pertaining to "information signs" merely regulate size, and Clyde's sign is within those guidelines.\textsuperscript{165} The HPC was aware that it was making its decision about a sign,\textsuperscript{166} yet they seem to have either (1) inferred a permanency requirement from the list of materials in guideline three, or (2) incorporated the art guidelines — which require the use of "durable materials intended for exterior applications"\textsuperscript{167} — into their decision about the sign; either is improper. The deliberation makes it clear the commission disagreed as to why the sign's material was the problem, but they all seemed to agree that material indeed was the problem.\textsuperscript{168}

The fourth and fifth non-residential sign guidelines forbid signs from obscuring "views and vistas of Salisbury’s historic downtown"\textsuperscript{169} or "[concealing] architectural features or details."\textsuperscript{170} The sign was placed on the front of the gallery, and did not conceal anything of historical importance, only a few bricks. Unless a half-dozen bricks are an

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item NON-RESIDENTIAL GUIDELINES, \textit{supra} note 140, at 55.
\item Minutes from HPC Meeting, \textit{supra} note 18, at 10.
\item Id. at 8.
\item Minutes from HPC Meeting, \textit{supra} note 18, at 10.
\item NON-RESIDENTIAL GUIDELINES, \textit{supra} note 140, at 62.
\item Minutes from HPC Meeting, \textit{supra} note 18, at 10.
\item NON-RESIDENTIAL GUIDELINES, \textit{supra} note 140, at 55.
\item Id.
\end{enumerate}
\end{footnotesize}
unacceptable concealment of architectural features or details, Clyde's sign is within these requirements. The rest of the guidelines are inapplicable to Clyde's sign.

In addition to analyzing the sign guidelines as they apply to Clyde's sign, and since the commission may have freely meshed the two, it is necessary to consider the guidelines as they pertain to art. The preamble to Salisbury's enumerated art guidelines provides:

Installation of art in downtown and other locally designated historic districts creates focal points, destinations and vitality in or near landscaped areas, sidewalks, street medians, pocket plazas and similar public spaces. The Confederate Monument on West Innes Street and the mural on West Fisher Street are examples of existing art that have become downtown Salisbury landmarks. The second example illustrates how blank walls or surfaces can provide a suitable framework for installation of artwork. Design review of art installations in historic districts should be content-neutral while ensuring that the overall scale, durability of the piece and manner of installation are compatible with the historic character of downtown.

The two examples mentioned are incredibly large pieces of artwork and, thus, do not provide much guidance to the majority of artists in Salisbury's art guild. "Fame," the Confederate Monument, is a fourteen-foot tall bronze statue, constructed in 1909, of an angel holding a wounded Confederate soldier. The mural on West Fisher Street

171. Id. at 62-63.
172. Id. at 62.
depicts a street scene at the town square in Salisbury and is 6,000 square feet in size, taking up the entire side of a large building. 174

How, exactly, these two examples assist a downtown artist’s decision about displaying much smaller works is unclear. The enumerated art guidelines that follow are equally unhelpful. They provide that the artwork should be “appropriately-scaled,”175 should “avoid areas that are important to the overall design or architectural rhythm of the building,”176 and should not “conceal or result in the removal of character-defining details or features.”177 As previously mentioned, the art guidelines also note that the selected materials should be “durable materials intended for exterior applications.”178 These guidelines would be applicable if the HPC was reviewing the appropriateness of “Underwear Alley” itself; since the artwork was not at issue (the city has allowed it to remain), these guidelines should not have been used to review the sign. However, they do provide support for the existence of the sign in the first place. The second art guideline explicitly encourages “signage and other improvements to enhance the setting and the viewing experience [of the art].”179 Clyde’s “Underwear Alley” does not conceal or remove anything of architectural significance, and assuming it is appropriately scaled, it seems the protest piece itself would likely receive a certificate of appropriateness if an application were made. If the display itself is not objectionable, then it is difficult to argue that a sign about the display that the guidelines explicitly encourage, and that arguably does not violate any of the guidelines for signs discussed above — at least as they are enumerated in the sign guidelines — is objectionable.

174. Mark Wineka, Artists touch up downtown Salisbury mural, SALISBURY POST, June 5, 2010, available at http://www.salisburypost.com/News/060510-mural-w-pix (depicting a photo of the mural on West Fisher Street). Depicted in the mural are more than 150 local people, id.; found among them, ironically, wearing overalls and standing behind a horse carriage, is Clyde. Telephone Interview with Clyde, Owner and Operator, Off Main Art Gallery and the Salisbury Confederate Civil War Prison (Sept. 29, 2010).

175. NON-RESIDENTIAL GUIDELINES, supra note 140, at 62.

176. Id.

177. Id.

178. Id.

179. Id.
ii. Are the HPC reviewing criteria permissibly narrow, objective, and definite?

The Second Circuit in *Lusk* stated that content-neutral aesthetics regulations, like the Salisbury Design Guidelines, must be "narrow, objective, and definite" to prevent a reviewing authority from impermissibly infringing on First Amendment rights. The criteria for signs in the ordinance for the HPC states that signs must be "congruous with the historic aspects of the designated landmark or district." Included in this are the Salisbury Non-Residential Design Guidelines for signs used to analyze Clyde's denial of a Certificate of Appropriateness. As previously mentioned, the HPC seized upon the scale and materials of the sign in deliberating on and eventually denying the certificate of appropriateness. The only criteria in the sign guidelines relating to the scale of a sign is that it be compatible with the building, and the only criteria regarding materials is that they be "found on turn-of-the-century commercial buildings such as wood, metal, or stone." That the scale of a sign should be appropriate to qualify for a certificate of appropriateness is completely subjective without further guidance and neither narrow, objective, nor definite. Additionally, the commission seems to presuppose that the mention of "wood, metal, or stone" in the guidelines implies that sign materials must be permanent, without considering that turn-of-the-century commercial buildings could have easily displayed paper signs. In this regard, the commission is reading narrowness, objectivity, and definiteness into the guidelines to require "permanency" of materials. If the city wishes to require that materials be permanent, it is free to adopt that language. It has not.


182. See *supra* notes 144-65 and accompanying text.


185. *Id.*
Hidden within these overly broad, indefinite guidelines is the possibility of subjectivity. For instance, the HPC could easily use scale as a way to mask the content of the sign. Indeed, scale is generally used as a guideline to prevent signs from being too large, whereas the HPC suggested Clyde's sign was too small.\(^{186}\) The only unquestionably objective guideline is the size of the HPC (nine members)\(^{187}\) and the *limits* on the square footage of signs (and even here, the guidelines read "generally").\(^{188}\) As the ordinance is written, the HPC has the power to use scale and materials as the basis for regulating signs, and for that matter art, without narrow, objective, and definite guidelines by which to do so.

The *Gilleo* court made clear that it was unwilling to limit speech in the interest of minimizing visual clutter.\(^{189}\) To be sure, the signs at issue in *Gilleo* were in protest of the Persian Gulf War,\(^{190}\) a matter overtly political, while the sign at issue in this controversy was erected in protest of a dispute over access to an alley.\(^{191}\) While Gileo's signs may have more protection because of the nature of the protest, Clyde's sign was also erected in peaceful protest and seems to have similar First Amendment protection.\(^{192}\) Additionally, since the Salisbury sign ordinances, unlike the City of Ladue's ordinance, do not completely

\(^{186}\) Minutes from HPC Meeting, *supra* note 18, at 9.


\(^{190}\) *Id.* at 45.

\(^{191}\) See discussion *supra* Section II.

\(^{192}\) Courts have recognized that the First Amendment protects "protest" speech. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559, 574 (1965) ("[O]ur constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society."); Coal. To Protest Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 69 (D. Mass. 2004) ("Protest speech falls squarely within the protection of the First Amendment's guarantees of freedom of speech and assembly.").
restrict any certain form of expression, mounting a facial challenge\textsuperscript{193} to the ordinance as was done in \textit{Gilleo} is likely to fail. Certainly, however, the Salisbury HPC’s determination that Clyde’s sign did not meet the requirements for a COA had the same effect on that particular sign as the blanket ban in \textit{Gilleo} had on the residential signs across the city. The \textit{Gilleo} Court specifically noted the importance of protecting residents’ First Amendment right to express their views through signs; the recognition of this protection is relevant to the present controversy.\textsuperscript{194} An as-applied challenge to the denial of Clyde’s COA may be successful in light of the Court’s analysis in \textit{Gilleo}, particularly in light of the Court’s view of a sign as a form of speech.

iii. Balancing historic preservation with First Amendment rights.

Restricting Clyde from displaying a sign directing passersby to his art installation infringes upon, at least to some degree, his First Amendment right to free speech. Moreover, at trial, Clyde admitted that the initial underwear display was a protest sign. His neighbor had overtaken an alley, which Clyde believed his neighbor had no right to possess. Clyde was upset with the obstructions placed in the alley and was voicing his opinion on the matter. What the \textit{protest} sign was explicitly meant to imply is up for debate, but communicating with underwear is unlikely to connote anything pleasant. It appears that Clyde’s initial display of the men’s briefs does have some level of First Amendment protection. The second “Underwear Alley” display had just as much First Amendment protection as the initial display, as did the sign announcing the display’s existence.

\textsuperscript{193} Facial challenges attack the constitutional validity of the entire piece of legislation, while as-applied challenges attack the constitutional validity as it has been applied in a particular circumstance. \textit{See, e.g.}, United States v. Salerno, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”). \textit{See also} Richard H. Fallon, Jr., \textit{As-Applied and Facial Challenges and Third-Party Standing}, 113 Harv. L. Rev. 1321 (2000) (analyzing the Supreme Court’s treatment of facial and as-applied constitutional challenges).

\textsuperscript{194} \textit{See Gilleo}, 512 U.S. at 58 (“Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views.”).
The trajectory of the case law seems to be toward applying a balancing test on a case-by-case basis when First Amendment interests conflict with municipal interests in historic preservation and aesthetics to determine whether municipal ordinances are impermissibly subjective. Clyde’s interest in exercising his First Amendment right to display an explanatory, or protest, sign is substantial. The interest of the city in preserving its history, an interest that has been recognized by the courts since *Penn Central v. New York*, while substantial in its own right, is not unlimited. Certainly Salisbury has an interest in ensuring that its 1820 Dr. Josephus Hall House remains standing, or that the 1908 Train Station does not fall into disrepair — but is the municipal interest in preventing paper signs from being erected significant enough to override Clyde’s First Amendment rights? Seizing on this point during the HPC hearing, Clyde inquired about the city not requiring others with similar paper signs to obtain certificates of appropriateness. Nothing in the record implies there was a response by the HPC.

An individual’s First Amendment right to erect a sign on his property seems paramount in this instance, and the events that followed illustrate the city’s lack of interest. After the initial denial by the HPC, Clyde considered appealing on procedural grounds. For whatever reason, Clyde decided to drop his appeal and construct a sign the HPC could not deny. The sign he erected has yet to provoke any complaints.

195. See RATHKOPF & RATHKOPF, *supra* note 48, at § 17:14. Additionally, the *Lusk* court declined to decide the issue when faced with this tension. *Lusk v. Vill. of Cold Spring*, 475 F.3d 480 (2d Cir. 2007).
201. Id.
203. Interview with Clyde (Nov. 1, 2010), *supra* note 4. The fact that Clyde dropped his appeal is significant. A First Amendment challenge to a situation like Clyde’s could involve a significant amount of time and money in order to proceed...
from the HPC despite the fact that it is the exact same 8-by-11 inch sign that had previously hung outside his door, except this time it is framed in wood.\textsuperscript{204}

In light of these cases, it still remains uncertain to what degree municipalities can restrict a person’s First Amendment rights when competing, legitimate interests in historic preservation conflict. Instituting meaningful guidelines appears sufficient to be one possible solution. The discussion that follows will analyze the value of determining what guidelines are “narrow, objective, and definite,” whether there can ever be guidelines to satisfy restricting First Amendment rights, and what must be done when municipalities and courts are faced with the challenge of balancing historic preservation interests with the competing interests of free speech and artistic expression.

VI. CONCLUSION

The Historic Preservation Guidelines for the City of Salisbury have as their central focus the preservation of the architectural integrity of historic buildings and historic districts. It is understandable that a city would have a legitimate interest in preventing the destruction of or destructive additions to the very buildings that comprise a city’s history and house historic events, historic people, and the aesthetics of a time long since past. Destroying a city’s oldest chapel to build a strip mall in the name of progress is concerning, and few could successfully oppose that argument. But denial of this innocuous sign is something different, and more concerning. This is the type of arbitrary regulation that leads to the disputes like the one at issue in this case.

The HPC seemed to decide that this sign or piece of art was not pleasing and obnoxious, and that it should be taken down lest the city suffer from a loss in tourism, or something equally concerning. Rather than try and dispute the decision in court, the decision was allowed to stand after Clyde dropped his procedural appeal. Yet Clyde did with litigation. It is often those without means, the “starving artists,” who are forced to decide whether to try and enforce their rights in court, or accept the curtailment of those rights by municipalities.

\textsuperscript{204} Interview with Clyde (Nov. 1, 2010), supra note 4.
something that most would not — he challenged the city in his own, unique way. He could have hired an attorney and challenged the removal of the sign as a suppression of his First Amendment rights by the City of Salisbury (or, although it is quite a stretch, challenged removal of the initial display by the Rowan Arts Council in its capacity as a local actor funded by the State of North Carolina). But this would have cost a lot of money, with no guarantee of success. Instead Clyde, through a peculiar and controversial system in its own right, utilized the resources of the State of North Carolina and the power of the criminal law. While Clyde's financial situation is not known to me, artists, as a group, are not known for their abundance of means, and this seems an ingenious and resourceful way to assert his rights. Unfortunately for Clyde, the outcome of the criminal trial could very well forecast the outcome of a constitutional challenge to the regulation.

As this Note has indicated, challenging the statutory scheme through which the HPC makes its decisions would be difficult, and unlikely to be undertaken by those most affected by its decisions. The sheer number of design guidelines utilized by the HPC provide ample opportunity to make a facially neutral arguments about its decisions to approve or deny any particular sign or piece of art. The numerous guidelines also provide the city with a legally defensible argument that its guidelines are sufficiently "narrow, objective, and definite." Yet the possible legal defensibility of the municipal scheme does not mean it is one that has the interests of its citizens, or even the interest of protecting its history, as its primary concern.

One possible step toward more protection of citizens' (especially citizen-artists') rights is to reconfigure the structure of the commission. The commission is an appointed body of nine members. These members do not receive compensation and must display some interest in history, architecture, or preservation. It is concerning that the commission is not required to include members who represent the art community, a community in which Salisbury prides itself, when the commission is given the power to make decisions about signs and art and their appropriateness. It is no surprise that the commission would find itself at odds with an artist who takes pride in his singularity. The make-up of the commission is important because the statute through which it operates is broad enough to encompass an incredible range of matters, and, thus, the commission is mainly limited by the matters it selects to regulate.
More importantly, relying on the artists to challenge a system wielding so much power is not a sound policy because many artists have limited resources to bring claims and there are only a limited number of artists who are affected. To prevent future infringement on First Amendment rights, the city could also tailor its ordinances relating to the HPC to make it more clear what the guidelines are designed to encompass. For example, what are “traditional materials commonly found on turn-of-the-century commercial buildings”? The examples listed – wood, stone, and metal – do not provide reasons why others are not allowed. Specifically, there is not an identifiable reason that paper is not a material “traditionally found on turn-of-the-century commercial buildings” other than the fact that it is not mentioned in the list of examples. If the list is written to be exclusive, the ordinance needs to be explicit about this point; if not, the HPC should be required to explain its reasoning without reference to criteria, like permanency, not in the language of the sign ordinance. Additionally, what exactly does it mean to be “appropriately-scaled”? The guidelines need language more meaningful so the HPC can effectively use them to make decisions that are not arbitrary. It is not too much to ask that the ordinance provide ratios or examples of what is or is not “appropriately-scaled” to guide the commission’s decision-making.

These are only a few examples of improvements that can aid in striking the appropriate balance between citizens’ rights and municipal interest in historic preservation; there are undoubtedly many more. This Note was designed to highlight an instance where these interests clash, and what can be done to provide citizens more protection when voicing their concerns while simultaneously recognizing that historic preservation is a vital part of a city’s identity. Historic Preservation Commissions perform a noble and often unpopular task, and should be given credit for their accomplishments. However, it is equally important that they be held accountable when their decisions overstep their constitutional bounds.