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Property Law—*State v. Jones*: Aesthetic Regulation—From Junkyards to Residences?

Since 1900, the population of the United States has tripled.¹ With this expansion has come an increase in the pollution, instability, and congestion of cities, as well as an increasing awareness of the need for controlling these negative byproducts of rapid growth.² Since the Supreme Court's approval of zoning in 1926,³ all states have authorized their local governments to zone⁴ in order to promote "public health, safety, morals or general welfare."⁵ Most jurisdictions, however, have prohibited the use of zoning solely for aesthetic purposes, on the grounds either that aesthetic concerns bear no relation to health, safety, morals, or general welfare⁶ or that aesthetically based ordinances are simply too subjective to enforce without caprice.⁷ Nevertheless, within the last decade, several courts have approved "aesthetic zoning."⁸ The

1. See NEWSPAPER ENTER. ASS'N, *THE WORLD ALMANAC AND BOOK OF FACTS* 1983 210 (1983). The population in 1900 was 75,994,575. By 1980 it had increased to 226,504,825.

2. 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 1.01, at 1-6 to -14 (4th ed. 1975). Among the reasons cited for early zoning ordinances were increasing density of population, multiplying forms of industry, protection of quiet neighborhoods, control of pollution, and prevention of haphazard growth that could reduce property values and the overall attractiveness of a community. *Id.*

3. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); see also *infra* notes 34-41 and accompanying text.

4. 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 2.19 (2d ed. 1976).

5. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). To be a proper exercise of the police power, the Constitution requires that the ordinance promote the public health, safety, morals, or general welfare. *Id.* See also *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971):

The police power of the State extends to all the compelling needs of the public health, safety, morals, and general welfare. Likewise, the liberty protected by the Due Process and Law of the Land Clauses of the Federal and State constitutions extends to all fundamental rights of the individual. It is the function of the courts to establish the location of the dividing line between the two . . .

Id. at 497, 176 S.E.2d at 457. See also *Mugler v. Kansas*, 123 U.S. 623 (1887):

It belongs to [the legislature] to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, . . . it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 661. For further discussion of the police power, see *infra* note 15 and text accompanying notes 38-46.

6. See, e.g., *Varney & Green v. Williams*, 155 Cal. 318, 100 P. 867 (1909); *People v. Dickenson*, 171 Cal. App. 2d 872, 343 P.2d 809, *cert. denied*, 361 U.S. 894 (1959); *Crawford v. City of Topeka*, 51 Kan. 756, 33 P. 476 (1893); *Baker v. Somerville*, 138 Neb. 466, 193 N.W. 326 (1940); *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513 (1921). See generally 3 P. ROHAN, *ZONING AND LAND USE CONTROLS* § 16.03 (1978).

7. See, e.g., *Mayor & Council v. Turk*, 14 Del. Ch. 392, 129 A. 512 (1925); *State Bank & Trust Co. v. Village of Willmette*, 358 Ill. 311, 193 N.E. 131 (1934); *Forbes v. Hubbard*, 348 Ill. 166, 180 N.E. 767 (1932). Cf. *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 498, 162 N.W.2d 206, 212 (1968). See generally Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1971).

8. *Bufford, Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125 (1980). Since 1972 eleven courts have joined the grow-

North Carolina Supreme Court, which had long prohibited aesthetic zoning, recently joined this developing trend in *State v. Jones*.⁹ While this decision will help municipalities preserve a pleasant environment for the public, there is a danger that North Carolina courts will extend the approval of aesthetic zoning to situations involving mere differences in taste. Although *Jones* may satisfactorily cover regulation of billboards, junkyards, and other eyesores, it may not be an appropriate precedent for regulation of architecture, particularly residential architecture.

State v. Jones arose from the arrest of Mack Jones for violating a Buncombe County ordinance that restricted the location of junkyards within unincorporated areas of the county.¹⁰ The ordinance required junkyard owners to erect an opaque fence¹¹ six feet high to surround any junkyard within a "residential area."¹² Jones filed a motion to quash the arrest warrant on grounds that the ordinance was unconstitutional,¹³ arguing that because the ordinance was based solely on aesthetic concerns, it lacked sufficient relation to the public health, safety, or general welfare.¹⁴ Therefore, argued Jones, the county lacked authority under the police power¹⁵ to zone for this purpose, and had

ing body of authority permitting zoning based solely on aesthetic considerations. See *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), modified 453 U.S. 490 (1981); *Veterans of Foreign Wars v. City of Steamboat Springs*, 195 Colo. 44, 575 P.2d 835, appeal dismissed, 439 U.S. 809 (1978); *City of Lake Wales v. Lamar Advertising Ass'n*, 414 So. 2d 1030 (Fla. 1982); *City of Champaign v. Kroger Co.*, 88 Ill. App. 3d 498, 410 N.E.2d 661 (1980); *John Donnelly & Sons v. Outdoor Advertising Bd.*, 369 Mass. 206, 339 N.E.2d 709 (1975); *National Used Cars v. City of Kalamazoo*, 61 Mich. App. 520, 233 N.W.2d 64 (1975); *Mississippi State Highway Comm'n v. Roberts Enters.*, 305 So. 2d 637 (Miss. 1974); *State v. Bernhard*, 173 Mont. 464, 568 P.2d 136 (1977); *Dockwatch Hollow Quarry Pit v. Township of Warren*, 142 N.J. Super. 103, 361 A.2d 12 (App. Div. 1976), *aff'd*, 74 N.J. 312, 377 A.2d 1201 (1977); *State v. Smith*, 618 S.W.2d 474 (Tenn. 1981); *Buhler v. Stone*, 533 P.2d 292 (Utah 1975). For the positions of other jurisdictions on aesthetic zoning, see *infra* note 23.

9. 305 N.C. 520, 290 S.E.2d 675 (1982). In several decisions following its holding in *State v. Brown*, 250 N.C. 54, 108 S.E.2d 74 (1959), the supreme court had either reaffirmed its prohibition of aesthetic zoning, or simply declined to address the question. As recently as 1979, the court had declined "to endorse such a broad concept of the scope of the police power." *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 216, 258 S.E.2d 444, 450 (1979). For a discussion of the history of North Carolina case law in this area, see *infra* text accompanying notes 55-78.

10. 305 N.C. at 521, 290 S.E.2d at 676. The ordinance prohibited junkyards near public roads or schools, or within residential areas.

11. *Id.* at 522, 290 S.E.2d at 676. The ordinance provided: "said junkyard or automobile graveyard shall be entirely surrounded by a fence, or by a wire fence and substantial vegetation of sufficient height and density as to prevent as nearly as is practical any contents of said junkyard from being visible from the public road or residence." *Id.* (quoting Buncombe County Ordinance No. 16401).

12. *Id.* at 521-22, 290 S.E.2d at 676 (quoting Buncombe County Ordinance No. 16401). The ordinance defined a "residential area" as "twenty-five (25) or more housing units within a geographical area comprised of a one-fourth (1/4) mile wide strip contiguous and parallel to the external boundary lines of the tract of real property on which said automobile graveyard or junkyard is located"

13. *Id.* at 521, 290 S.E.2d at 676.

14. See *id.* at 523, 290 S.E.2d at 676. Jones also claimed that the ordinance was unconstitutionally vague. *Id.* The supreme court rejected this argument, concluding that "when read contextually [the ordinance] apprises persons of ordinary intelligence, who desire to know the law and abide by it, what is required by it." *Id.* at 531, 290 S.E.2d at 681.

15. "The state possesses the police power in its capacity as sovereign, and in the exercise thereof the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, . . . safety and general welfare of society." *State v. Warren*, 252 N.C. 690, 694,

violated his rights under the "law of the land" clause of the North Carolina Constitution¹⁶ and due process clause of the fourteenth amendment by denying him his desired use of the land.¹⁷

The superior court agreed with this argument and accordingly granted the motion.¹⁸ The court of appeals reversed and remanded.¹⁹ In so doing, the court of appeals recognized that the ordinance was based on aesthetic reasons alone, and that the supreme court had consistently prohibited this type of zoning.²⁰ Nevertheless, the court determined that dicta expressed in several supreme court cases had indicated a trend toward permitting aesthetic zoning, and that cases in which the court had refused to uphold such zoning were no longer controlling precedent.²¹

Indeed, the supreme court had become more tolerant of aesthetic zoning, for it affirmed the court of appeals.²² In an opinion written by Chief Justice Branch, the court observed that the majority of jurisdictions that had addressed the issue now permit aesthetic zoning,²³ and that four courts had re-

114 S.E.2d 660, 664 (1960). This power may be delegated to municipalities, but since zoning is an exercise of this delegated police power, they too must protect or promote the public health, safety, morals, or general welfare. See *Southern Ry. v. City of Winston-Salem*, 275 N.C. 465, 168 S.E.2d 396 (1969); *infra* notes 38-53 and accompanying text. See generally 1 A. RATHKOPF, *supra* note 2, §§ 2.02-.08, at 2-7 to -14. Enforcement of an ordinance that lacks sufficient relation to these public interests constitutes a taking for which compensation must be paid. See *State v. Vestal*, 281 N.C. 517, 189 S.E.2d 152 (1972).

16. N.C. CONST. art. 1, § 19 ("No person shall be taken, imprisoned, or dis seized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."). The term "law of the land" is synonymous with "due process of law" as used in the fourteenth amendment to the United States Constitution. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976). A United States Supreme Court decision construing the due process clause, however, does not control the North Carolina Supreme Court's interpretation of the law of the land clause. *Bulova Watch Co. v. Brand Distrib., Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

17. *State v. Jones*, 305 N.C. at 523, 290 S.E.2d at 677. See U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law . . .").

18. 305 N.C. at 521, 290 S.E.2d at 676.

19. *State v. Jones*, 53 N.C. App. 466, 281 S.E.2d 91 (1981), *aff'd*, 305 N.C. 520, 290 S.E.2d 675 (1982).

20. *Id.* at 469-70, 281 S.E.2d at 93-94.

21. *Id.* For a discussion of prior North Carolina case law, see *infra* text accompanying notes 55-78.

22. 305 N.C. at 531, 290 S.E.2d at 681-82.

23. *Id.* at 526-27, 290 S.E.2d at 679. Including North Carolina, nineteen jurisdictions now permit regulation based solely on aesthetics, seven prohibit it, sixteen have not answered the question definitively, and nine have reported no cases on aesthetic regulation.

In addition to those listed *supra* note 8, these jurisdictions permit zoning based solely on aesthetics: Delaware (*Franklin Builders v. Sartin*, 58 Del. 173, 207 A.2d 12 (Del. Super. Ct. 1964)); District of Columbia (*Berman v. Parker*, 348 U.S. 26 (1954)); Hawaii (*State v. Diamond Motors*, 50 Hawaii 33, 429 P.2d 825 (1967)); New York (*Rochester Tel. Corp. v. Village of Fairport*, 84 A.D.2d 455, 446 N.Y.S.2d 823 (1982)); North Carolina; Ohio (*State v. Buckley*, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968), *cert. denied*, 395 U.S. 163 (1969)); Oregon (*Perkins v. Marion County*, 252 Or. 313, 448 P.2d 374 (1968)); and Wisconsin (*Racine County v. Flourde*, 38 Wis. 2d 403, 157 N.W.2d 591 (1968)).

The following jurisdictions prohibit zoning based solely on aesthetics: Maryland (*Montgomery County v. Citizens Bldg. & Loan Ass'n*, 20 Md. App. 484, 316 A.2d 322 (1974)); Nebraska (*Baker v. Somerville*, 138 Neb. 466, 293 N.W. 326 (1940)); Pennsylvania (*White Advertising*

cently upheld regulation of junkyards based solely on aesthetics.²⁴ In justifying their approval of aesthetic zoning, these courts had cited modern societal concerns for environmental protection, control of pollution, and elimination of discordant or unsightly surroundings.²⁵ Although the North Carolina Supreme Court had formerly limited exercise of the police power to measures promoting the health, safety, morals, or general welfare of the public, it agreed that these modern concerns "may constitute a valid basis for the exercise of police power."²⁶

Concerned that the decision should not lead to arbitrary and unreasonable regulation, however, the court limited the power to zone solely for aesthetic reasons to situations in which the gain to the public outweighs the diminution in value of the individual's property.²⁷ Private concerns to be considered include "whether the regulation results in confiscation of the most substantial part of the value of the property or deprives the property owner of the property's reasonable use."²⁸ To be balanced against these private concerns are:

the purpose of the regulation and the manner in achieving a permitted purpose, [as well as possible] corollary benefits to the general community such as protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and promotion of the comfort, happiness, and emotional stability of area residents.²⁹

The court also warned local governments not to delegate responsibility for promulgating aesthetic zoning ordinances to organizations the legislature

Metro v. Zoning Hearing Bd., — Pa. Commw. —, 453 A.2d 29 (1982)); Rhode Island (City of Providence v. Stephens, 47 R.I. 387, 133 A. 614 (1926)); Texas (City of Houston v. Johnny Frank's Auto Parts Co., 480 S.W.2d 774 (Tex. Civ. App. 1972)); Vermont (Vermont Salvage Corp. v. Village of St. Johnsbury, 113 Vt. 341, 34 A.2d 188 (1943)); and Virginia (Board of Supervisors v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975)).

The following jurisdictions have not answered the question definitively: Arkansas, Connecticut, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Missouri, New Hampshire, New Mexico, North Dakota, Washington, and West Virginia. For a discussion of the state of the law in these jurisdictions, see Bufford, *supra* note 8, at 151-62. This group also includes Georgia (Rockdale County v. Mitchell's Used Auto Parts, 243 Ga. 465, 254 S.E.2d 846 (1979)) and Maine (Stewart v. Inhabitants of Durham, 451 A.2d 308 (Me. 1982) (holding that aesthetic considerations, fear of depreciation in the value of neighboring properties, and concern over an adverse impact on the town's tax base are legitimate bases for exercise of the zoning power, but not deciding whether aesthetics alone would be a sufficient basis)).

Alabama, Alaska, Arizona, Idaho, Nevada, Oklahoma, South Carolina, South Dakota, and Wyoming have reported no cases on aesthetic regulation. See Bufford, *supra* note 8, at 130-31.

24. 305 N.C. at 528-30, 290 S.E.2d at 679-80.

25. *Id.*

26. *Id.* at 530-31, 290 S.E.2d at 681. The court did not specify whether aesthetic zoning promotes the general welfare, or whether it was expanding the police power beyond the traditional factors of public health, safety, morals, and general welfare to include promotion of aesthetic values. Its mention of the traditional factors as possible corollary benefits of aesthetic zoning, however, suggests the latter. See *infra* text accompanying note 29.

27. 305 N.C. at 530-31, 290 S.E.2d at 681. For a criticism of this balancing test, see *infra* notes 94-101 and accompanying text.

28. 305 N.C. at 530, 290 S.E.2d at 681.

29. *Id.*

has not authorized to exercise the police power.³⁰ This warning also apparently stemmed from the court's desire that local governments avoid arbitrariness in aesthetic zoning.

Thus, if an organization that is authorized to exercise the police power promulgates a zoning ordinance that promotes the public interest, without causing greater diminution in the individual's property value, the court will uphold its constitutionality. To understand the impact of this decision, one must consider the relatively short history of zoning.

As cities grew in the late 1800s and early 1900s, apartment houses, factories, garages, stables, and other discordant structures were built in close proximity to residential areas regardless of their harm to neighborhoods and communities, or to the public safety, morals, welfare, or values.³¹ Only piecemeal ordinances and individual nuisance actions regulated this development.³² As growth continued and the problem became apparent, cities began to realize the need for more efficacious means of control. In 1916, New York City adopted the first comprehensive zoning ordinance in the United States.³³ Ten years later, in *Village of Euclid v. Ambler Realty Co.*,³⁴ the Supreme Court authorized comprehensive zoning in general. In *Village of Euclid*, a property owner had sued for an injunction restraining enforcement of a recently adopted comprehensive zoning ordinance.³⁵ Plaintiff argued that enforcement of the ordinance would reduce the value of his property, depriving him of liberty and property in violation of the due process and equal protection clauses of the fourteenth amendment.³⁶ The district court found the ordinance unconstitutional and enjoined its enforcement, but the Supreme Court reversed, ruling that the ordinance promoted the public health, safety, and general welfare.³⁷

The Court recognized the need for limitations, however. Because zoning restricts the use of land, and often lowers its value, the Court required the state

30. *Id.* at 531, 290 S.E.2d at 681.

31. See E. BASSETT, ZONING 23-26 (1936); 1 A. RATHKOPF, *supra* note 2, § 1.01, at 1-6 to -8.

32. 1 R. ANDERSON, *supra* note 4, § 3.07; P. GREEN, ZONING IN NORTH CAROLINA 14-19 (1952). In order to recover under a nuisance theory in North Carolina, a party must show a substantial nontrespassory invasion of his interest in the private use and enjoyment of land. One is liable for an intentional invasion when his conduct is unreasonable under the circumstances. One is liable for an unintentional invasion when his conduct is negligent, reckless, or ultrahazardous. *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 77 S.E.2d 682 (1953).

33. 1 R. ANDERSON, *supra* note 4, § 3.07. The New York ordinance was "comprehensive" in that it was not intended to apply to particular landowners or parts of the city, but instead was adopted pursuant to a plan for the entire city. For a description of this plan, see S. MAKIELSKI, THE POLITICS OF ZONING: THE NEW YORK EXPERIENCE (1966). Today, most jurisdictions permit zoning ordinances only when adopted pursuant to a comprehensive plan. See, e.g., N.C. GEN. STAT. § 160A-383 (1982). See generally 1 R. ANDERSON, *supra* note 4, §§ 5.02-.07; 1 P. ROHAN, *supra* note 6, § 1.02[3]. Upon a finding that an ordinance was not passed pursuant to a comprehensive plan, courts generally will rule it invalid as arbitrary, discriminatory "spot zoning." See, e.g., *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972). See also 1 R. ANDERSON, *supra* note 4, § 5.08.

34. 272 U.S. 365 (1926).

35. *Id.* at 379-84.

36. *Id.* at 384.

37. *Id.* at 395.

to demonstrate some compelling interest to overcome an individual's rights under the fourteenth amendment.³⁸ In effect, the Court pitted the state's rights under the police power against the individual's right to use and enjoy his property.³⁹ If an ordinance's provisions "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," it will be declared unconstitutional.⁴⁰ Thus, *Village of Euclid* necessitates case-by-case analysis of specific applications of a particular ordinance to ensure that it represents a legitimate exercise of the police power.⁴¹

This declaration of constitutional validity prompted many state courts to approve zoning in principle, at least in those jurisdictions where legislatures had authorized municipalities to zone.⁴² Municipalities in many other jurisdictions, however, remained powerless to zone. Because the police power rests initially with the state, municipalities could not enact zoning ordinances absent delegation from the state.⁴³ Although some states quickly followed New York's example in authorizing their municipalities to zone, authorization became widespread only after the *Village of Euclid* decision.⁴⁴ Authorization came in the form of zoning enabling acts, frequently patterned after the New York act and a standard act prepared by the Department of Commerce in 1926.⁴⁵ The movement spread quickly; by the mid-Thirties virtually every state had passed such an act.⁴⁶

While authorizing municipalities to zone, these zoning enabling acts also limited the scope of the municipalities' power.⁴⁷ Since the power to zone is merely delegated, the limitations of an enabling act are effectively the limitations of the municipality.⁴⁸ Thus, in determining the validity of a zoning ordinance, courts must consider not only the scope of the police power, but also

38. *Id.* at 384-88.

39. *See id.* at 387.

40. *Id.* at 395.

41. *See id.* The Court stated:

It is true that, when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.

Id. In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Supreme Court illustrated this case-by-case analysis, holding a particular application of an ordinance unconstitutional. After *Nectow*, it was primarily the state courts that assumed the case-by-case analysis. 1 R. ANDERSON, *supra* note 4, § 3.11.

42. *See* P. GREEN, *supra* note 32, at 53.

43. *See* *State v. Joyner*, 286 N.C. 366, 369, 211 S.E.2d 320, 322 (1975); *Allgood v. Town of Tarboro*, 281 N.C. 430, 437, 189 S.E.2d 255, 260 (1972). *See generally* 1 A. RATHKOPF, *supra* note 2, § 2.01.

44. P. GREEN, *supra* note 32, at 52-53.

45. *Id.* at 52. *See also* 1 R. ANDERSON, *supra* note 4, §§ 2.21-29 (discussing the components of the Standard Act and its influence).

46. P. GREEN, *supra* note 32, at 52.

47. *See* *Harrington & Co. v. Renner*, 236 N.C. 321, 72 S.E.2d 838 (1952); 1 A. RATHKOPF, *supra* note 2, § 2.01.

48. *See, e.g.,* *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971); *Dale v. City of Morganton*, 270 N.C. 567, 155 S.E.2d 136 (1967).

the precise terms of the jurisdiction's zoning enabling act.⁴⁹ Typically, an enabling act includes a statement of purpose; a specification of areas and structures subject to the zoning power; an authorization to create districts to be regulated uniformly; and guidelines for adoption, amendment, and repeal of ordinances and for the establishment of a board of adjustment.⁵⁰ Often the act incorporates the limitation on the police power in its statement of purposes for which the zoning power may be exercised.⁵¹ In this way, compliance with the scope of the enabling act usually indicates compliance with the scope of the police power, but a municipality must exercise care to ensure compliance with both.

Originally promulgated in 1923 as one of the earliest enabling acts, the North Carolina Zoning Enabling Act includes many of the provisions mentioned above.⁵² Also included are a number of references to the health, safety, morals, and general welfare of the public, with provisions limiting the use of zoning to measures designed to promote these interests.⁵³ Soon after promulgation of the enabling act, the North Carolina Supreme Court readily approved zoning in principle,⁵⁴ but difficult questions arose when the court began considering exactly what type of zoning the enabling act permitted. One such question was whether the provisions of the act authorized zoning solely for aesthetic purposes. More specifically, the question was reduced to whether protection of an aesthetically pleasing environment through zoning promotes the health, safety, morals, or general welfare of the community.

The supreme court considered this question twice within fifteen years af-

49. See, e.g., *Keiger v. Winston-Salem Bd. of Adjustment*, 281 N.C. 715, 190 S.E.2d 175 (1972); *Heaton v. City of Charlotte*, 277 N.C. 506, 178 S.E.2d 352 (1971); *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968).

50. See 1 R. ANDERSON, *supra* note 4, §§ 2.21-29.

51. *Id.* Both the original New York enabling act and the Standard Zoning Enabling Act included reference to promotion of the public health, safety, morals, or general welfare. Their influence caused most states to include similar language in their acts. See *id.* §§ 2.21-29, 3.07; E. BASSET, *ZONING* 133 (1936).

52. See Act of Mar. 5, 1923, ch. 250, 1923 PUB. LAWS OF N.C. 572-76 (codified at N.C. GEN. STAT. §§ 160A-381 to -389 (1982)). Aside from certain changes in procedure and in the powers and composition of the Board of Adjustment, and in the recently conferred right to create historic districts, N.C. GEN. STAT. §§ 160A-395 to -400 (1982), the 1923 zoning enabling act remains relatively unchanged. The legislature has also authorized counties to zone. N.C. GEN. STAT. §§ 153A-340 to -348 (1978 & Cum. Supp. 1981).

53. See N.C. GEN. STAT. § 160A-381 (1982). G.S. 160A-383 states in part that "zoning regulations shall be . . . designed to lessen congestion in the streets, to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land." In the general grant of power to zone, G.S. 160A-381 provides:

For the purpose of promoting health, safety, morals, or the general welfare of the community, any city is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purpose.

54. *Elizabeth City v. Aydlett*, 201 N.C. 602, 161 S.E. 78 (1931). The court had appeared willing to assume the constitutionality of zoning five years earlier in its first zoning case. See *Harden v. City of Raleigh*, 192 N.C. 395, 135 S.E. 151 (1926) (apparently approving several provisions of the enabling act, but the constitutionality of zoning was not raised on appeal).

ter passage of the enabling act. In *MacRae v. City of Fayetteville* the court asserted that "the law does not allow aesthetic tastes to control private property under the guise of the police power,"⁵⁵ and struck down an ordinance prohibiting operation of gas stations near dwelling units.⁵⁶ Ten years later, however, in *In re Appeal of Parker*, the court upheld a setback ordinance even though the ordinance primarily promoted aesthetic concerns.⁵⁷ Parker had constructed a wall in excess of the height restrictions on walls and fences located in his zoning district. After the city building inspector ordered him to remove the wall, Parker petitioned the court to block the order on grounds that as applied to his wall, the ordinance lacked substantial relation to the public health, safety, or general welfare.⁵⁸ Although concluding that structures close to the street might obstruct drivers' views and impede the work of firemen, the court also stated that "while aesthetic considerations are by no means controlling, it is not inappropriate to give some weight to them in determining the reasonableness of the law under consideration."⁵⁹

While this opinion suggested a willingness on the part of the North Carolina court to consider aesthetic purposes in determining the validity of an ordinance, in *Berman v. Parker*⁶⁰ the United States Supreme Court went further. Though the case involved an eminent domain proceeding, in dictum the Court discussed the police power:

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power, and do not delimit it. . . .

. . . The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as clean, well-balanced as well as carefully patrolled.⁶¹

55. 198 N.C. 51, 54, 150 S.E.2d 810, 812 (1929).

56. *Id.* at 55, 150 S.E. at 812. The court also established itself as the final authority on the validity of an ordinance or statute, stating:

A determination by the Legislature [as] to what is a proper exercise of the police power is not final and conclusive, however, but is subject to the supervision of the courts. For, as has already been stated, the mere assertion by the Legislature that a statute relates to the public health, safety and welfare, does not of itself bring such statute within the police power of the state.

Id. at 56, 150 S.E. at 813 (quoting 6 RULING CASE LAW *Constitutional Law* § 229, at 241-42 (M. McKinney & B. Rich eds. 1915)).

57. 214 N.C. 51, 197 S.E. 706, *appeal dismissed sub nom.* *Parker v. City of Greensboro*, 305 U.S. 568 (1938). Setback ordinances restrict construction of buildings to areas beyond a specified distance from the street. The ordinance in *Parker* provided that "no part of any building or structure shall be within 25 feet of any street line in any residence district." *Id.* at 52, 197 S.E. at 707 (quoting ordinance).

58. *Id.* at 54, 197 S.E. at 709.

59. *Id.* at 57, 197 S.E. at 710.

60. 348 U.S. 26 (1954).

61. *Id.* at 32-33 (citations omitted). Any doubt as to whether *Berman* should be limited to eminent domain cases ended when the Supreme Court cited it in two zoning cases. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (upholding the constitutionality of an ordinance

This language prompted some jurisdictions to uphold aesthetic zoning, but North Carolina was not among them.⁶² In *State v. Brown*,⁶³ decided five years after *Berman*, the supreme court declared unconstitutional a state statute requiring fences around junkyards operated within 150 yards of a paved highway. The court conceded that the statute might remotely protect the public health, safety, morals, or general welfare, but found no "real or substantial relation" to these interests.⁶⁴ According to the court, the legislature's actual intent was to provide attractive highways, a purely aesthetic concern insufficient to support exercise of the police power.⁶⁵

After reaffirming the *Brown* holding one year later in *Little Pep Delmonico Restaurant v. City of Charlotte*,⁶⁶ the court displayed a slowly increasing acceptance of aesthetic zoning during the ensuing twenty years. For example, in *Horton v. Gulledge* the court quoted from *Berman* and termed its reasoning "persuasive," but asserted that *Berman* did not control North Carolina courts' interpretations of the "law of the land" clause in the North Carolina Constitution.⁶⁷ Two years later, in *State v. Vestal*, the State argued that an ordinance requiring erection of a fence around a junkyard promoted the public safety.⁶⁸ Finding no "reasonable basis for supposing that the restriction imposed will promote such safety," the court declared the restriction unconstitutional as a deprivation of property without due process of law.⁶⁹ In dictum, however, the court acknowledged the growing number of jurisdictions that permitted purely aesthetic zoning, but found it unnecessary to determine the issue since the State had not raised it.⁷⁰

During the next ten years, as the number of courts permitting aesthetic zoning continued to increase,⁷¹ the supreme court was not asked to reconsider its position, though indications of a potential change in position continued. In *A-S-P Associates v. City of Raleigh* the court upheld an ordinance regulating the external appearance of houses within an historical district in Raleigh.⁷² The court reasoned that this regulation differed from purely aesthetic regulation in that it promoted the general welfare by promoting economic and social stability, architectural creativity, and tourism.⁷³ The court in dicta reiterated

prohibiting the erection and display of off-premises billboards); *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974).

62. See 3 P. ROHAN, *supra* note 6, § 16.05.

63. 250 N.C. 54, 60, 108 S.E.2d 74, 78 (1959).

64. *Id.* at 59, 108 S.E.2d at 77-78.

65. *Id.*, 108 S.E.2d at 77.

66. 252 N.C. 324, 113 S.E.2d 422 (1960) (holding unconstitutional an ordinance prohibiting business signs over sidewalks in designated areas of the city).

67. 277 N.C. 353, 359, 177 S.E.2d 885, 889 (1970).

68. 281 N.C. 517, 189 S.E.2d 152 (1972).

69. *Id.* at 522-23, 189 S.E.2d at 156-57.

70. *Id.* at 524, 189 S.E.2d at 157. The dictum was particularly strong. After stating that it was expressing no opinion on the subject, the court cited cases from eight jurisdictions that permitted zoning for aesthetic reasons alone.

71. See *supra* notes 8 & 23.

72. 298 N.C. 207, 258 S.E.2d 444 (1979).

73. *Id.* at 216-17, 257 S.E.2d at 450. This writer questions the degree to which historical

its acknowledgement of the growing number of jurisdictions permitting aesthetic zoning, but declared that it was "not prepared to endorse such a broad concept of the scope of the police power."⁷⁴

The court of appeals was prepared to endorse this concept, however. In *Cumberland County v. Eastern Federal Corp.* the court noted *Berman* and the string of supportive North Carolina dicta, and upheld a county ordinance restricting the location of billboards.⁷⁵ It refused to authorize aesthetic zoning in all cases, but held that the "ordinance in this case could lawfully be based upon aesthetic considerations."⁷⁶ Apparently unwilling to break completely from the traditional rule, the court accepted as an additional justification that the ordinance protected property values and the public safety.⁷⁷ Thus, not until deciding *State v. Jones*⁷⁸ did the court of appeals gather the courage to uphold aesthetic zoning without mentioning a relation to the traditional notion of the public health, safety, or general welfare.

Much of the aversion to aesthetic zoning had reflected concern over its "subjective" nature.⁷⁹ Courts rejecting aesthetic zoning essentially assumed that an ordinance which promoted aesthetic concerns necessarily favored the tastes of one individual or group over those of another, resulting in capricious regulation.⁸⁰ As the population continued to grow, however, many structures and practices developed that the public increasingly condemned as "eyesores." Junkyards and billboards might legitimately fall into this category. The expanding interest in preservation and environmental legislation in recent years indicates a growing concern that the environment remain as attractive as practicable.⁸¹ Because of the general agreement on their unattractiveness, and the relative specificity with which ordinances regulating them may be drafted, it appears particularly appropriate to subject billboards, junkyards, and other structures commonly recognized as eyesores to the exercise of the police

district zoning promotes social stability and architectural creativity, but finds it significant that the court mentioned promotion of architectural creativity as a legitimate goal of zoning.

74. *Id.* at 216, 258 S.E.2d at 450.

75. 48 N.C. App. 518, 269 S.E.2d 672, *review denied*, 301 N.C. 527, 273 S.E.2d 527 (1980).

76. *Id.* at 524, 269 S.E.2d at 676.

77. *Id.*, 269 S.E.2d at 677. In concluding that the ordinance promoted public safety, the court cited the "common knowledge that uncontrolled display of billboards and signs can distract travelling motorists and thereby create hazards to vehicular traffic and to pedestrians." *Id.* Such reasoning has been used by many courts to uphold aesthetically based ordinances on the traditional grounds of promoting the public health, safety, morals, or general welfare. *See generally*, 3 P. ROHAN, *supra* note 6, § 16.04[2] & nn.14-18.

78. 53 N.C. App. 466, 281 S.E.2d 91 (1981), *aff'd*, 305 N.C. 520, 290 S.E.2d 675 (1982).

79. *See* 1 A. RATHKOPF, *supra* note 2, § 14.01, at 14-5 to -11.

80. *Id.*

81. *See, e.g.*, 23 U.S.C. § 138 (1976); 49 U.S.C. § 1653(f) (1976). The intention of Congress in passing these acts was to maintain natural scenery near the nation's highways. *See also* N.C. GEN. STAT. § 160A-451 to -455 (1982), which authorizes municipalities and counties to create Community Appearance Commissions responsible for plans and programs that would "improve the visual quality and aesthetic characteristics of the municipality or county." *Id.* § 160A-452. *See also* *Stone v. City of Maitland*, 446 F.2d 83, 89 (5th Cir. 1971) ("[I]n an age in which the preservation of the quality of our environment has become a national goal, concern for aesthetics seems even more urgent.").

power.⁸² As applied to these problems, *State v. Jones* is a welcome development.

As applied to structures not so commonly condemned, *State v. Jones* may cause promulgation of ordinances that unreasonably infringe upon the traditional right of a property owner to use his land as he desires. Most notable is the potential establishment of architectural standards for residential housing. Municipalities in other jurisdictions have established architectural review boards to ensure that new housing either conforms to specifications established by the city government, or does not differ significantly from the existing architecture in the area.⁸³ When not designed to assist an historical district zoning plan, these architectural controls promote primarily aesthetic concerns, and the choice becomes one solely between competing tastes.⁸⁴

An Ohio Court of Appeals decision, *Reid v. Architectural Board of Review*,⁸⁵ illustrates the unreasonable restraints on expression of personal taste that may arise from enforcement of such ordinances. In *Reid* plaintiff had sought permission to build a modern one-story house surrounded by trees and a wall in a neighborhood of "dignified, stately and conventional structures, two and one-half stories high."⁸⁶ Although Reid undoubtedly considered the design attractive, the board denied approval because it "[did] not conform to the character of the houses in the area."⁸⁷ As one board member explained: "Our issue was the fact that it was a single story house in a multi-story neigh-

82. See *United Advertising v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964) (noting the "widely held" opinion that billboards are incongruous with the appearance of other properties). Certainly, the extent of agreement on what constitutes a billboard or junkyard exceeds that on what constitutes an architectural style conforming with others in the neighborhood. Because of this agreement, municipalities can draft ordinances regulating billboards and junkyards with more specificity. See generally Note, *Beyond the Eye of the Beholder*, 71 MICH. L. REV. 1438 (1973) and cases and studies cited therein.

83. See, e.g., *Pacesetter Homes v. Village of Olympia Fields*, 104 Ill. App. 2d 218, 219, 244 N.E.2d 369, 370 (1968); *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 306 (Mo. 1970); *Board of Supervisors v. Rowe*, 216 Va. 128, 145, 216 S.E.2d 199, 213 (1975); R. BABCOCK, *BILLBOARDS, GLASS HOUSES AND THE LAW* 6 (1977) (citing Dade County, Fla.; Danville, Ill.; and Riverside County, Cal. as examples of communities that have passed ordinances requiring architectural styles to conform with others in the vicinity).

84. See Kolis, *Architural Expression: Police Power and the First Amendment*, 16 URB. L. ANN. 273, 287 n.55 (1979). Some authorities cite protection of property values as another basis for architectural controls. E.g., *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 310 (Mo. 1970); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 270-71, 69 N.W.2d 217, 222 (1955); Turnbull, *Aesthetic Zoning*, 7 WAKE FOREST L. REV. 230, 243-53 (1971). This may be a legitimate argument in controlling grossly discordant architecture. But see *infra* note 98 and accompanying text.

85. 119 Ohio App. 67, 192 N.E.2d 74 (1963). See also *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970) (approving city's creation of architectural board with power to deny building permits to construct houses the board believes lack conformity with the design of surrounding structures); *Oregon City v. Hartke*, 24 Or. 35, 46, 400 P.2d 255, 261 (1965) ("[T]here is a growing judicial recognition of the power of a city to impose zoning restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings."); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (upholding a village zoning ordinance that prohibited the issuance of a building permit pending approval of the exterior architecture of a proposed building by a building board that determined whether the proposed building could diminish the value of surrounding properties), *cert. denied*, 350 U.S. 841 (1955).

86. 119 Ohio App. at 70, 192 N.E.2d at 77.

87. *Id.* at 68, 192 N.E.2d at 75 (quoting the board of review's order).

borhood We don't like the appearance of that house in this neighborhood."⁸⁸ The court upheld the board's decision.⁸⁹

In a society in which an increasing number of people are unable to own a home, concern for conformity should not so limit those who can. One of the fruits of owning property should be the opportunity to use it as the owner pleases, so long as his or her use does not harm others.⁹⁰ In *Reid* the only apparent harm to others was that the planned house offended their idea of aesthetic attractiveness—conformity. The court permitted this desire for conformity to override a property owner's desire to express her tastes by building a home she considered attractive.

Some commentators would limit this practice by extending first amendment rights to architectural expression.⁹¹ While such an inquiry is beyond the scope of this note, language from cases in which the Supreme Court granted first amendment rights to artistic and other nonverbal expression suggests a legitimate possibility of eventual protection of architectural expression as well.⁹² Regardless of possible first amendment protection, however, courts should give some weight to property owners' interests in building homes they find aesthetically pleasing.

Nevertheless, if North Carolina's courts extend *State v. Jones* to regulation of residential architecture, property owners interested in building homes will receive no more protection than Reid received. One reason is the general rule the court laid down—zoning based solely on aesthetic considerations is a valid exercise of police power.⁹³ Moreover, courts applying *Jones* might neglect to apply the balancing test and simply cite the general rule. In *R. O. Givens, Inc. v. Town of Nags Head*⁹⁴ the court of appeals appears to have done just that. In *Givens*, the court approved an ordinance banning off-premises commercial signs, citing *Jones* for the proposition that aesthetics "constitute a legitimate consideration in the exercise of the police power."⁹⁵ The court also

88. *Id.* at 73-74, 192 N.E.2d at 79 (Corrigan, J. dissenting) (quoting from the trial record).

89. *Id.* at 72, 192 N.E.2d at 78.

90. A maxim of property law that describes the courts' traditional approach to the rights of a property owner is *Sic utere ut alienum non laedas*: "Use your own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1238 (rev. 5th ed. 1979). At one time this maxim defined the extent of a property owner's duty to others in the use of his property. While zoning has restricted the application of this principle, it should not be disregarded entirely.

91. See, e.g., Kolis, *supra* note 84; Williams, *Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977); Note, *Architecture, Aesthetic Zoning and the First Amendment*, 28 STAN. L. REV. 179 (1975).

92. See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) (in determining whether allegedly obscene material deserves first amendment protection the court established the test of whether the object lacks "serious literary, artistic, political or scientific value"). Cf. *Poe v. Ullman*, 367 U.S. 497, 514 (1961) (Douglas, J., dissenting) ("The actor on stage or screen, the artist whose creation is in oil or clay or marble . . . are beneficiaries of freedom of expression."). See generally, Note, *supra* note 91, at 182-88, which suggests other bases for extension of first amendment protection to architecture—e.g., rights to self-expression and symbolic expression. The author also discusses whether architecture is art, concluding that it has long been recognized as such. *Id.* at 182 & nn.11-14.

93. 305 N.C. at 530, 290 S.E.2d at 681.

94. 58 N.C. App. 697, 294 S.E.2d 388 (1982).

95. *Id.* at 701, 294 S.E.2d at 391.

stated: "We have examined the zoning scheme and stated objectives of the town and we find the off-premises advertising restriction to be within the police power of the municipal government."⁹⁶ In limiting its examination to the zoning scheme and stated objectives of the town, the court applied only one side of the balancing test, circumventing the supreme court's desire for a limitation upon its general rule.

Even if North Carolina courts apply the balancing test, its limiting effect is insufficient to avoid a result like that reached in *Reid*. Under the *Jones* test, the property owner must show that enforcement of the ordinance would result in a diminution of his property's value that outweighs all the subjective benefits to the public—i.e., "promotion of tourism, preservation of the character and integrity of the community, promotion of the comfort, happiness, and emotional stability of area residents."⁹⁷ In barring a property owner from building a house that does not conform to others in the neighborhood, the ordinance has not caused a diminution in the property's value. The subjective value has been reduced, but the property owner is still free to build a conforming house that would not reduce his property's value.

Of course, architecture can be so discordant or offensive that it does lower the value of nearby property. Municipalities should be permitted to regulate such architecture in their exercise of the police power. Often, however, the "nonconforming" architecture does not actually lower surrounding property values; in some cases the courts have simply assumed the architecture had this effect.⁹⁸ In applying the balancing test, if a court limits its consideration of private loss to the diminution of property value, it should similarly limit its consideration of the effect on the public to potential diminution in property value, and require proof of this diminution.⁹⁹ On the other hand, if a court insists on considering such values as the character and integrity of the community and the comfort and happiness of the public, it should also consider the comfort and happiness of an individual who is allowed to build a house that he finds aesthetically pleasing. As rising costs and increasing demand for limited space have restricted the number of people who are able to procure property, courts should protect the rights of those who can, and consider their interest in comfort and architectural expression as well as the public's. Otherwise the standards the courts use in applying the balancing test are inconsistent, working to the disadvantage of the individual and perhaps ultimately to the disadvantage of the public. This country has a long tradition of individu-

96. *Id.*

97. *Jones*, 305 N.C. at 530, 290 S.E.2d at 681.

98. See, e.g., *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955). Both courts seemed to assume that loss of property value would occur, but neither required proof of such loss. See also *Kolis*, *supra* note 84, at 285-86; *Turnbull*, *supra* note 84, at 245 ("The problem with the cases turning on theories of preservation of neighborhood character and property values seems not to be that character and values cannot be objectively measured, but rather that they were not in fact measured and that measurement may have proved that depreciation of value may not have occurred . . .").

99. See *Turnbull*, *supra* note 84 (arguing that aesthetic regulation should be upheld only when loss of property value can be shown).

alism and freedom of choice. Permitting government to regulate design affronts this tradition, risking what one commentator has described as "cultural dictatorship."¹⁰⁰ In protecting architectural creativity, a concern the supreme court has cited in justifying historic district zoning,¹⁰¹ the courts can promote the comfort and happiness of individuals and observe societal interests in individualism.

The other limitation upon the general rule—that municipalities should not delegate responsibility for promulgation of aesthetic zoning ordinances to groups the General Assembly has not authorized to exercise the police power¹⁰²—also would not prevent a *Reid*-like result. A municipality could still establish an architectural review board with power to enforce the zoning regulations,¹⁰³ or the board of commissioners itself could bar a construction plan as discordant with existing architecture.

In protecting architectural expression and the right to use one's property as one desires, other possibilities besides changing the balancing test include removing the presumption¹⁰⁴ that an ordinance is valid and applicable. This presumption merely places one more burden on the landowner. The legislature might also step in and allow zoning of architecture only when the dwelling is grossly discordant, or when it significantly reduces the value of other property. This action would prevent the courts from possibly extending the *Jones* test to architectural regulation, thereby eliminating the risk that landowners could be barred from building a house because of differences in aesthetic taste.

In conclusion, the *Jones* test should not be extended to residential architecture. Regardless of the means, the property owner should be permitted to choose an architectural style he desires so long as the style does not significantly harm others. In *State v. Jones*, while appropriately permitting the regulation of junkyards, billboards, and similar public eyesores, the supreme court also opened the door to regulation of architectural taste. Absent compelling reasons, that door should remain closed.

MARC DAVID BISHOP

100. R. BABCOCK, *supra* note 83, at 8.

101. See *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 216, 258 S.E.2d 444, 450 (1979).

102. See *supra* text accompanying note 30.

103. See N.C. GEN. STAT. § 160A-384 (1982) ("The city council shall provide for the manner in which zoning regulations and restrictions and the boundaries of zoning districts shall be determined, established and enforced . . . in accordance with the provisions of this Article."). Apparently, nothing in this statute would prohibit the establishment of an architectural review board with power to enforce zoning regulations. See N.C. GEN. STAT. §§ 160A-384 to -392 (1982).

104. See *Helms v. City of Charlotte*, 255 N.C. 647, 650-51, 122 S.E.2d 817, 820 (1961).

