You Can’t Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review

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INTRODUCTION

Traditionally, property owners had an unfettered right to use, enjoy and dispose of their property.1 The advent of zoning laws, however, curtailed this freedom.2 Zoning regulations routinely legislate possible uses, area requirements, building height, light and air access, open space, and peace and quiet.3

Aesthetic zoning attempts to legislate aspects of community beauty.4 Originally, courts rejected zoning based solely on aesthetics5 because aesthetics were considered a luxury that should not be permitted to infringe upon an owner's property rights.6 To circumvent unfavorable judicial treatment, communities enacted regulations that combined aesthetic goals with some health, safety, moral or general welfare objective7 permitted under the state's police power.8

4. Aesthetic zoning is simply zoning for aesthetic purposes. Aesthetic has been defined as "[r]elating to that which is beautiful or in good taste." Black's Law Dictionary 52 (5th ed. 1979); see also Sundeen v. Rogers, 83 N.H. 253, 141 A. 142, 144 (1928) ("Just what is meant by the use of the term 'aesthetic' is not entirely clear, but apparently it is intended to designate thereby matters which are evident to sight only, as distinguished from those discerned through smell or hearing.").
5. See, e.g., Spann v. City of Dallas, 111 Tex. 350, 357, 235 S.W. 513, 516 (1921) ("it is not the law . . . that a man may be deprived of the lawful use of his property because his tastes are not in accord with those of his neighbors"); see also 1 E. Ziegler, Rathkopf's The Law of Zoning and Planning § 14.02, at 14-11 - 14-14 (1975) (discussion of early views of aesthetic regulation).
8. This Note does not address ordinances designed to promote or preserve a community interest in tourism or the historic value of the community. See, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978) (preservation of historic structures and areas); Bachman v. State, 235 Ark. 339, 341, 359 S.W.2d 815, 817 (1962) (tourism); South of Second Assocs. v. Georgetown, 196 Colo. 89, 94, 580 P.2d 807, 811 (1978) (en banc) (historic value); Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 195 Colo. 44, 51, 575 P.2d 835, 841 (en banc) (tourism), appeal dismissed, 439 U.S. 809
In 1954, the United States Supreme Court decided Berman v. Parker.\(^9\)

In dictum,\(^0\) Berman indicated that the concept of general welfare could include aesthetic values. Courts have used this dictum to uphold zoning based solely on aesthetic considerations.\(^1\)

After Berman, several views developed concerning the propriety of zoning based on aesthetics alone. Currently, twelve states do not permit zoning based solely on aesthetics\(^12\) while eleven states allow zoning based

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\(^1\) 348 U.S. 26 (1954). For further discussion of Berman, see infra notes 81-82, 90-96 and accompanying text.

\(^9\) For a discussion of police power, see infra notes 19-28 and accompanying text.

\(^10\) Berman dealt with health, safety and aesthetic factors of slum clearance and was an eminent domain action under the fifth amendment of the Constitution. See Berman v. Parker, 348 U.S. 26, 31 (1954). For the text of the dictum, see infra note 82 and accompanying text.


In addition, courts in fourteen states have noted in dicta that zoning based on aesthetics alone may be improper. See South of Second Assocs. v. Georgetown, 196 Colo. 89, 94, 580 P.2d 807, 811 (1978) (en banc); Dawson Enter., Inc. v. Blaine County, 98 Idaho 506, 517-18, 567 P.2d 1257, 1269 (1977); General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 94, 172 N.E. 309, 312 (1930); Stoner McCray Sys. v. City of Des Moines, 247 Iowa 1313, 1319, 78 N.W.2d 843, 848 (1956); City of New Orleans v. Levy, 223 La. 14, 30-31, 64 So. 2d 798, 802 (1953); Warren v. Municipal Officers, 431 A.2d 624, 629 n.6 (Me. 1981); Board of County Comm’rs v. CMC of Nevada, Inc., 99 Nev. 739, 743, 670 P.2d 102, 105 (1983); Piper v. Meredith, 110 N.H. 291, 297-98, 266 A.2d 103, 106 (1970); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741, 757 (N.D. 1978),
on aesthetic factors alone.\textsuperscript{13}

Architectural review is one example of zoning based on aesthetics.\textsuperscript{14} Many communities have established architectural review boards solely to evaluate the visual design of new structures.\textsuperscript{15} These boards regulate aesthetical similarity, dissimilarity, or inappropriateness); Clarkstown Local Law No. 4, \textsuperscript{14} Aurora Local Law No. 5, \textsuperscript{15} and accompanying text (discussing effect of architectural review). These boards regulate aesthetics as a sole factor also consider whether the ordinance is reasonable. According to one study, over 500 municipalities now have architectural review boards.

\begin{footnotesize}
\begin{enumerate}
\item See E. Ziegler, supra note 5, § 14.04, at 14-34. \textit{See also infra} notes 33-34 and accompanying text (discussing effect of architectural review).
\item See, e.g., Mamaroneck Local Law No. 1, §§ 3-4 (N.Y. 1973) (establishing review board to judge effects of any new building, structure, or sign on surrounding areas); East Aurora Local Law No. 5, §§ 2-3 (N.Y. 1972) (review board established to prevent excessive similarity, dissimilarity, or inappropriateness); Clarkstown Local Law No. 4, §§ 3.3 (N.Y. 1971) (board created may disapprove of structures); \textit{see also} Anderson, \textit{Architectural Controls}, 12 Syracuse L. Rev. 26, 29 (1960) (describing role of architectural review boards). Boards also usually have jurisdiction over proposed additions to existing structures. \textit{See} Mamaroneck Local Law No. 1, § 5 (N.Y. 1973).
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In the Village of Euclid v. Ambler Realty Co., the United States Supreme Court decided that regulating building height, area and use through zoning infringes on an owner’s liberty and property rights and is antithetical to our constitutional scheme. Part IV also suggests an alternative to public regulation of aesthetics that will protect the rights of individual property owners.

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In Euclid, Justice Sutherland found authorization for zoning in the police power of a state. He outlined the standards for declaring provisions unconstitutional under the police power: "[B]efore the ordinance can be declared unconstitutional, [it must be shown] that such provisions are clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare."

State courts construing Euclid have required zoning regulations to have some basis in the health, safety, morals or general welfare aspect of the police power. Although general welfare is an important police power objective, it remains an amorphous term. The Euclid decision underscored the elastic nature of the general welfare in the area of zoning.

19. See id. at 396-97. Euclid remains the single most influential zoning case. As one commentator noted, "Sixty years after the Court's approval of zoning, Euclid endures as substance and symbol, despite waves of demographic, economic and political change." See C. Haar & M. Wolf, Land Use Planning 372 (4th ed. 1989). The type of zoning that was approved in the Euclid case became the basis for almost all subsequent zoning in the United States. See id. In fact, zoning according to a common plan is called "Euclidean" zoning. See id.

20. See Euclid, 272 U.S. at 387. The police power is "that power required to be exercised in order to effectually discharge within the scope of the constitutional limitations [a state's] paramount obligation to promote and protect the public health, safety, morals, comfort and general welfare of the people." Sinclair Ref. Co. v. City of Chicago, 178 F.2d 214, 216 (7th Cir. 1949); see also Euclid, 272 U.S. at 395 (exercise of police power supported by considerations of health, safety, morals or general welfare). The police power derives from the sovereign powers of each state, verified by the tenth amendment of the United States Constitution. See R. Cunningham, W. Stoebuck & D. Whitman, supra note 1, § 9.2, at 516. The police power is effectively used to control growth in local areas. See Euclid, 272 U.S. at 394; see also R. Epstein, Takings 107-08 (explaining benefits derived from exercise of police power).


22. When zoning is rationally related to health considerations, the regulation will be upheld. See Euclid, 272 U.S. at 391; N. Williams & J. Taylor, supra note 3, § 8.02.

23. See Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82 (1946). In Euclid, safety concerns validly helped support the exercise of the police power. The Court upheld the ordinance partly because the plan afforded easier fire protection, tended to prevent traffic accidents, and preserved a better environment for safe child-rearing. See Euclid, 272 U.S. at 394.

24. Moral objectives rarely support the exercise of the police power in zoning cases. See N. Williams & J. Taylor, supra note 3, at § 8.03.

25. See, e.g., Anderson v. City of Cedar Rapids, 168 N.W.2d 739, 742 (Iowa 1969) (ordinance must be related to either health, safety, morals or general welfare); Warren v. Municipal Officers, 431 A.2d 624, 627 (Me. 1981) (ordinance valid because related to general welfare); Baker v. Somerville, 138 Neb. 466, 472, 293 N.W. 326, 328 (1940) (ordinance must be related to health, safety, morals or general welfare).

General welfare has been considered to include factors such as protection of property values, general convenience and spiritual or spacial relationships of a community. See State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 265, 69 N.W.2d 217, 220 (preserve property values), cert. denied, 350 U.S. 841 (1955); R. Cunningham, W. Stoebuck & D. Whitman, supra note 1, § 9.2 n.1 (public convenience); Berman v. Parker, 348 U.S. 26, 30-32 (1954) (spiritual and spacial relationships). Some commentators claim general welfare provides an umbrella which covers health, safety and morals beneath it. See N. Williams & J. Taylor, supra note 3, § 13.02.

26. See infra notes 51-52 and accompanying text.
zoning: general welfare can stretch or shrink to embrace the situation.\(^{27}\) In this spirit, some courts have expanded the general welfare concept to include the power to uphold zoning based solely on aesthetics.\(^{28}\)

### B. Aesthetic Regulation

While the *Euclid* case upheld area, use and height restrictions implemented according to a comprehensive community plan, the case did not address aesthetic zoning.\(^{29}\) Over the years, municipalities have developed three main types\(^{30}\) of aesthetic regulation: controls on billboard and sign advertising,\(^{31}\) regulation of junkyards,\(^{32}\) and architectural review regulation.\(^{33}\)

\(^{27}\) See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926). In *Euclid*, Justice Sutherland declared: "The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." Id.

\(^{28}\) See supra note 11 and accompanying text.

\(^{29}\) See *Euclid*, 272 U.S. 365.


\(^{33}\) See, e.g., City of Scottsdale v. Arizona Sign Ass'n, Inc., 115 Ariz. 233, 234, 564 P.2d 922, 923 ( Ct. App. 1977) (would uphold design regulation); Novi v. City of Pacifica, 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439, 441 (1985) (anti-similarity ordinance upheld); City of West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 863-64, 30 So. 2d 491, 492 (1947) (architectural ordinance invalid because not grounded in health, safety, morals or welfare); State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 312 (Mo. 1970) (architectural ordinance upheld on general welfare grounds); Morris County Fair Housing Council v. Boonton Township, 230 N.J. Super. 345, 357, 553 A.2d 814, 821 (App. Div. 1989) (county with no architectural review ordinance cannot impose architectural requirements); Morristown Rd. Assoc. v. Mayor of Bernardsville, 163 N.J. Super. 58, 59-
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Typical architectural review regulations seek to control the appearance of structures within a given area or community.\(^\text{34}\) In anticipation of litigation, ordinances often list evils that they seek to eradicate.\(^\text{35}\) Predictably, these ordinances also routinely claim to protect the health, safety, morals and general welfare of the community's inhabitants.\(^\text{36}\)

There are several variations of architectural design regulations. Some ordinances contain anti-similarity provisions permitting an architectural board to disapprove a permit for excessive similarity to any other standing or approved structure within a specified distance.\(^\text{37}\) These provisions are designed to avoid block after block of homogeneous housing. In contrast, other communities have established regulations prohibiting excessive differences between structures.\(^\text{38}\) These provisions seek to encourage some amount of homogeneity. Another type of ordinance prohibits building of structures that are "inappropriate" in design.\(^\text{39}\) Finally, some communities enact statutes which, oddly enough, simultaneously prohibit excessive similarity, dissimilarity, and inappropriateness to the area.\(^\text{40}\)

All of these architectural review ordinances generally give the board of review\(^\text{41}\) power to approve or deny an owner's building permit.
II. PROHIBITION OF ZONING BASED ON AESTHETICS ALONE

States have relied on several rationales to prohibit zoning based solely on aesthetic considerations. For example, some of these courts find that purely aesthetic regulation is not a valid assertion of the police power and that it exceeds the proper role of government. Other courts have held that aesthetic zoning is based on subjective factors that defy attempts to find reasonable standards. Abuse of discretion and corruption are dangerous byproducts of such regulation. Finally, some courts have suggested that zoning based on aesthetics alone infringes on personal freedom.

Regulation based on aesthetics alone does not fall under the traditional police power categories of health, safety or morals. Many states also find that protection of aesthetic value alone is not a valid general welfare purpose. "General welfare" is a very broad, unclear term. Courts can use general welfare as a catchall to constitutionalize otherwise invalid purposes. Not surprisingly, architectural review ordinances often claim to have a valid general welfare purpose. However, a preamble's mere statement of a "general welfare" purpose cannot guarantee the true
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Therefore, regulations should not be automatically upheld for paying lip service to a general welfare purpose. Courts should avoid the extension of the general welfare to support aesthetics alone. Such action would curtail citizens' property rights, a result that should be avoided.55

By regulating aesthetics, government exceeds its proper function.56 While some aesthetic regulations appropriately protect property value, government legislation of beauty threatens an individual's liberty by depriving a citizen of the right to decide how their property will look.57 One court noted the importance of property rights:

To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. . . . Like every other fundamental liberty, it is a right to which the police power is subordinate.58

The expansion of the police power to legitimize governmental regulation of aesthetics provides dangerous precedent for other infringements on natural rights.59 To avoid this result, the police power should be restricted to measures traditionally related to health, safety, and general welfare.60

Courts have indicated that zoning is inherently subjective and influ-

56. See Spann, 111 Tex. at 357, 235 S.W. at 515.
57. See id. at 357, 235 S.W. at 516; Reid, 119 Ohio App. at 76, 192 N.E.2d at 80-81 (Corrigan, J., dissenting); Village of Hudson, 9 Ohio St. 3d at 76, 458 N.E.2d at 858 (Brown, J., dissenting); see also infra notes 61-65 and accompanying text (discussion of legislation of subjective aspects of taste).
58. Spann, 111 Tex. at 356, 235 S.W. at 515; see also J. Locke, Two Treatises of Government § 131 (P. Laslett ed. 1967) (origin of government in protection of property).

"Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned by the Constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and the labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions."

Spann, 111 Tex. at 359, 235 S.W. at 516-17 (quoting In re Jacobs, 98 N.Y. 98, 114-15 (1885)).
60. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Sinclair Ref. Co. v. City of Chicago, 178 F.2d 214, 216-17 (7th Cir. 1949); Anderson v. City of Cedar Rapids, 168 N.W.2d 739, 742 (Iowa 1969); Warren v. Municipal Officers, 431
enced by shifting notions of taste. Such factors can lead to arbitrary and unreasonable governmental actions. The United States Supreme Court has also recognized that aesthetic "judgments are necessarily subjective, defying objective evaluation . . . ." Indeed, aesthetic values by their very nature vary from person to person. Legislation of aesthetics risks the replacement of a property owner's views of beauty with the views of a public official. Thus, subjective zoning regulations should not circumscribe individual views on aesthetic matters.

Proper standards are necessary for reasonable implementation of aes-


Health purposes include, among other objectives, prevention of slum conditions and protection of residential homeowners from the environmental dangers of industrial districts. See, e.g., Berman v. Parker, 348 U.S. 26, 30-31 (1954) (eradication of slum housing); Euclid, 272 U.S. at 391 (protection of health in residential areas). Courts have found various examples of valid safety regulations. See, e.g., Reinman v. City of Little Rock, 237 U.S. 171, 178 (1915) (upholding regulation of livery stables on safety grounds); Corrigan v. City of Scottsdale, 149 Ariz. 553, 556, 720 P.2d 528, 531 (App. 1985) (prevention of rock slides as legitimate regulatory concern), aff'd in part, vacated in part, 149 Ariz. 538, 720 P.2d 513 (en banc), cert. denied, 479 U.S. 986 (1986); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82-83 (1946) (prevention of fire hazards in buildings); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 214 (1885) (regulation of boats for harbor safety). For general welfare examples, see supra note 25.


The philosopher Immanuel Kant said, "The judgment of taste . . . is not a cognitive judgment, and so not logical, but is aesthetic—which means that it is one whose determining ground cannot be other than subjective." I. Kant, The Critique of Judgment 41 (Judge J.C. Meredith trans. 1952), quoted in Palmetto Dunes Resort v. Brown, 287 S.C. 1, 7 n.2, 336 S.E.2d 15, 19 n.2 (Ct. App. 1985).

63. See Village of Hudson, 9 Ohio St. 3d at 75, 458 N.E.2d at 858 (Brown, J., dissenting).


One commentator quoted a case highlighting the problems of both subjectivity and shifting tastes:

"Certain Legislatures might consider that it was more important to cultivate a taste for jazz than Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard entirely impractical as a standpoint for use restriction upon property."

thetic zoning because they help avoid the abuse of discretion inherent in decisions on beauty. Most ordinances, however, lack objective standards necessary to apply aesthetic regulation with certainty. Ordinances usually contain loopholes that vest the architectural review board with unreasonable discretion. Phrasing such as "excessive similarity" and "striking dissimilarity, visual discord or inappropriateness" are inherently malleable. Since objective standards have been so difficult to formulate, courts that uphold regulation based on aesthetics alone risk encouraging abuse of discretion by public officials.

66. See City of W. Palm Beach v. State ex rel. Duffey, 158 Fla. 863, 864, 30 So. 2d 491, 492 (1947) (en banc). The Duffey court stressed that "it is necessary that exactions be fixed in the ordinance with such certainty that they not be left to the whim or caprice of the administrative agency . . . ." Id.


68. See Anderson, supra note 15, at 44. Anderson finds standards to be "[t]he most troublesome problem encountered in municipal attempts to control architectural design . . . ." Id.; see also Hershman, Beauty as the Subject of Legislative Control, 15 Prac. Law. 20, 25 (1969) ("objective standards are difficult if not impossible to formulate in matters of taste, attractiveness, and structural beauty").

Courts will often strike down ordinances that lack adequate standards and grant excessive discretion to the public official. See, e.g., Pacesetter Homes, Inc. v. Village of Olympia Fields, 104 Ill. App. 2d 218, 225-26, 244 N.E.2d 369, 372-73 (1968) (vague architectural review ordinance struck down); Morristown Rd. Assocs., 163 N.J. Super. at 67, 394 A.2d at 163 (struck down an ordinance which contained a standard of "harmony with existing structures and terrain" (emphasis in original)); Hankins, 55 N.J. Super. at 136, 150 A.2d at 66 (struck down requirement of early American design because it "could be construed as authorizing a tepee, adobe, log cabin, Cape Cod, New England, Dutch colonial, or Pennsylvania Dutch architectural design."); Village of Shoreview, 304 N.W.2d at 328 (unreasonably vague or subjective standards cause invalidation of ordinance); Morris County Fair Hous. Council v. Boonton Township, 230 N.J. Super. 345, 357, 553 A.2d 814, 821 (App. Div. 1989) (invalidated decision with no architectural review ordinance at all).

To strengthen standards, municipalities have drafted architectural regulations requiring evaluation of specific parts of the structure. See, e.g., Village of Hudson, 9 Ohio St. 3d at 71, 458 N.E.2d at 855 (evaluation of doors, windows, shutters, chimneys and other specific design features); Bellerose Local Law No. 1, §§ 5(F)(2)(a)-(4)(a) (N.Y. 1970) (evaluation of the facade, the size and arrangement of doors, windows, and porticos, the cubical content and gross floor area, roof structures, exposed mechanical equipment, retaining walls, landscaping, signs, lightposts, parking areas, and fences).

69. See Mamaroneck Local Law No. 1, § 6 (N.Y. 1973) (allowing disapproval for inappropriateness of architectural quality, nature of materials, harmony of colors, and compatibility of design with the surrounding terrain). Other loopholes exist in the drafter's choice of language for many architectural review ordinances. See, e.g., id. (disapproval for excessive similarity or dissimilarity); Bellerose Local Law No. 1, § 5(F)(2) (N.Y. 1970) ("[s]triking dissimilarity, visual discord or inappropriateness [sic]").

70. See 3A N. Williams & J. Taylor, supra note 3, § 71C.02, at 58.

71. Judicial approval of these unsatisfactory standards will lead to grossly unreasonable results. "Where the courts are willing to approve vague standards . . . the only reasonable expectation is that local administration will produce results which are both
Corruption is the greatest danger in public decisionmaking processes devoid of objective standards. Thus, bribery may become standard practice when zoning is based solely on aesthetics. Already, land use accounts for a large majority of local corruption. Zoning and subdivision control are already the most corrupt areas of municipal government; decisions based on subjective, discretionary aesthetic criteria will only worsen corruption.

Courts have recognized that the dangers presented by government control of aesthetic decisions are especially apparent in the area of architectural review. Architectural design is a form of artistic expression and should be protected by the first amendment. Government control of architecture will suppress originality and creativity, which, it has bizarre and arbitrary . . . .” Id. Unfortunately, changes in board composition requiring architectural or building professionals will not solve the problems of abuse of discretion and legislation of taste. See Kolis, supra note 15, at 302-03.


73. See id. Judge Brown argued in dissent that:
   The allowance of such standards of review vests in the [architectural] board of review absolute power to impose its will on the private property interests of citizens. . . . Under such a system, bribery will become the only way landowners of the future will be able to effect any reasonable and proper change with regard to the use of their properties.

Id. (emphasis added).


75. See id.; see also R. Ellickson & A. Tarlock, Land Use Controls 244 (1981) (highlights the link between land use and corruption in the mind of the public).

76. Id. (emphasis added).


78. See Village of Hudson, 9 Ohio St. 3d at 76, 458 N.E.2d at 858 (Brown, J., dissenting); Poole, Architectural Appearance Review Regulations and the First Amendment: the Good, the Bad and the Consensus Ugly, 19 Urb. Law. 287, 291 (1987).

79. See Poole, supra note 77, at 291; Kolis, supra note 15, at 340.

Commentators have underscored the problems of aesthetic regulation in the form of architectural review. See Anderson, supra note 15, at 48. Professor Anderson claims that the structure of the board and the usual nature of the ordinances will assure that a community becomes no more beautiful. See id. at 48. Architectural review ordinances are by nature conservative because they seek to prevent changes in building designs. See id. Government control favoring existing styles therefore discourages the architectural improvement of the community. See id. As one commentator correctly surmised, the legislation of tastes is dangerous. The “most sensible recommendation is that local governments get out of the role of imposing majoritarian notions of tastefulness on the com-
been argued, could lead to an era of Orwell's "Big Brother".80

III. ALLOWANCE OF ZONING BASED SOLELY ON AESTHETICS

States that allow zoning based solely on aesthetic factors have primarily relied on the Supreme Court dictum in Berman v. Parker.81 In Berman, Justice Douglas wrote,

[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.82

Protection of property values is another rationale used to support zoning based solely on aesthetics.83 Aesthetic regulation to protect property values is a valid general welfare purpose under the police power.84

80. See Village of Hudson, 9 Ohio St. 3d at 76, 458 N.E.2d at 858 (Brown, J., dissenting). Judge Brown warned, "[t]his zoning [architectural review] case has now placed us in the era of Orwell's '1984' where Big Brother tells us what to do and think in a realm that is protected by the constitutional right of privacy under the First Amendment to the United States Constitution." Id. See infra note 61 for discussion of the dangers of power in the hands of the architectural review board.


Courts that approve aesthetic zoning recognize the subjective nature of aesthetics, yet these courts seek some objective standard to uphold the ordinance. See, e.g., Morristown Rd. Assocs. v. Mayor of Bernardsville, 163 N.J. Super. 58, 67, 394 A.2d 157, 163 (Law Div. 1978) (basic criterion of harming existing structures and terrain does not meet test of certainty required in zoning regulations); Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 69, 192 N.E.2d 74, 76-77 (1963) (standards sufficient for use by experts on architectural review board); see also 1 E. Ziegler, supra note 5, § 14.02, at 14-28 to 14-29 (outlining a newer approach to aesthetics). Some courts have upheld ordinances requiring similarity to existing structural styles. See State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305, 310 (1970). Courts upholding solely aesthetic zoning have stressed that some amount of discretion is necessarily permissible. See Wieland, 269 Wis. at 274, 69 N.W.2d at 224.

82. Berman, 348 U.S. at 33 (citations omitted) (emphasis added).


Although ordinances based on aesthetics may cite property values as justification, some courts recognize that this is still solely aesthetic zoning. See Board of Supervisors v. Rowe, 216 Va. 128, 146, 216 S.E.2d 199, 213 (1975).

Under the general welfare, a community also has the right to determine its own visual environment.  

Some courts also claim that aesthetic zoning symbolizes a culturally advanced society and that increased judicial recognition of aesthetics is the result of a general refinement of tastes in a maturing society. Furthermore, they claim aesthetic regulation promotes the comfort and general well-being of the population. The happiness of citizens is said to be tied to the appearance of their surroundings. These metaphysical concerns have provided additional support for solely aesthetic zoning. The Berman dictum and these lesser rationales, however, do not withstand close scrutiny.

IV. ZONING SHOULD NOT BE BASED ON AESTHETICS ALONE

Although courts have advanced several justifications for upholding solely aesthetic zoning, their rationales are improper. Reliance on Berman v. Parker or the protection of property values misconstrues the actual issue: the validity of zoning based exclusively on aesthetics. Such zoning improperly vests excessive discretion in a governmental body, encouraging encroachment on both individual liberty and property rights. A proper reading of Berman v. Parker does not support zoning based solely on aesthetics. First, Berman was not decided on aesthetics alone. The Berman Court cited important health and safety problems that would support government interference with property rights. Aesthetic regulation based on protection of property values without categorizing it as general welfare, cert. denied, appeal dismissed, 371 U.S. 233 (1963).

(architectural review ordinance upheld); United Advertising Corp., 42 N.J. at 5-6, 198 A.2d at 449 (outdoor advertising prohibition upheld); Jones, 305 N.C. at 530-31, 290 S.E.2d at 681 (upholding a junkyard regulation); Village of Hudson, 9 Ohio St. 3d at 73, 458 N.E.2d at 857 (authorizing an architectural review ordinance); Wieland, 269 Wis. at 270, 69 N.W.2d at 220 (1955) (architectural review ordinance upheld); cf. Vickers v. Township Comm., 37 N.J. 223, 247, 181 A.2d 129, 137 (upheld aesthetic regulation based on protection of property values without categorizing it as general welfare), cert. denied, appeal dismissed, 371 U.S. 233 (1963).

87. See Hartke, 240 Or. at 47, 400 P.2d at 261.
89. See id.; see also Westfield Motor Sales Co. v. Town of Westfield, 129 N.J. Super. 528, 544, 324 A.2d 113, 120 (Law Div. 1974) (aesthetics are part of psychological and emotional stability).
90. See Bufford, Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation, 48 UMKC L. Rev. 125, 165-66 (1980); Note, supra note 85, at 302.
92. See id. at 30.

In the neighborhood in question, 57.8 percent of the houses had no indoor bathrooms (health), 64.3 percent of the buildings were irreparable and another 18.4 percent needed major repairs (health and safety), 29.3 percent of the buildings had no electricity (health...
AESTHETIC ZONING

...the Court decided Berman on eminent domain grounds. For these reasons, Justice Douglas' statement regarding the police power and aesthetics is only dictum and should not be used to support solely aesthetic zoning. Berman's scope should be limited to eminent domain actions in which some aspect of health, safety, morals or general welfare supports the police power. Moreover, the Supreme Court had opportunities to extend Berman to aesthetic zoning in general and architectural review in particular but has not done so.

Preservation of property values should never support purely aesthetic zoning. Property valuation will only rise or fall as a result of some other factor. Courts should look to the cause of the value change, not the change in value itself. If the primary cause of the depreciation is an appropriate subject for regulation under the police power, courts should uphold the ordinance. As one judge noted, "bootstrapping" a solely aesthetic regulation to lawful status by using property values will allow any "absurd" provision to become lawful. Courts should not allow property value protection to rescue an ordinance that has no health, safety, moral, or general welfare purpose.

Expansion of the police power to include solely aesthetic considerations provides dangerous precedent for governmental encroachments on

and safety), 82.2 percent had no wash basins or laundry tubs (health), 83.8 percent lacked central heating (health and safety). Id.

93. See id. at 36. The power involved in takings of property is distinct from the power to zone; zoning usually triggers a due process analysis. See D. Mandelker, Land Use Law § 2.17, at 34 (2d ed. 1988); see also R. Cunningham, W. Stoebuck & D. Whitman, supra note 1, § 9.2, at 517 (delineating due process and takings analyses).

94. See supra notes 49-51 and accompanying text.

95. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). In Metromedia, the one recent case with a full opinion, the Court struck down part of a billboard ordinance on first amendment grounds, but allowed a combination of traffic safety and aesthetic factors to support the part of the ordinance that was not ruled unconstitutional. Id. at 507-08. Other cases with more cursory treatment also illustrate the Court's reluctance to deal with the issue. See Corey Outdoor Advertising, Inc. v. Board of Zoning Adjustment, 254 Ga. 221, 327 S.E.2d 178, appeal dismissed, 474 U.S. 802 (1985); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978), appeal dismissed, 440 U.S. 901 (1979); Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835 (en banc), appeal dismissed, 439 U.S. 809 (1978); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963), appeal dismissed, 375 U.S. 42 (1963).


98. See N. Williams & J. Taylor, supra note 3, § 15.03, at 424.

99. See id. at 425.

100. See id. at 424-25. For discussion of a suggested scope of the police power, see supra notes 49-54 and accompanying text.


liberty and property rights. As John Locke aptly noted, government was formed to protect the liberty and property of an individual. When government enacts zoning based on inherently subjective aesthetic considerations, some measure of property rights are lost. Courts should recognize Lockean theory on protection of individual rights of property and liberty. Application of this ideal to zoning mandates a return to a less intrusive police power that does not authorize solely aesthetic zoning.

The lack of adequate standards for review of architecture also creates difficulty and uncertainty for property owners. Creating standards for aesthetic zoning requires subjective judgments. While the United States Supreme Court has sanctioned zoning regulations that promote historic preservation, it has not considered architectural review. Vague standards in a historic preservation situation can be used in a reasonable manner, because they are applied to a certain area with precise historic characteristics. Ordinary architectural standards do not possess the same objective qualities. Architectural ordinances lack the automatic reference to an established historic style. Unfortunately,

103. See Spann v. City of Dallas, 111 Tex. 350, 356, 235 S.W. 513, 515 (1921); see also supra notes 57-59 and accompanying text.

104. See J. Locke, supra note 58, § 131. Locke wrote:

But though Men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require; yet it being only with an intention in every one the better to preserve himself his Liberty and Property ... the power of the Society ... is obliged to secure every ones Property ... .

Id. (emphasis added).

105. See Spann, 111 Tex. at 356, 235 S.W. at 516. For a discussion of the subjectivity of aesthetics, see supra notes 61-65 and accompanying text.

106. See Spann, 111 Tex. at 356, 235 S.W. at 516 (court applies a natural rights theory to issue of the scope of the police power).


108. See supra notes 66, 71 and accompanying text.

109. See supra notes 61-63 and accompanying text.


111. See supra notes 95-96 and accompanying text.

112. See Anderson, supra note 15, at 46.

113. See, e.g., City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 415-16, 389 P.2d 13, 18 (1964) (standards for historic preservation ordinance properly broad if capable of reasonable application); Salvatore v. City of Schenectady, 139 A.D.2d 87, 90, 530 N.Y.S.2d 863, 864-65 (1988) (standards for historic ordinance valid if person of ordinary intelligence is not forced to guess at meaning); see also Anderson, supra note 15, at 46 (comparing standards for architectural review and historic preservation).


115. See id. "Ordinances which impose community-wide standards of design com-
the lack of objective standards plagues any architectural review ordinance. These subjective standards then create a breeding ground for corruption.116

Architectural review ordinances are also suspect because they do not contain an important safeguard found in the great majority of zoning regulations: the comprehensive community plan.117 A comprehensive plan helps to ensure that zoning considers the needs of the whole community.118 Community-wide development was a central factor in the Euclid decision,119 which has provided land planners with an acceptable model that is still used today.120 The public nature of the plan provides the additional benefit of promoting honest dealings between owners and members of government.121 Planning specific aesthetic aspects of a community, however, presents a danger to creative freedom that outweighs any benefit derived from the plan.122

Likewise, promotion of the emotional well-being and cultural maturity of society through aesthetic zoning should be accorded little weight. Zoning for solely aesthetic reasons is not a symbol of cultural maturity, but rather a symbol of over-intrusive government.123

A. Covenants: A Possible Solution

Land development in this country is highly regulated.124 Given this context of extreme regulation, one alternative to public regulation of aest-

116. See supra notes 72-76 and accompanying text.
117. See Anderson, supra note 15, at 29.
118. See Udell v. Haas, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 900-01, 288 N.Y.S.2d 888, 893-94 (1968). The court in Haas noted that the plan is “insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.” Id.
120. See C. Haar & M. Wolf, supra note 19, at 372. In the Euclid model, zoning is defined as "legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan." Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 110, 141 A.2d 606, 609 (1958).
122. See Village of Hudson, 9 Ohio St. 3d at 76, 458 N.E.2d at 858 (Brown, J., dissenting); Kolis, supra note 15, at 278-81.
123. See Village of Hudson, 9 Ohio St. 3d at 75, 458 N.E.2d at 858 (Brown, J., dissenting). As one judge inquired, “should [the property owner’s] aesthetic sensibilities in connection with her selection of design for her proposed home be stifled because of the apparent belief in this community of the group as the source of creativity?” Reid v. Architectural Bd. of Review, 119 Ohio App. 67,76, 192 N.E.2d 74, 81 (1963) (Corrigan, J., dissenting).
the expanded use of restrictive covenants. Restrictive covenants are land use controls that derive from private agreement to restrict the use of land. Covenants protect the landowner’s expectancy by assuring that the conditions surrounding the property will not change drastically.

Currently, many states allow aesthetic control through restrictive covenant. In fact, the majority of courts approve these covenants if they are exercised reasonably and in good faith. Covenants provide a good solution to the aesthetic zoning dilemma because they are private, voluntary, and less centralized than zoning. Furthermore, courts have been less stringent in scrutinizing aesthetic standards in covenants, thus providing a flexible, yet private answer to the problem of aesthetics.

Covenants have been successful tools through which communities have effectively controlled architecture. In private, consensual transactions, there are necessarily fewer worries about forcing tastes upon

125. See Ellickson, supra note 124, at 682-83; see also Town & Country Estates Ass’n v. Slater, 227 Mont. 489, 740 P.2d 668, 671 (1987) (aesthetic considerations have place in prior approval covenants).


Unfortunately, the usefulness of restrictive covenants diminishes when used in areas that have been substantially overbuilt. See Ellickson, supra note 124, at 718. In these situations, covenants would not provide a viable alternative to public regulation. However, as one newspaper noted, the existence of subdivisions, where covenants would be effective, has increased. See Lueck, Do Housing Covenants Intrude on Rights?, New York Times, Nov. 5, 1989, § 10, at 15, col. 1. In these situations, the extensive use of restrictive covenants remains possible and even popular. See id.


131. See Ellickson, supra note 124, at 682.


133. See Butler Mountain Estates, 90 N.C. App. at 47, 367 S.E.2d at 406 (1988) (quoting Rhue v. Cheyenne Homes, Inc., 168 Colo. 6, 8, 449 P.2d 361, 362 (1969)), aff’d, 324 N.C. 80, 375 S.E.2d 905 (1989). The court in Rhue stated that, “[m]odern legal authority recognizes . . . that the approval of plans by an architectural control committee is one
other individuals.\textsuperscript{134}

CONCLUSION

Although a state’s police power must admittedly encroach on the rights of property ownership, that encroachment should be limited. Police power should not be extended beyond health, safety, moral, or general welfare purposes to encompass solely aesthetic regulation. Aesthetics are inherently subjective and attempts to legislate them infringe upon individual creative freedom.

Aesthetic regulation acquires more draconian overtones in the case of architectural review, when boards can withhold building permits for “improper” designs. Difficulty in formulating proper architectural standards only compounds the problem, because abuse of discretion is more likely with open-ended standards. Such broad discretion provides the breeding ground for corruption.

Although some states have authorized zoning solely on aesthetic considerations, this view is not wise. Freedom of choice and protection of property rights were among the values upon which this country was founded. These individual rights should not be sacrificed in the name of beauty. A more equitable alternative to aesthetic zoning is the implementation of covenants to address aesthetic concerns. Private, voluntary restrictions of property rights are preferable to excessive government regulation. Covenants adequately balance a property owner’s interest with the aesthetic interests of the surrounding neighborhood, and should replace zoning based on aesthetics alone.

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\textsuperscript{134} See supra notes 79-80 and accompanying text.