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public use is being preserved. These plaintiffs include; (a) Citizens protesting the issuance of bonds for such a purpose;[32] (b) Businessmen against whom taxes are being assessed for the improvement in their area;[33] (c) Businessmen attacking the operation of parking lots and ramps on the grounds that such a facility only benefits those people whose businesses are in close proximity to the faculty, indicating that a private rather than a public purpose is being preserved;[34] (d) Citizens whose property was to be condemned and the proceedings were later abandoned;[35] (e) Persons seeking to stop the city from entering into a contract with a private contractor for the construction of a parking ramp;[36] (f) Plaintiffs who want damages for property not actually taken, on the grounds that such property which is used in conjunction with other property will be worthless for its present use;[37] (g) Parking lot operators who have attacked the taxing of private lots where public lots leased to private operators are not taxed because of the public function being performed.[38]

There have been no cases reported in Wyoming on the subject of off-street parking. Under § 1-173, W.S. 1957, a municipality may condemn property for public purposes "including streets, alleys or public highways as sites for public buildings, or for any public purpose." If the statute were amended to specifically include off-street parking, this would go far to establish that a public use was involved. Such an amendment should include: (1) maximum length of leases, (2) minimum rates to be charged, (3) possible sizes of parking lots varying with the population of the city in which they are located, (4) the amount of space of such city-operated parking lots that can be used for private purposes, such as private shops etc., (5) a city may issue bonds for such a purpose. From what has been said above, however, a condemnation under such an amendment might still be subject to challenge on the grounds that the use was private. Such legislative action would raise a presumption that public purpose would be served by the construction of parking facilities. However, the city can avoid any argument that the parking lot is not being used for a private purpose only by adequate control over the facility after it is put into operation.

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THE AESTHETIC AS A FACTOR CONSIDERED IN ZONING

Emphasis on the nature of beauty and good taste was of definite concern to philosphers such as Plato, Aristotle, and Hegel and today it remains a vital subject for legal speculation.[1] This is particularly true in the

32. Reviere v. Orlando Parking Commission, ... Fla. ... , 74 So.2d 694 (1956).
33. Whittier v. Dixon, 24 Cal. 2d 664. 151 P.2d 5 (1944).
34. Brodhead v. City of Denver, 126 Colo. 119, 247 P.2d 140 (1952).
35. Eways v. Reading Parking Authority, 385 Pa. 592, 124 A.2d 92 (1956).
36. Supra note 30.
37. City of Quincy v. Best Plumbing. 17 Ill. 2d 570, 162 N.E.2d 373 (1959).
38. Cabot v. Assessors of Boston, 335 Mass. 53, 138 N.E.2d 618 (1956).

1. Bridgwater & Sherwood, The Columbia Encyclopedia, 22 (1956).

field of zoning, where the complexities of urban life are increasingly demanding the recognition of aesthetic factors in the development of the commercial and residential areas of our municipalities.

The word "aesthetic" has only slightly changed its spelling and meaning from the Latin term "aesthetica" which was first used by Baumgarten about 200 years ago ". . . to designate the science of sensuous knowledge, whose goal is beauty, in contrast with logic, whose goal is truth."[2] Contemporary courts have interpreted this word as pertaining to "that which is beautiful or in good taste."[3]

As late as 1923 one court commented that the phrase "to zone" was a comparatively new expression. It was defined as the partition of a city into commercial and residential districts, with specific restrictions on physical structures imposed in each district.[4] Zoning regulations have found particular application in two areas: (a) Structural and architectural regulations which govern the size or bulk of buildings and (b) Regulations which prescribe the use that may be made of buildings within each district. The United States Supreme Court has authorized both methods of regulation.[5]

The general authority for zoning arises out of the police power possessed by the states. Commonly, legislatures have delegated to their separate municipalities the authority to enact zoning ordinances. Thus, zoning ordinances must be reasonable, and can be enacted only for the purpose of promoting the health, safety, morals or general welfare of the community.[6]

The division between the dominions of eminent domain (in which compensation is given for the actual taking of private property)[7] and the police power (involving a total or partial taking or restriction without compensation)[8] is sometimes difficult to determine. Zoning regulations have been sustained under both powers,[9] but of course municipal governments will avoid zoning by the costly power of eminent domain whenever possible.

2. Webster's New International Dictionary of the English Language, 42 (2d ed. 1956).
3. Ballentine, Law Dictionary With Pronunciations, 51 (1948); Black, Black's Law Dictionary, 78 (4th ed. 1951).
4. State v. City of New Orleans, 154 La. 271, 97 So. 440, 33 A.L.R. 260 (1923).
5. Welch v. Swasey, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923 (1909) (Upheld the constitutionality of a zoning ordinance which divided a city into districts and regulated the height of buildings in each district); and Reinman v. Little Rock, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 800 (1915); Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) authorized the restriction of certain occupations from specific and defined portions of a city.
6. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016 (1926).
7. Appeal of White, 287 Pa. 259, 134 Atl. 409, 53 A.L.R. 1215 (1926).
8. Ibid.
9. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016 (1926) (Zoning regulation was sustained under the police power); State v. Houghton, 144 Minn. 1, 176 N.W. 159, 8 A.L.R. 585 (1920) (zoning regulation was sustained under the power of eminent domain).

As early as 1905, the traditional rule concerning aesthetic considerations was announced as being ". . . that (where) the regualtion has a reasonable reference to the safety, health, morals or general welfare of the (municipal) community, considerations of an aesthetic nature may enter in as an auxiliary factor and such fact will not invalidate the regulation."[10] The temper for other early decisions was struck by this court's further caution that individuals may not be deprived merely because their aesthetic preferences do not coincide with those of their neighbors, and that "aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take property without compensation."[11]

Four years later the United States Supreme Court, in upholding the constitutionality of a zoning ordinace prescribing the different height limitations of buildings, re-phased this rule by stating that the mere presence of aesthetic considerations will not of themselves invalidate the statute.[12]

During the next five decades, a succession of decisions indicated a reluctance in many jurisdictions to expand this constricted rule regarding the application of aesthetic considerations to zoning. The following selected statements are indicative of the justifications which have been used in refusing to accept aesthetic considerations as the sole basis for zoning regulations: "The world would be at a continual seesaw if aesthetic considerations were permitted to govern the use of the police power."[13] "Regulations based on aesthetic considerations are not in accord with the spirit of our democratic institutions."[14] "Causes which may depress highly sensitive persons furnish no basis for restrictions on the use of property by zoning ordinances."[15] "The exercise of property rights cannot be left to caprice, whim, or aesthetic sense of a special group of individuals who may object to the use by a property owner . . ." of his property.[16] "The zoning power cannot be exercised from an arbitrary desire to resist the natural operation of economic laws or for purely aesthetic considerations."[17]

In a quiet New York community an ordinance was adopted in an attempt to preserve the desirability of a residential area by restricting the use of the property within the village boundary and thereby provide ". . . a beautiful and dignified frontage along the public throughfare." In striking down this ordinance the court recognized that the popular concept of public welfare had been greatly expanded, but it refused to go

10. *Passaic v. Patterson Bill Posting Co.*, 72 N.J.L. 285, 62 Atl. 267 (1905).
11. Ibid.
12. Welch v. Swasey, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923 (1909).
13. City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842, 43 A.L.R. 662 (1925).
14. City of St. Louis v. Evraiff, 301 Mo. 231, 256 S.W. 489 (1923).
15. Women's Kansas City St. Andrew Society v. Kansas City, 58 F.2d 593 (1932).
16. Johnson v. City of Huntsville, 249 Ala. 36, 29 So.2d 342 (1947); Pentecostal Holiness Church v. Dunn, 248 Ala. Sup. 314, 27 So.2d 561 (1947).
17. Appeal of White, 287 Pa. 259, 134 Atl. 409, 53 A.L.R. 1215 (1926).

as far as to approve aesthetic considerations as the sole jusification for this zoning ordinance.[18] In a Pennsylvania case, a proposed structure which did not harmonize with adjacent buildings was nonetheless held to be permissible, irrespective of the effect on the neighbors' aesthetic sensibilities, since it came within the regulations of an existing zoning ordinance.[19] Recently, another decision held that the petition by a waterworks company to erect a water tower should be granted over the objections of a zoning board of appeals, which had been based on aesthetic considerations. The court stated that the maintenance of the landscaping appearance of the neighborhood is insufficient in itself to sustain a zoning restriction, though it does constiute one factor which is to be evaluated with all surrounding circumstances.[20]

A portion of another municipal zoning ordinance which provided that "except when the commissioner of buildings otherwise approves, minor (car) garages shall be located to the rear of the established line of houses facing the street," was held to be unconstitutional where the ordinance was based solely on aesthetic considerations of harmony and beautification.[21]

In addition to these examples, many other cases can be found which indicate the tenacious hold, in some jurisdictions, of the rule against allowing aesthetic considerations as the sole basis for zoning regulations.[22]

But another stream of authority has been developing in recent years which indicates an increased acceptance of aesthetic factors such as harmony in the style of homes, symmetry of the streets, beautification of the entire community, etc., as the actual motivating factor, if not the sole basis, for the enactment of zoning restrictions under the police powers.

As early as 1911, the eminent Judge Dillon, in his well known treatise on municipal corporations, acknowledged the traditional rule as it had then devoloped, but went on to observe that the law concerning aesthetic considerations was undergoing development and that it could not be said to be conclusively settled with regard to the extent of the police power.[23]

One of the first cases to almost reach the holding that aesthetic considerations alone justified the exertion of the police power, concerned a suit to require the inspector of buildings in Minneapolis to issue a building permit for the construction of a three-story building. The municipal ordinance provided that the realtor's property could be condemned under

18. Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427, 86 A.L.R. 642 (1931).
19. Miller v. Seaman, 137 Pa. Super. 24, 8 A.2d 415 (1939).
20. Northport Water Works Co. v. Carll, 133 N.Y.S.2d 859 (1954).
21. Meade v. City of Cincinnati, 14 Ohio App. 412 (1921).
22. Ayer v. Commissioners, 242 Mass. 30, 136 N.E. 338 (1922); City of Syracuse v. Snow, 123 Misc. Rep. 568, 205 N.Y.S. 785 (1924); City of Wilmington v. Turk, 14 Del. Ch. 392, 129 Atl. 512 (1925); Cordts v. Hutton Co., 146 Misc. 10, 262 N.Y.S. 539, affirmed 269 N.Y.S. 936 (1933); Murdock v. City of Norwood, 30 Ohio Supp. 278 (1937); Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843, 58 A.L.R.2d 1304 (1957).
23. Dillon, Municipal Corporations, § 695 (5th ed. 1911).

the power of eminent domain, to restrict its use, and thereby effectively prevent the erection of an apartment building within a restricted residence area. The court held that this ordinance which provided for condemnation as the means of restricting the use of property was based upon a public use and it was therefore constitutional.[24] After noting that other decisions had allowed, as public uses accomplished through eminent domain, the addition of a strip on each side of a street for ornament and beauty; the preservation of the scenic beauty of the river and park along the Palisades of the Hudson; and the condemnation of the Gettysburg battlefield for its preservation, improvement and ornamentation, the court added:

> Another reason is that giving the people a means to secure for that portion of a city, wherein they establish their homes, fit and harmonious surroundings, promotes contentment, induces further efforts to enhance the appearance and value of the home, fosters civic pride, and thus tends to produce a better type of citizen. It is time that courts recognized the aesthetic as a factor in life. Beauty and fitness enhance values in public and private buildings. But it is not sufficient that the building is fit and proper standing alone; it should also fit in with surrounding structures to some degree. People are beginning to realize this more than before, and are calling for city planning, by which the individual homes may be segregated from not only industrial and mercantile districts, but also from the districts devoted to hotels and apartments.[25]

Three years later a Kansas court took a stronger stand when it refused to grant a request for a permit to erect a business building in a residential section of the city in its holding that a zoning ordinance, designed to restrict indiscriminate building construction to provide for the harmonious development of the town, was properly within the expanded definition of the police power, since there was an aesthetic and cultural side of municipal development which may be fostered, within limits.[26] At least one court has stated that the above holding meant that aesthetic considerations alone had justified the enactment of the police power.[27] This was apparently based on the Kansas court's additional statement, following an extensive discussion of aesthetic and cultural considerations, that "(o)ur own court is committed to the view that, if there is fair ground for differences of opinion touching the existence of an evil to be remedied, the police power may be invoked to suppress it, and the Legislature is the exclusive arbiter of when, how, and to what extent it may be invoked."[28]

The same year, a Wisconsin court continued this trend of expounding a modern doctrine of the police power when it held that a zoning ordinance

24. State v. Houghton, 144 Minn. 1, 176 N.W. 159, 8 A.L.R. 585 (1920); reversing on rehearing 174 N.W. 885 (1919).
25. Ibid.
26. Ware v. Wichita, 113 Kan. 153, 214 Pac. 99 (1923).
27. State v. Harper, 182 Wis. 148, 196 N.W. 451, 33 A.L.R. 269 (1923).
28. Supra note 26.

prohibiting the enlargement of an existing dairy and milk pasteurizing plant, which was located in a residential district, was not unreasonable. In arriving at its decision the court declared:

> It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured. Our sensibilities have become more refined and our ideals more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered.[29]

Also in 1923, a southern court held as being valid, a zoning ordinance which in effect provided for the maintenance of a beautiful and fashionable part of New Orleans. The court declared that a regard for the outward appearances of a neighborhood was a matter of the public welfare and therefore the exercise of the police power was justifiable. This decision indicated an additional reliance on a nuisance theory in posing this question: "Why should not the police power avail, as well as to suppress or prevent a nuisance committed by offending the sense of sight, as to suppress or prevent a nuisance committed by offending the sense of hearing, or the olfactory nerves?"[30]

Some of the subsequent cases have avoided a direct decision as to the proper status of the aesthetic purpose in zoning by finding other pegs on which decisions could be hung, such as restricting the heights of buildings in order to promote the public health[31] or prohibiting the stripping of the top soil on a vacant lot for the public welfare,[32] rather than specifically admitting that aesthetic considerations were the motivating factors for these restrictions.

"Harmonious appearance, appropriateness, good taste and beauty displayed in a neighborhood not only tend to conserve the value of property, but foster contentment and happiness among homeowners" reflected the views of the Texas court in 1940, when it upheld the validity of a zoning ordinance which forbade the establishment of an office for the practice of dentistry in a single-family dwelling district.[33] The court went on to say that if aesthetic considerations are concerned with a regard for outward appearances in the beauty of a neighborhood, then there is no substantial reason for saying that such a consideration is not a matter of the public welfare.[34]

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29. Supra note 27.
30. State v. City of New Orleans, 154 La. 271, 97 So. 440, 33 A.L.R. 260 (1923).
31. Brougher v. Board of Public Works, 107 Cal. App. 15, 290 Pac. 140 (1930).
32. Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243, 326 U.S. 739, 66 S.Ct. 51 (1945).
33. Conner v. City of University Park, 142 S.W.2d 706 (1940).
34. Ibid.

The United States Supreme Court in 1954 had before it the question of the constiutionality of a Congressional Act providing for slum clearance in the District of Columbia. It was argued that the Act could not be justified under the police power and that it was in violation of the due process clause of the Fifth Amendment. The court unanimously disagreed with these contentions and in doing so greatly widened the public welfare concept, when it declared that:

> The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[35]

This pronouncement by the United States Supreme Court has opened wide the portals of the police power for the application of aesthetic considerations in zoning. Though the court was dealing with the due process clause of the Fifth Amendment, whereas it is the due process clause of the Fourteenth Amendment which pertains to the states, at least one court has considered this distinction to be immaterial in considering the police power's scope.[36]

This latter court went on to uphold, as a valid exercise of the police power, a zoning ordinance which required a finding by a local board that the exterior architectural appeal of the proposed structure was in harmony with the other homes in the neighborhood, so as to not cause a substantial depreciation in property values. In addition, the court added that ". . . the general rule is that the zoning power may not be exercised for purely aesthetic considerations, (and) such rule was undergoing development. In view of the latest word spoken on the subject by the United States Supreme Court in *Berman v. Parker* (citations omitted) this development of the law has proceeded to the point that it renders it extremely doubtful that such prior rule is any longer the rule."[37] However, an attempt to make unlawful the placing of unconcealed junk yards near a highway, without the benefit of zoning restrictions, was held to be unconstitutional in that purely aesthetic considerations are insufficient by themselves to warrant restrictions upon the lawful use of property.[38]

The Ohio Supreme Court, within this past year, has held that a proposal for the construction of a super-market should have been granted where the zoning ordinance authorized the granting of a variance in hardship cases and the intended use was in harmony with the needs and

35. Berman v. Parker, 38 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954).
36. State v. Wieland, 269 Wis. 262, 69 N.W.2d 217, 100 L.Ed. 750, certiorari denied, 350 US. 841, 76 S.Ct. 81 (1955).
37. Ibid.; Jefferson County v. Timmel, 261 Wis. 39, 51 N.W.2d 518 (1952).
38. State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959).

nature of the community.[39] This court gave recognition to what may be an even greater enlargement of the limits of the police power, when it indicated that the expanding concepts of zoning philosophies are beginning to dictate that in addition to the protection of our neighbor's investment and an acknowledgement of aesthetic tastes, that future zoning must be based on long-range planning, taking into account wide interests which extend beyond a consideration of the immediate use of the land in question and that this consideration must of necessity be correlated with the recreational, educational and economic needs of the community.[40]

The traditional rule, that aesthetic considerations alone are not sufficient to justify the enactment of zoning regulations, is apparently breaking down and people appear to be dissatisfied and impatient with its restrictive implications. To reflect this change in public opinion the courts are stretching, sometimes to the point of ridiculousness, their interpretation of concepts such as "public welfare," "public health," and "nuisance" so as to find a legal justification for the inclusion of the aesthetic side of municipal development in new zoning regulations. The time has come to frankly accept aesthetic considerations as the sole basis for zoning regulations.

In the August, 1922 issue of the American Bar Association Journal, an article appeared which urged that aesthetic considerations be recognized as sufficient in themselves to justify reasonable municipal regulations, in the area of billboard signs, without resort to attenuated theories.

> With many protestations and by means of the fantastic argument that billboards are a menace to public safety, the courts have nevertheless given aid to the movement for protection against this disfigurement. Has the time not come, or at least is it not almost here, when the courts will drop the mask of an exclusive concern for safety and health that in the case of billboards is not real, and frankly approve reasonable regulation of the use of property in the interest of beauty?[41]

To the courts which tenaciously cling to a traditional reliance on a narrow interpretation of the police power in zoning situations, as extending to only the safety, health, morals or general welfare of the community, yet achieve the same result as the more liberal interpretations by forcing the aesthetic consideration label into an unfamiliar and strained piegonhole, the question is once again asked: Isn't it time to drop the cloak of an exclusive concern for the traditional vindications, which oftentimes are not real, and frankly approve of aesthetic considerations as being sufficient in themselves to justify reasonable regulations?

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39. State v. City of East Cleveland, 169 Ohio St. 375, 160 N.E.2d 1 (1959).
40. Ibid.
41. Henry B. Chandler, The Attitude of the Law Toward Beauty, 8 A.B.A.J. 470 (August, 1922).