

1930

Aesthetics in Zoning

Charles P. Light Jr.

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Light, Charles P. Jr., "Aesthetics in Zoning" (1930). *Minnesota Law Review*. 985.
<https://scholarship.law.umn.edu/mlr/985>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

MINNESOTA LAW REVIEW

Journal of the State Bar Association

VOLUME XIV

JANUARY, 1930

No. 2

AESTHETICS IN ZONING

By CHARLES P. LIGHT*, JR.

IF a recent prediction that "the year 2000 will find the United States with a population of nearly 200,000,000, largely segregated in enormous decentralized cities . . ." with "the possibility of a narrow strip of land along the Atlantic seaboard becoming . . . an almost continuous city from Portland, Me., to Washington,"¹ approach fulfilment, present problems of zoning attain greater importance. Compilations for 1928 show that "more than 37,000,000 people . . . comprising three-fifths of the urban population of the United States"² live in zoned municipalities. Scarcely a day passes without some comment dealing with one of the phases of the subject appearing in the metropolitan dailies: "Today house developers of their own initiative are placing restrictions in covenants running with titles to residences even more detailed and stringent"³ than are found in zoning laws. Developments in the United States have elicited the expression that "England should not fall behind America in promoting the kind of education and scientific work needed to develop the resources of the country by means of regional and town planning."⁴

*Associate Professor of Law, Washington and Lee University, School of Law, Lexington, Va.

¹The Evening Star (hereafter cited *The Star*), Washington, D. C., July 27, 1929, p. 12, headline "Population of U. S. To Be 187,000,000 By Year of 2000." The signed article epitomizes a study by Frederic A. Delano and Dr. John M. Gries.

²Department of Commerce mimeographed compilation by Norman L. Knauss, *Zoned Municipalities in the United States I*.

³*The Star*, July 27, 1929, p. 13.

⁴"Letters to the Editor," *The Times*, London, England, July 13, 1929, p. 10.

Not all minds are agreed upon the advisability of zoning laws. Mr. Newton D. Baker, counsel in the *Euclid* Case,⁵ states an objection in these careful words:

"That our cities should be made beautiful and orderly is, of course, in the highest degree desirable, but it is even more important that our people should remain free. Their freedom depends upon the preservation of their constitutional immunities and privileges against the desire of others to control them, no matter how generous the motive or well intended the control which it is sought to impose."⁶

Another, less mild, perceives in zoning laws the introduction of "a destructive socialistic program under the terms of constitutionalism"⁷ and believes "the fact that zoning is anticonstitutional . . . is readily inferred from the confessions of the professional zoners themselves."⁸ However, the Supreme Court has squarely sustained the constitutionality of the comprehensive zoning ordinance in its general scope;⁹ of the exclusion of a four-family flat building from a restricted residence district;¹⁰ of the exclusion of a business building from a residence district;¹¹ of a set-back regulation.¹²

⁵(1926) 272 U. S. 365, 47 Sup. Ct. 114, 71 L. Ed. 303.

⁶(1926) 272 U. S. 365, 379, 47 Sup. Ct. 114, 71 L. Ed. 303.

⁷Wm. P. Gest, *The Principles of Zoning* 11. "Delivered before the Forum of the Philadelphia Chapter of the American Institute of Banking."

⁸Wm. P. Gest, *The Principles of Zoning* 11, 36. The preceding sentence reads: "Solicitor General Beck has drawn a useful distinction between acts which are juridically unconstitutional and those which are politically anti-constitutional."

⁹*Village of Euclid v. Ambler Realty Co.*, (1926) 272 U. S. 365, 47 Sup. Ct. 114, 71 L. Ed. 303.

¹⁰*Beery v. Houghton*, (1927) 273 U. S. 671, 47 Sup. Ct. 474, 71 L. Ed. 832. Per Curiam.

¹¹*Zahn v. Board of Public Works*, (1927) 274 U. S. 325, 47 Sup. Ct. 594, 71 L. Ed. 1074.

¹²*Gorieb v. Fox*, (1927) 274 U. S. 603, 47 Sup. Ct. 675, 71 L. Ed. 1228. This case and those cited in notes 9, 10, 11 are discussed by Alfred Bettman in Note, (1928) 2 U. Cin. L. Rev. 314.

One zoning decision, *Nectow v. City of Cambridge*, (1928) 277 U. S. 183, 48 Sup. Ct. 447, 72 L. Ed. 842 was handed down during Oct. Term 1927. It held that the action of the Cambridge, Massachusetts authorities in placing plaintiff's land in a residence district, under the particular circumstances, came "within the ban of the fourteenth amendment" and could not be sustained. Noted in (1928) 8 B. U. L. Rev. 330.

Seattle Title Trust Co. v. Roberge, (1928) 278 U. S. 116, 49 Sup. Ct. 50 holds invalid a consent ordinance, as applied to the erection of a philanthropic home in a residence district.

PROBLEMS

The reasons for zoning are thus summed up by Helen Margaret Werner in her brochure on the constitutionality of zoning regulations:¹³

"(1) the need for preserving the general character of districts, as residence or business districts; (2) the recognized evil of congestion, which demands regulations for congested areas which are not needed elsewhere; and (3) the enormous loss due to building obsolescence, resulting from lack of adaptation to function." Assuming that it is not implied in (1), why is a fourth reason—the aesthetic improvement of municipalities—not given? (a) Must it be said that aesthetic considerations alone are insufficient as a basis for the exercise of police power in the form of zoning laws?¹⁴ (b) Does the inclusion of such considerations invalidate an otherwise valid law?¹⁵ This paper is concerned with what the courts and writers have said on these questions, with what the courts have done which throws light upon them.

It is possible that the very term aesthetic ("appreciative of the beautiful, or in accord with its principles") incites the common-law trained judge to squirm. He—in Ohio, she, as well—is afraid perhaps that the epithet aesthete ("one who makes much or overmuch of the sense of the beautiful") will be hurled at him. In so many cases does the word aesthetic appear, however, that no advantage would be gained by discarding it. Better it is to embrace it with circumspect courage.

The major question put above speaks of aesthetic considerations alone. The difficulty arising from the use of "alone" in a police power discussion is apparent. Subsequent discussion will develop the accuracy of its use.

To restate any of the various attempted definitions of the police power would scarcely prove helpful. This "inherent" power of the state extends at least to the enactment of measures affecting the public health, safety, morals. Some add, the public welfare and convenience. Whether the sustained exercises of power necessitate a broadening of definition must stand over till later.

¹³ Werner, *The Constitutionality of Zoning Regulations* 9. University of Illinois Studies in the Social Sciences.

¹⁴ Referred to *infra* as "major question," "primary question," "Question (a)."

¹⁵ Referred to *infra* as "subsidiary question," "Question (b)."

In the closing days of 1927 a Washington newspaper¹⁶ thus headlined a front-page story: "Fine Arts Victor In Fight On Cigar Store's Building." Legally, the fight was a figment. A corporation intended to erect its new building opposite the projected group of monumental federal buildings. The fine arts commission objected to the style of the building, alleging it would clash with the design of the government structures. There was a conference and the company voluntarily revised its plans to conform to the views of the commission. But suppose that Fine Arts had met with opposition and assume a grant of power by Congress to approve or disapprove plans without compensation,¹⁷ would the headline have read the same? Professor Van Hecke has this to say:

"No one seriously contends, however, that zoning legislation [under the police power] would either be enacted or upheld if it attempted to prescribe requirements as to the minimum cost or architectural design of buildings, or the shape and landscaping of lots. These factors can be handled only by private contracts."¹⁸ Let us see.

DATA

I

"The entire field of zoning outside of the subject of use has been upheld by the courts throughout this country. This embraces the subjects of height, area and bulk, courts and yards."¹⁹ The Massachusetts supreme court has done pioneer work in sustaining maximum height regulations under the police power. There is a recognized aesthetic interest in such limitations. As the Supreme Court, affirming a Massachusetts judgment,²⁰ puts it:

¹⁶ The Star, December 8, 1927.

¹⁷ The Star, December 5, 1927, p. 2, under the headline, "Planning Avenue Building Program," says: "A bill designed to give the Commission of Fine Arts and the National Capital Park and Planning Commission authority to approve or disapprove types of construction of private structures which face on or impinge upon public buildings was introduced in the Senate at the last session of Congress by Senator Shipstead of Minnesota, and is to be reintroduced at the session which began today."

It is not stated whether the authority was to be exercised under police or under eminent domain power.

¹⁸ M. T. Van Hecke, *Zoning Ordinances and Restrictions in Deeds*, (1928) 37 Yale L. J. 407, 410.

¹⁹ Department of Commerce mimeographed study of Edward M. Bassett, *Zoning and the Courts* 3. Mr. G. Topham Forrest, the architect to the London County Council in his, *Report on Construction and Control of Buildings and Development of Urban Areas in the United States of America* 66, refers to "Mr. Edward M. Bassett, who is recognized as the highest legal authority on Zoning in America."

"That in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them."²¹

Aesthetics is given a back seat. Though "very powerful"²² with the legislature or council which enacted the laws, the courts utilize the familiar to sustain them. The public safety, they say, is protected against the fire hazard inherent to the tall structure. Adequate light and air conserve the public health. True enough, but it must seem passing strange to the layman that the reason which motivated his agitation for the law is either ignored by the courts or minimized. However, "in law as elsewhere actions speak louder than words." So no doubt, he will believe "that in fact the reasonable promotion of the aesthetic is a vital factor" which the courts "consciously, subconsciously or unconsciously"²³ are employing to sustain such regulations.

The maximum height cases give us an early answer to our subsidiary question: the inclusion of aesthetic reasons does not invalidate a law sustainable on orthodox grounds. But they shed no light on our primary question.

Nor is much to be gleaned concerning it from the area cases. Reasonable area restrictions have been sustained, usually by invoking the ancient reasons. The Connecticut court goes further, in a case upholding the establishment of building lines, when it says:

"Such a plan is wise provision for the future. It betters the health and safety of the community; . . . it adds to the appearance and wholesomeness of the place, and as a consequence it reacts upon the morals and spiritual power of the people who live under such surroundings."²⁴

We should like to, but cannot know what part "appearance and wholesomeness" played in the final result. Maybe an important one, for the court seems to deprecate the fact that "our large communities all have their examples of . . . community eyesores."²⁵

²⁰ Welch v. Swasey, (1907) 193 Mass. 364, 79 N. E. 745.

²¹ Welch v. Swasey, (1909) 214 U. S. 91, 108, 29 Sup. Ct. 567, 53 L. Ed. 923.

²² (1925) 13 Calif. L. Rev. 417, 418.

²³ Legal Limitation on Municipal Beautification, (1924) 30 W. Va. L. Q. 191.

²⁴ Windsor v. Whitney, (1920) 95 Conn. 357, 363, 111 Atl. 354. Noted (1921) 19 Mich. L. Rev. 327.

²⁵ (1920) 95 Conn. 357, 363, 111 Atl. 354.

II

It is in the field of zoning for use that courts pronouncedly disagree upon the scope of police power. In the case of the non-nuisance uses it has proved difficult to classify under the formal labels, health, safety, morals. Consequently, while the creation of use districts "in general" is constitutional, the exclusion of certain types of structures from restricted areas—stores from residence districts, apartment houses from one-family districts—²⁶ has not been unanimously sustained. In part, this lack of unanimity has provoked expressions which bear importantly on our problems.

First to be considered are the cases which construe the police power broadly, sustain the questioned exclusions, seem favorable to aesthetics.

In *Ware v. City of Wichita*,²⁷ the Kansas court sustained the proscription of a business building from a residence district. In answer to the objection that the zoning law depreciated the value of plaintiff's property, it said:

"With the march of the times, however, the scope of the legitimate exercise of the police power is not so narrowly restricted by judicial interpretation as it used to be. There is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations . . . Such legislation is merely a liberalized application of the general welfare purposes of state and federal constitutions."²⁸

The Kansas attitude seems to be: reasonable aesthetic considerations alone are a sufficient basis, but it is better to justify an exercise of police power under the more familiar phrase, general welfare. The accuracy of this description is substantiated by further remarks of Davison, J.:

"The writer of a timely article, 'The Attitude of the Law Toward Beauty,' in the American Bar Association Journal for August, 1922, p. 470, et seq., urges that aesthetic considerations be recognized as sufficient in themselves to justify reasonable municipal regulations governing the use of property without resorting to some attenuated theory that such regulations have to do with health, safety, or morals. . . ."

²⁶ See *Village of Euclid v. Ambler Realty Co.*, (1926) 272 U. S. 365, 390, 47 Sup. Ct. 114, 71 L. Ed. 303. "This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded."

²⁷ (1923) 113 Kan. 153, 214 Pac. 99. See (1924) 2 Wis. L. Rev. 443.

²⁸ (1923) 113 Kan. 153, 157, 214 Pac. 99.

"It cannot be denied, however, that there is good ground for the view that a reasonable zoning ordinance has some pertinent relation to the health, safety, morals and general welfare of the community."²⁹

Pertinent remarks are found in the Minnesota case, *State ex rel. Twin City B. & T. Co. v. Houghton*,³⁰ which involved the exclusion of an apartment building from a residence zone under a law providing for compensation. However, the decision is in point on the police power, for, as the court points out in a later case:

"the last prevailing opinion in *State v. Houghton* . . . which established the law . . . was fundamentally opposed to some of the views made the basis of the denial of the right of exclusion under the police power in the earlier cases. . ."³¹

Holt, J., contributes this:

"It is about time that courts recognize the aesthetic as a factor in the affairs of life. Who will dispute that the general welfare of dwellers in our congested cities is promoted if they be allowed to have their homes in fit and harmonious or beautiful surroundings? Besides preserving and enhancing values it fosters contentment, creates a wholesome civic pride, and is productive of better citizens."³²

This court points to the aesthetic factor as productive of a finer citizenship. It does not recognize the creation of such citizenship as a valid end for police power, at the same time ignoring one of the causes thereof. Other cases do, as we shall see.

The Louisiana court in *State ex rel. Civello v. New Orleans*,³³ sustained the exclusion of "Piggly-Wiggly" grocery stores from residence districts. To do so it overruled prior decisions which had held such exclusion a matter of mere aesthetics, unsustainable upon recognized grounds. The court's view was stated thus:

"If by the term 'aesthetic considerations' is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of general welfare."³⁴

The negative phrasing does not weaken the recognition of the aesthetic factor in the court's dictum and decision.

²⁹ (1923) 113 Kan. 153, 159, 160, 214 Pac. 99.

³⁰ (1919) 144 Minn. 1, 174 N. W. 885 and 176 N. W. 159.

³¹ *State ex rel. Beery v. Houghton*, (1925) 164 Minn. 146, 151, 204 N. W. 569.

³² (1919) 144 Minn. 1, 13, 176 N. W. 159.

³³ (1923) 154 La. 271, 97 So. 440.

³⁴ (1923) 154 La. 271, 284, 97 So. 440.

The refusal to permit an enlargement of a dairy plant contrary to the provisions of a zoning law, was sustained by the Wisconsin court in *State ex rel. Carter v. Harper*.³⁵ To its way of thinking, the zoned city compares to the unzoned "about as a well-ordered department store compares to a junk-shop."³⁶ It is no surprise then to see it characterize the results of zoning as "material rather than aesthetic in their nature."³⁷ However, the following language indicates the court's awareness of the problem of recognition:

"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. . . . 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."³⁸

The considered cases from Kansas, Minnesota, Louisiana and Wisconsin accord as favorable treatment to aesthetic considerations as any others. While the courts deciding them, Kansas excepted,³⁹ have not flat-footedly asserted that considerations of beauty or aesthetics per se justify use of police power, yet they do consider them to be of primary importance, if there are other and more orthodox factors also present. The opinions fail to analyze the situation with respect to aesthetics. Judicial evaluation is what is now most needed. This should come about in future cases having to do with further extensions of zoning power. Yet it must be said that the courts in question have achieved supposedly desirable results without sacrificing realism. Others have gotten results, camouflaging their reasons. Still others, realists, but with more or less static notions, have set aside the legislative desires, visioning them as attempts "to degrade certain trades into the class of nuisances, to prohibit legitimate business on one's own land, and in one's own home. . ."⁴⁰

³⁵ (1923) 182 Wis. 148, 196 N. W. 451.

³⁶ (1923) 182 Wis. 148, 158, 196 N. W. 451.

³⁷ (1923) 182 Wis. 148, 159, 196 N. W. 451.

³⁸ (1923) 182 Wis. 148, 159, 196 N. W. 451.

³⁹ To this effect see (1925) 35 Yale L. J. 238, 239: "And order and beauty in the development of a city has in one case been recognized as per se sufficient justification for a zoning ordinance. *Ware v. Wichita*. . . ."

⁴⁰ Wm. P. Gest, *The Principles of Zoning* 11.

III

The change in judicial attitude toward billboard legislation, formerly antagonistic but now more or less sympathetic, represents a desire to reach an aesthetic result while avoiding the term in giving reasons. Take the Illinois cases. The *Haller Case*,⁴¹ decided in 1911, held a law prohibiting the erection of billboards within 500 feet of any public park or boulevard inside the limits of a city of 100,000 or more, invalid. According to Vickers, C. J.:

"The gist of the argument in support of this law is, that the police power ought to be extended, both by restriction and compulsion, to the promotion of purely aesthetic purposes, upon the ground that the general welfare of the public requires it."⁴²

He would not extend it to prohibit billboards because they spoil the view in a park.

In 1915, the *Cusack Case*⁴³ decided by the same judge sustained the validity of a Chicago ordinance requiring frontage consents for the erection of billboards in residence districts. The answer to the bill set up:

"That bill-boards are dangerous to the public health, safety, morals, welfare and comfort in that they afford protection to disorderly persons, who conceal themselves behind them; that the space behind bill-boards is used in such manner as to create nuisances by reason of the shelter and protection afforded by said bill-boards; that the maintenance of such bill-boards causes the accumulation of inflammable material, thereby increasing the danger of fires."⁴⁴

Billboards can be prohibited (depending upon the consents), if they collect rubbish in a city. The aesthetic issue is dodged. Preferable to silence is the cautious recognition of Mr. Justice Holmes in the *St. Louis Poster Case*:⁴⁵

"Possibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary."⁴⁶

⁴¹ *Haller Sign Works v. Physical Culture Training School*, (1911) 249 Ill. 436, 94 N. E. 920.

⁴² (1911) 249 Ill. 436, 447, 94 N. E. 920.

⁴³ *Cusack Co. v. City of Chicago*, (1915) 267 Ill. 344, 108 N. E. 340, Affirmed under same name, (1917) 242 U. S. 526, 37 Sup. Ct. 190, 61 L. Ed. 472.

⁴⁴ (1915) 267 Ill. 344, 346, 347, 108 N. E. 340.

⁴⁵ *St. Louis Poster Adv. Co. v. St. Louis*, (1919) 249 U. S. 269, 39 Sup. Ct. 274, 63 L. Ed. 599.

Mr. Chandler's comment on these cases bears repeating:

"With many protestations and by means of the fantastic argument that bill-boards 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 bill-boards is not real, and frankly approve reasonable regulations of the use of property in the interest of beauty?"⁴⁷

Has the mask-dropping for which he prays occurred? It would seem not. The courts continue to reach aesthetic results, but they do so "by basing their decisions on other grounds and making the widest possible interpretation of order, safety, health, morals, and the like."⁴⁸ The same practice is noted in two cases which uphold establishment of the one-family house district: the Massachusetts court, on the ground that "the mental welfare of society would be promoted by each family dwelling in a house by itself;"⁴⁹ the California court, because such restrictions protect "the civic and social values of the American home."⁵⁰

IV

Opposed to the view that the police power can impinge upon property rights on aesthetic grounds is a cloud of witnesses. In *Youngstown v. Kahn Building Co.*,⁵¹ an Ohio case of the nimbus variety, a non-comprehensive ordinance which excluded apartment houses from a residence district comprising "merely a small fraction of the entire city" was held invalid. Judge Florence E. Allen thus states ably the case against aesthetics:

"It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. Certain legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. . . . The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power. We are therefore remitted to the proposition that the police power is based upon public necessity, and

⁴⁶ (1919) 249 U. S. 269, 274, 39 Sup. Ct. 274, 63 L. Ed. 599.

⁴⁷ (1922) 8 A. B. A. J. 472.

⁴⁸ Newman F. Baker, *Legal Aspects of Zoning* 15.

⁴⁹ *Brett v. Brookline*, (1924) 250 Mass. 73, 78, 145 N. E. 269.

⁵⁰ *Miller v. Board of Public Works*, (1925) 195 Cal. 477, 492, 234 Pac. 381. See Comment (1925) 13 Calif. L. Rev. 417.

⁵¹ (1925) 112 Ohio St. 654, 148 N. E. 842.

that the public health, morals, or safety, and not merely aesthetic interest, must be in danger in order to justify its use."⁵²

The antipathetic Maryland court in *Goldman v. Crowther*⁵³ held that the comprehensive zoning ordinance for Baltimore was void in so far as it "attempts to regulate and restrict the use of property." Goldman wished to operate a clothing repair shop in the basement of his four-story house, but was refused a permit under the zoning act. In an opinion particularly unsympathetic toward zoning, after mentioning the "veritable flood of so-called 'zoning' legislation," Offutt, J. says:

"But the question before us goes much further than that. It is whether the power to hold, use and enjoy property can be restricted or taken away by the state under the guise of the police power for purely aesthetic reasons or for such elastic and indeterminate object as the general prosperity without compensation."⁵⁴

Commenting upon the *Ware, Civello and Harper Cases*, in his opinion these use restrictions "bore no necessary relation to the public . . . welfare," but in those cases were sustained because "repugnant to the aesthetic sensibilities of that part of the public in whose interest they were drawn."⁵⁵

Bond, C. J.'s, dissenting opinion reads:

"If any kind or degree of aesthetic regulation is ever to be within the legitimate powers of government, the principle controlling it cannot be formulated as yet, and we are not authorized to declare it to be so. . . But is the Court at liberty to assume that an aesthetic purpose was the only one, or even that it was the predominant purpose, in the enactment of the present ordinance?"⁵⁶

The dissenting judges⁵⁷ differed with the majority as to the proper function of the court in deciding a police power case. But differing views of the judicial function often are symptomatic of a conflict upon the major problem itself. This is unfortunate for book law, but so long as judges are human the phenomenon will exist.

The Texas court,⁵⁸ thinking it selfishly discriminatory, in 1921 held invalid a Dallas ordinance forbidding the erection of busi-

⁵² (1925) 112 Ohio St. 654, 661, 662, 148 N. E. 842.

⁵³ (1925) 147 Md. 282, 128 Atl. 50.

⁵⁴ (1925) 147 Md. 282, 302, 128 Atl. 50.

⁵⁵ (1925) 147 Md. 282, 305, 128 Atl. 50.

⁵⁶ (1925) 147 Md. 282, 316, 128 Atl. 50.

⁵⁷ Bond C. J. and Urner, J.

⁵⁸ *Spann v. City of Dallas*, (1921) 111 Tex. 350, 235 S. W. 513.

ness buildings within a residence district "except with the consent of three-fourths of the property owners of the district, and on the building inspector's approval of the design of the proposed structure." The court said:

"It is doubtless offensive to many people for a store to be located within a given area where they own residence property. Others would possibly regard the store as a convenience. An aesthetic sense might condemn a store building within a residence district as an alien thing and out of place, or as marring its architectural symmetry. But it is not the law of this land 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."⁵⁹

This decision was followed and the opinion cited from fully in the New Jersey case, *Ignaciuvas v. Risley*.⁶⁰

Mr. Chandler begins his article with this sentence: "On first impression no two terms would seem to be more incongruous than beauty and the law."⁶¹ So far as the cases just quoted from are concerned, the impression persists. And notes and comments from law periodicals pretty unanimously essay the answer yes to our major question. In discussing "the constitutionality of building lines for aesthetic purposes,"⁶² a note editor has said:

"Though it is recognized that provisions incidentally aesthetic will not vitiate otherwise valid restrictions, no court, it seems, has yet gone so far as to sustain legislation whose sole object is to promote the aesthetic. . . .

". . . Obviously as civilization advances, the public aesthetic sense will become more and more compelling. . ."⁶³

The statement is accurate in 1929, for civilization advances gradually.

In commenting upon the right of municipal corporations to zone,⁶⁴ a case comment editor remarks that:

"The zoning cases have also displayed a tendency to justify zoning under the police power verbiage. With two exceptions they deprecate argument based on esthetic considerations, although it is a matter of common knowledge that esthetic considerations are very powerful motives with the city council which enacts the zoning law."⁶⁵

We find it stated by Miss Werner that "aesthetic considerations

⁵⁹(1921) 111 Tex. 350, 358, 235 S. W. 513.

⁶⁰(1923) 98 N. J. L. 712, 121 Atl. 783.

⁶¹(1922) 8 A. B. A. J. 472.

⁶²(1921) 34 Harv. L. Rev. 419.

⁶³(1921) 34 Harv. L. Rev. 419, 420, 422.

⁶⁴(1925) 13 Calif. L. Rev. 417.

⁶⁵(1925) 13 Calif. L. Rev. 417, 418.

as such do not furnish sufficient grounds for imposing restrictions on the use of private property under the police power,"⁶⁶ and by Williams, that:

"Under our state constitutions the police power cannot be used to promote civic beauty; although if the main purpose of the measure in question justifies the employment of that power, the promotion of beauty may be a subsidiary consideration."⁶⁷ McQuillin says:

"Undoubtedly the law has undergone a decided change in this respect in recent years. However, so far as it appears from the decided cases, apart from general expressions on the subject, restrictions on the use of property contained in zoning regulations solely for purely aesthetic purposes are regarded as invasions of private property rights."⁶⁸

V

Before stating conclusions, it will be well to notice predictions as to the trend of the cases. Well-considered comments discern "a decided tendency to give . . . more weight"⁶⁹ to aesthetic considerations, a tendency "to broaden the scope of the police power and to use it to accomplish aesthetic purposes whenever in sound public policy there is reason to do so."⁷⁰ However, "the present trend of authority does not favor the sufficiency of aesthetic grounds as a sole justification for zoning laws."⁷¹ Newman F. Baker predicts:

". . . that the time is not distant when the courts of our country will hold that reasonable legislation affecting the property of the individuals will be considered constitutional if passed to promote the well-being of the people by making their surroundings more attractive, their lot more contented, and by inspiring a greater degree of civic pride."⁷²

And McQuillin believes aesthetic legislation

"is destined to increase with the years, and in the development of the law in this respect courts will incline more and more to give a broader interpretation to such regulations, and finally sanction restrictions imposed solely to advance material attractiveness and artistic beauty."⁷³

⁶⁶ Werner, *The Constitutionality of Zoning Regulations* 22.

⁶⁷ Frank Backus Williams, *The Law of City Planning and Zoning* 393, 394. "A very worthy text-book," per O'Niell C. J. in *State ex rel. Civello v. New Orleans*, (1923) 154 La. 271, 97 So. 440.

⁶⁸ 3 McQuillin, *Municipal Corporations*, 2d ed., sec. 1049.

⁶⁹ (1920) 19 Mich. L. Rev. 191, 202.

⁷⁰ (1920) 30 Yale L. J. 171, 173.

⁷¹ (1924) 24 Col. L. Rev. 640, 644.

⁷² Baker, *Legal Aspects of Zoning* 27.

⁷³ 3 McQuillin, *Municipal Corporations*, 2d ed., sec. 943. (1925) 25 Col.

CONCLUSIONS

1. A categorical reply cannot be given to Question (a). What is decided in the cases must be distinguished from what is said. The cases upholding use restrictions upon apartment houses and stores, in their *decisions*, seem to recognize the aesthetic as an important justifying factor. Another discernible factor is conservation of property values.⁷⁴ If this more tangible consideration affords a valid reason for exercising police power,⁷⁵ its presence along with the aesthetic prevents saying that aesthetic considerations alone are sufficient.

2. Where a regulation simply affects the design of ordinary buildings in ordinary places, the affirmative answer⁷⁶ to Question (a) seems correct at present. The boulevard billboard decision⁷⁷ bears out this conclusion.

3. The *language* in the cases upholding rigorous use restrictions flirts with aesthetics without indicating how seriously. The *Wichita Case*⁷⁸ says that considerations of this nature alone justify use of the police power, but the dictum is weakened because the court rested its decision on the ordinary grounds as well.

4. Those use cases which deny the power to exclude business from residence districts say the result follows because the police power cannot be used to accomplish exclusively aesthetic ends.

L. Rev. 1047, 1052: "Constitutionality in New York depends not on general principles but on individual hardships and on whether the court feels that the community is ready to impose them on the individual. Such a standard is an evershifting standard, and to prophesy successfully it behooves one to watch the trend of thought in ordinary men and women as to the propriety of greater refinements in zoning. For courts reflect communal thought on this question."

⁷⁴ J. S. Young, *City Planning and Restrictions on the Use of Property*, (1925) 9 MINNESOTA LAW REVIEW 518 and 593, 626: ". . . what has been called by the courts aesthetic is in reality economic. If this be true, it follows that the economic promotes the general welfare and the general welfare is the leading object for the use of the police power."

Alfred Bettman, *Constitutionality of Zoning*, (1924) 37 Harv. L. Rev. 835, 840: "Stabilization of property values has been frequently mentioned as one of the purposes of zoning which form its constitutional basis. . ."

(1924) 12 Calif. L. Rev. 428, 430: "But the primary purpose of these regulations, although the courts would no doubt be loath to admit it, would seem to be essentially economic."

⁷⁵ 3 McQuillin, *Municipal Corporations*, 2d ed., sec. 944.

⁷⁶ M. T. Van Hecke, *Zoning Ordinances and Restrictions in Deeds*, (1928) 37 Yale L. J. 407, 410.

⁷⁷ *Haller Sign Works v. Physical Culture Training School*, (1911) 249 Ill. 436, 94 N. E. 920.

⁷⁸ (1923) 113 Kan. 153, 214 Pac. 99.

If the premise is correct, the broad gauge courts necessarily have decided otherwise. But, as suggested above, this view of their decisions cannot positively be stated and only Kansas has even said that it can. The difficulty appears to be one of "definition,"⁷⁹ though really it goes more deeply than that, to the fundamental judicial attitude toward "property."

5. The answer to Question (b) is clear: the presence of aesthetic considerations does not invalidate a law sustainable on ordinary police grounds. Here, the problem of definition or of relativity⁸⁰ recurs. The same regulation may be sustained under (a) by a court answering (a) negatively, under (b) by a court answering (a) affirmatively, independently of (a) or (b) by a complete ignoring of the aesthetic factor.⁸¹

6. The concept that the police power is limited strictly to the protection of the public health, safety, morals is outgrown. But the power is so vast and its exercise so fraught with possibilities of abuse, that those courts which conceive it dynamically cling to the terms of the past while giving them enlarged meaning. Progress lies along the path of realism, when each exercise of power shall be furnished its own well-fitted verbal raiment unhidden by the venerable cloak fashioned of safety and health and morals.

⁷⁹Alfred Bettman, *Constitutionality of Zoning*, (1924) 37 *Harv. L. Rev.* 835, 857: "Aesthetic is a word which needs more clear-cut precise definition, if it is to be used as a term of constitutional law." The remainder of the paragraph may contain antecedent questioning of the efficaciousness of the present article.

⁸⁰ See quotation to which note 38 is appended.

⁸¹3 McQuillin, *Municipal Corporations*, 2d ed., sec. 1048: "Zoning cases are replete with these seeming inconsistent phrases. We can learn only what was really decided by understanding the facts of the particular case and the judgment given because the facts were thus and so."