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is a significant step in the direction of making cure a viable tool for enforcing such obligation as well as for requiring good faith negotiations between the parties to resolve their difficulties within the framework of the contract.

Zoning: Billboard Ordinance Based on Aesthetics Held Constitutional

Petitioner had constructed a service station and diner adjacent to a highway and was erecting two signs on the other side for advertising. The building inspector served a stop order on the ground that the signs violated a town zoning ordinance. On appeal from the zoning board's approval of the stop order, petitioner asserted that the ordinance was unconstitutional. The petition was dismissed on the ground that the ordinance merely regulated but did not prohibit billboards. The New York Court of Appeals affirmed, holding that a zoning ordinance based primarily on aesthetic considerations is constitutional. Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

Zoning regulations are authorized under the state police power to promote the general welfare of the community by protecting the usefulness and value of property under a comprehensive system of land use regulation. Because the concept of police power is constantly being expanded by the courts to meet additional public demands, areas develop in which the border between regulation and infringement upon the consti-

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1. The town zoning ordinance set forth a comprehensive plan for the regulation of signs. The town was zoned into a number of use districts, with provisions regulating the size, location, and number of signs per district. Since the regulations covered only signs which were "related to an establishment located on the same lot" ("accessory" signs), "nonaccessory" signs were implicitly prohibited throughout the township.


4. The police power may be generally defined as the power of the state to regulate the conduct of individuals within its jurisdiction in order to promote health, safety, and morality, and to further the general welfare. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

tutional rights of individuals becomes unclear. Zoning regulations which are designed to achieve aesthetic ends have long existed in this border area.\(^5\)

The problem of the application of aesthetics to zoning regulations aimed at billboard control developed with the advent of outdoor advertising in the 1890's. Community officials responded to outraged public sensibilities by adopting ordinances regulating and sometimes entirely prohibiting billboard advertising.\(^6\) The courts reacted unfavorably toward these ordinances, holding them invalid on the ground that they were enacted solely for aesthetic purposes and therefore not within the scope of the police power.\(^7\) Aesthetic considerations were deemed a luxury and an indulgence, not a necessity which justified the exercise of the police power to take private property without compensation.\(^8\)

The earliest case upholding an ordinance regulating the size, location, and manner of construction of billboards was St. Louis Gunning Advertising Company v. St. Louis.\(^9\) The case departed from prior law, but did so by fitting the regulations within the police power to promote health, safety, and morality.\(^10\)

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6. Dukeminier, supra note 5; Rodda, supra note 5.


10. The court found that billboards were publicly dangerous because they were fire hazards and could be blown down by high winds thereby injuring passers-by; that they were deleterious to the public health in that the area surrounding them was used as privies and dumping ground for all kinds of waste; that they afforded shelter for criminals and concealment for immoral acts; and that they obstructed light and air. *See also* Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); *Ex parte* Savage, 63 Tex. Crim. 285, 141 S.W. 244 (1911).
not by recognizing the validity of aesthetic considerations in zoning. Subsequent decisions began to expand the traditional basis of the police power to include some aesthetic considerations.\textsuperscript{11} Some courts used language which seemed to imply that even if the regulation of billboards did not rest upon the traditional grounds, the preservation of scenic beauty would be sufficient support for the ordinances.\textsuperscript{12} Other courts upheld billboard ordinances by analogy of regulation of offensive eyesores under the police power to regulation of offensive sounds and odors under the law of nuisance.\textsuperscript{13}

In New York, an expansion of the concept of general welfare began as early as 1931 when the court of appeals, although invalidating an aesthetic ordinance, acknowledged the growing importance of aesthetic considerations.\textsuperscript{14} By 1940, a lower New York court recognized the general public acceptance of the idea that the creation of beauty in a city or village tends to promote the happiness, contentment, comfort, prosperity, and

\textsuperscript{11} In General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 187, 193 N.E. 799, 816, appeal dismissed sub nom. General Outdoor Advertising Co. v. Callanan, 296 U.S. 543 (1935), the court held that

it is . . . within the reasonable scope of the police power to preserve from destruction the scenic beauties bestowed on the commonwealth by nature in conjunction with the promotion of safety of travel on the public ways and the protection of travelers from the intrusion of unwelcome advertisers.

\textit{Id.} at 187, 193 N.E. at 816.


14. Dowsey v. Village of Kensington, 257 N.Y. 221, 230, 177 N.E. 427, 430 (1931). This expansion of the public welfare concept in the zoning area is also reflected in Ware v. City of Wichita, 113 Kan. 153, 214 P. 99 (1923), where the court sustained a general zoning ordinance which excluded business from residential districts, stating: "There is an aesthetic and cultural side of municipal development which may be fostered with reasonable limitations . . . Such legislation is merely a liberalized application of the general welfare purposes of state and federal constitutions." \textit{Id.} at 157, 214 P. at 101.
general welfare of its citizens. The court inferred that judicial acceptance would ultimately follow.\(^\text{15}\)

The United States Supreme Court in *Berman v. Parker*\(^\text{16}\) included aesthetics in the expanding scope of the concept of general welfare. Without dissent, the Court ruled that the District of Columbia Redevelopment Act of 1945 was constitutional as applied to the taking of a certain commercial building and land under the power of eminent domain. Stating that the concept of the public welfare includes spiritual and aesthetic as well as physical and monetary values, the Court concluded that a legislature has the power to determine that a community should be beautiful as well as healthy.\(^\text{17}\) Although *Berman* dealt with a taking under the power of eminent domain, it was applied to zoning under the police power.\(^\text{18}\)

The most recent development prior to acceptance of the validity of aesthetic zoning ordinances was the adoption of a property value rationale to sustain zoning ordinances clearly designed to promote the beauty of the community.\(^\text{19}\) This rationale was applied in *State ex rel. Saveland Park Holding Corporation v. Wieland*\(^\text{20}\) to uphold an ordinance requiring a determination by village officials, before issuance of a building permit, that the exterior architectural appeal and functional plan of the proposed structure would not be so at variance with those of the neighborhood as to cause a substantial depreciation in property values. The court based its holding on the premise that preservation of property values was within the scope of the police power.\(^\text{20}\)

In *People v. Stover*,\(^\text{21}\) the New York Court of Appeals up-

\(^{15}\) Preferred Tires v. Village of Hempstead, 173 Misc. 1017, 1019, 19 N.Y.S.2d 374, 377 (Sup. Ct. 1940).

\(^{16}\) 348 U.S. 26 (1954).

\(^{17}\) Id. at 33.

\(^{18}\) State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 272, 69 N.W.2d 217, 222 (1955), where it was held that: While the court in *Berman v. Parker* . . . was dealing with the "due process" clause of the Fifth amendment, . . . and it is the "due process" clause of the Fourteenth amendment which is applicable to state action, we consider such distinction to be immaterial in considering the scope of the police power and its exercise to promote the general welfare.


held the constitutionality of a city ordinance with prohibited the hanging of clotheslines in front and side yards in residential areas. The ordinance was sustained "as an attempt to preserve the residential appearance of the city and its property values by banning, insofar as practicable, unsightly clotheslines from yards abutting a public street." Stover became the leading authority on the constitutionality of an ordinance based primarily on aesthetic considerations. However, there remained some doubt as to whether an ordinance of this type would be upheld exclusively on the basis of aesthetics since the Stover court had addressed itself to the concept of property values and had argued by analogy to nuisance control.

The instant case removed any doubt in New York as to the validity of a zoning ordinance based exclusively on aesthetics. The court did not mention either the sustaining of property values or the nuisance theory as bases for its decision. In addition, the ordinance sustained by the Cromwell court was an even more severe limitation on the use of private property than the one sustained in Stover, since it did not allow for exceptions from the absolute prohibition of all nonaccessory billboards.

The Cromwell court, however, while stating that the purpose of all anti-billboard ordinances is primarily aesthetic and that such a purpose is a constitutionally acceptable basis for zoning ordinances, failed to establish workable standards to test the validity of future zoning ordinances based primarily on aesthetic considerations. Standards in the area of aesthetic zoning are particularly necessary because of the existence of a variety of personal conceptions as to what is or is not beautiful. To uphold land use control legislation based on a standard which is incapable of definition involves a sacrifice of property rights to the whims of personal taste.

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22. Id. at 466, 191 N.E.2d at 274, 240 N.Y.S.2d at 737.
25. The ordinance in Stover was arguably regulatory rather than prohibitive, since it expressly provided for the issuance of a permit if practical difficulty required. See 12 N.Y.2d at 465, 191 N.E.2d at 273, 240 N.Y.S.2d at 735; note 1 supra.
26. 19 N.Y.2d at 269, 225 N.E.2d at 753, 279 N.Y.S.2d at 27.
28. See People v. Stover, 12 N.Y.2d 471, 191 N.E.2d 272, 240 N.Y.S.
Other courts have adopted a more conservative approach by limiting the scope of their approval of aesthetic justification. Most aesthetic control cases in which restrictive or prohibitive ordinances were upheld confined their approval to preservation of beauty in particular areas generally felt to be deserving of protection. Rejecting this type of limitation, the court in the instant case could have adopted the property value standard suggested by commentators since it is of more general applicability. Based upon community opinion, it requires that the aesthetic merits of a certain use or structure be evaluated on the basis of changes in the market value of surrounding property. Correlation of aesthetics with property values would provide the courts with an objective standard by which to determine the extent to which aesthetically motivated legislation actually furthers the general welfare. In addition, such an objective standard would enable courts to define practical limits beyond which aesthetic considerations may not control.

Rather than consider any of the standards proposed by prior cases or commentaries, the Cromwell court upheld the complete prohibition of all nonaccessory advertising signs throughout the township. However, the same type of prohibition had been struck down by the New York court in 1937 in Mid-State Advertising Corporation v. Bond. In that decision the court argued that even if aesthetic or cultural reasons demanded restrictions on outdoor advertising, the court could not sustain a prohibition which included all land in the city and which did not define the structures proscribed or provide some other appropriate standard of regulation. The Bond court thus foresaw the pos-


31. Comment, supra note 5, at 90.


33. If the Cromwell court meant to infer that no standards are necessary, it could have cited Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965), where the Oregon court upheld an ordinance which,
sibility of aesthetically motivated legislation, but it refused to recognize legislation devoid of standards, as the Cromwell court did thirty years later.

A second problem with the court's decision in the instant case arises from the court's conclusion that the accessory-non-accessory distinction in the ordinance was not discriminatory. This blurs rather than clarifies the court's position on the scope of aesthetic purpose. The reasoning offered in support of the distinction is that accessory signs are part of the business itself, and the right to conduct a business in a district carries with it the right to maintain a business sign on the premises. Non-accessory signs, on the other hand, are erected pursuant to the business of outdoor advertising itself, and the nature of this business justifies the separate classification. The cases cited in Cromwell in support of the proposition that no discrimination exists upheld ordinances which prohibited nonaccessory signs in certain areas of a town but not in others. Cromwell may be distinguished because the ordinance in question prohibited all nonaccessory signs throughout the township.

If we are to accept the proposition that zoning for aesthetic purposes is permissible, then the accessory-nonaccessory classification is not very convincing. A sign which is aesthetically undesirable when not erected on business premises does not become desirable when placed on the business premises. Furthermore, the petitioner's signs in Cromwell were not erected pursuant to the business of advertising, but for the purpose of advertising a business which was located directly across the street.

Since the accessory-nonaccessory distinction is not consistent

without standards, prohibited all automobile wrecking yards within the city solely on the basis of aesthetics.

34. See United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 150, 93 A.2d 362, 365 (1953). However, it should be noted that the ordinance involved in United Advertising allowed authorization by the local board of adjustment for the continued use of already existing signs.


36. See Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960), which dealt with an ordinance limiting the size of signs in business and industrial districts and putting them in two classifications denominated "point of sale" and "non-point of sale." In the first class, wall signs were unlimited in size; in the second class, wall signs were limited to 300 square feet and all others 180 square feet. Although aesthetics was the criterion by which the court judged the ordinance, it held the ordinance invalid as being unreasonable and discriminatory.
with the aesthetic purpose rationale, the court's approval would seem to indicate an underlying assumption that there is in fact some limitation on the extent to which regulation can be justified solely by its aesthetic purpose. The opinion implies that the degree of infringement on private property rights is the limiting factor. The court seemed to be concerned with the possible eminent domain problems in prohibiting all signs, but was unwilling to become involved in the "regulation" and "taking" distinction. As such, the opinion leaves to speculation the court's intention in upholding the accessory-nonaccessory distinction.

The *Cromwell* case is the latest in a series of decisions which has gradually expanded the police power to include aesthetically motivated legislation. Courts are no longer attempting to find nonaesthetic justifications for billboard regulations which are obviously aesthetically motivated. They have reached the inevitable result that aesthetics is a valid legislative concern. However, by failing to establish reasonable standards, the extent of the *Cromwell* decision is unknown. It is difficult to determine whether billboards are the sole object of the holding, or whether it will extend to all aesthetically undesirable structures. Future courts have not been provided with any reasoning upon which they may base their decisions. Consequently, the New York court may be forced to re-examine its decision in *Cromwell* before the full implication of that decision is known.

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38. This distinction is discussed in Goldblatt v. Hempstead, 369 U.S. 590 (1962).