

Aesthetics and Zoning No Longer Mutually Exclusive

On May 4, 1982, the North Carolina Supreme Court announced an opinion in the case of State v. Jones 305 N.C. 520, 290 S.E. 2d 675 (1982), that reversed its prohibition of land use regulations that are justified solely upon aesthetic considerations. In doing so, the Court brought the law in North Carolina into accord with the view held by a majority of states that have explicitly ruled on the question.

This paper will address the questions about the scope of the police power to zone property or to otherwise regulate the use of land following the announced policy reversal of the Jones decision. It will not attempt to define "aesthetic." Instead, the paper will simply discuss the cases in which the court addressed the issue of aesthetics explicitly as a basis for the exercise of police power.

In State v. Jones, *supra*, the owner of a Buncombe County junkyard challenged the constitutionality of Buncombe County Ordinance 16401, which requires junkyards and automobile graveyards in any unincorporated area of the county to be screened from view from public roads or residential areas. The ordinance prohibits the operation of a junkyard or automobile graveyard within 100 yards of the center line of any public road, within one-quarter mile of any school, or within any residential area, unless the junkyard or automobile graveyard is entirely surrounded by an opaque fence, or by a wire fence and vegetation.

In upholding the constitutionality of the ordinance, the Court stated that the exercise of the police power in regulating the use of private property -- which is only justified when the regulation is substantially related to the public health, safety, morals, or to the general welfare -- may be justified by exclusively aesthetic considerations.

History of the Treatment of Aesthetic Regulations in North Carolina

The Jones decision expressly overruled a line of cases holding that regulation based on aesthetic considerations alone was an unconstitutional use of the police power. Following the national trend in both federal and state courts, the North Carolina Supreme Court has recently enlarged the permissible scope of the police power in several rulings. The expansion of the scope of the police power announced in Jones follows this trend, and permits regulations that

were previously invalid because they were based solely on aesthetic considerations.

The Court first considered the question of aesthetics as the basis for police power regulations in Macrae v. City of Fayetteville, 198 N.C. 51, 150 S.E. 810 (1929). The City of Fayetteville enacted an ordinance to prevent the construction of gasoline stations within 250 feet of any residence. In striking down the ordinance, the Court held that "the law does not allow aesthetic taste to control private property, under the guise of the police power."

In Appeal of Parker, 214 N.C. 51, 197 S.E. 706 (1938), the Court refined its view toward aesthetic considerations in land use regulation. In upholding a zoning ordinance that prohibited certain walls within 25 feet of any street in residential districts, the Court stated that "while aesthetic considerations are by no means controlling, it is not inappropriate to give some weight to them in determining the reasonableness of the law under consideration." 214 N.C. 51, 57, 197 S.E. 707, 710 (1938). This was basically the test applied by the Court to aesthetic regulations until the Jones decision.

The Supreme Court first applied the test set out in Parker to junkyard regulations in State v. Brown, 250 N.C. 54, 108 S.E. 2d 74 (1959). The Brown decision invalidated a statute prohibiting junkyards or garbage dumps along state highways, unless the junkyard or garbage dump was concealed from the view of persons on the highway. The Court concluded that the ordinance was enacted solely for aesthetic reasons. Stating that "neither the General Assembly nor a municipality may exercise the police power unless its exercise relates to the public health, safety, morals, or general welfare," the Court took the position that aesthetic considerations alone are insufficient to support the exercise of the police power. The Court repeated the rule set out in Parker, *supra*, that "if a regulation finds a reasonable justification in serving a generally recognized ground for the exercise of that power, the fact that aesthetic considerations play a part in its adoption does not affect its validity." 250 N.C. 54, 59, 108 S.E. 2d 74, 78 (1959).

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The Court has applied the rule set out in Parker and Brown to several types of ordinances in several decisions since Brown. One of these is Little Pep Delmonico Restaurant v. City of Charlotte, 252 N.C. 324, 113 S.E. 2d 422 (1960), in which the Court declared unconstitutional an ordinance which prohibited the maintenance of business signs over sidewalks within a designated district of the city. The Court stated that if it appears that the ordinance is "arbitrary, discriminatory, and based solely on aesthetic considerations, the court will not hesitate to declare the ordinance invalid." 252 N.C. 324, 326, 113 S.E. 2d 422, 424.

As recently as 1970, the North Carolina Supreme Court repeated the rule set out in the Brown case and applied the reasoning to a housing code-urban renewal case. In Horton v. Gulledge, 277 N.C. 353, 177 S.E. 2d 885 (1970), the court referred to the United States Supreme Court holding in Berman v. Parker, 348 U.S. 26 (1954), which ruled that the United States Constitution allows the police power to be exercised for aesthetic purposes. The North Carolina Court noted that the U.S. Supreme Court's interpretation of the Due Process Clause of the federal constitution does not control the corresponding Law of the Land Clause of the North Carolina Constitution. The scope of the police power to regulate land use within a state may be more narrow, due to the interpretation of state constitutions by state courts, than that which is permitted by federal constitutional requirements as interpreted by the U.S. Supreme Court.

Since the Horton decision in 1970, the North Carolina Supreme Court has decided two cases that have indicated its willingness to consider expanding its interpretation of the permissible extent of the police power. These decisions, State v. Vestal, 281 N.C. 517, 189 S.E. 2d 152 (1972) and A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258, S.E. 2d 444 (1978), foreshadowed the policy reversal concerning aesthetic-based regulations of the Jones decision.

In State v. Vestal, supra, the Court struck down an ordinance requiring a fence or an evergreen screen around junkyards. The Court, however, suggested that it may reconsider its position on ordinances based on aesthetic considerations. The state in Vestal contended that the ordinance in question was not based solely or predominantly upon aesthetic considerations, but was based on concern for highway safety. The Court felt that the ordinance bore no reasonable relation to the safety of the travelling public and, therefore, declared it an invalid exercise of the police power. The Court seemed to invite a challenge to the rule set out in Brown prohibiting reasonable regulation that is based solely on aesthetic considerations.

In A-S-P Associates v. City of Raleigh, supra, the Court upheld an ordinance adopting architectural guidelines and design standards to be applied by a Historic District Commission to a historic district created by the City of Raleigh. A-S-P Associates challenged the ordinance as based solely on aesthetic considerations and therefore beyond the scope of permissible police power. The Court ruled to expand the permissible scope of the police power to include the exterior appearance of buildings when the purpose of the regulation is "the preservation of the State's legacy of historically significant structures." 298 N.C. 207, 216, 258, S.E. 2d 444, 450 (1978). The Court noted that "cases dealing with purely aesthetic regulations are distinguishable from those dealing with preservation of a historical area or a historical style of architecture." Id. The Court then pointed out the benefits to the general welfare of historic preservation and the substantial relationship to this purpose of the ordinance in question. While the Court was unprepared to accept purely aesthetic regulation, it did accept regulations focusing on the educational, cultural, and economic value of the appearance of historic neighborhoods.

Discussion of the Decision in Jones

With its decision in Jones, the North Carolina Supreme Court ruled that "reasonable regulation based on aesthetic considerations may constitute a valid basis for the exercise of the police power depending on the facts and circumstances in each case." 305 N.C. 520, 530-31, 290 S.E. 2d 675, 681 (1982). The Court was careful



to emphasize that this does "not grant blanket approval of all regulatory schemes based on aesthetic considerations." *Id.* In short, the regulation must be reasonable to be upheld as constitutional. This is a standard constitutional due process or law of the land requirement from which aesthetic regulations are obviously not exempt.

In determining the reasonableness of a regulation, the Court adopted the balancing test which was first announced in *A-S-P Associates v. City of Raleigh*, *supra*, in which the diminution in value of an individual's property is weighed against the corresponding gain to the public from the regulation. Several factors are listed that are to be considered in applying the balancing test, including 1) whether the regulation results in the confiscation of the most substantial part of the value of the property, 2) whether the regulation deprives the property owner of the property's reasonable use, 3) the purpose of the regulation, and 4) the manner in which the regulation attempts to achieve the purpose of the regulation.

The Court in *Jones* provides guidance in determining the acceptability of the purpose of a regulation based on aesthetic considerations. The Court mentions "corollary community benefits" that are to be considered as part of the balancing test. Examples of the corollary benefits that justify an aesthetic regulation are "protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community and promotion of the comfort, happiness, and emotional stability of the area residents." *Id.*

The Court also added that "we feel compelled to caution the local legislative bodies charged with the responsibility for and the exercise of the police power in the promulgation of regulations based solely upon aesthetic considerations that this is a matter which should not be delegated by them to subordinate groups or organizations which are not authorized to exercise the police power by the General Assembly." *Id.*

The Court, thus, sets out the factors that courts are to consider in reviewing the validity of an ordinance that previously would have been struck down as beyond the permissible extent of the police power. The Court also stresses that regulations that are aesthetic-based are to be promulgated by bodies of elected officials rather than by appointed commissions or advisory boards.

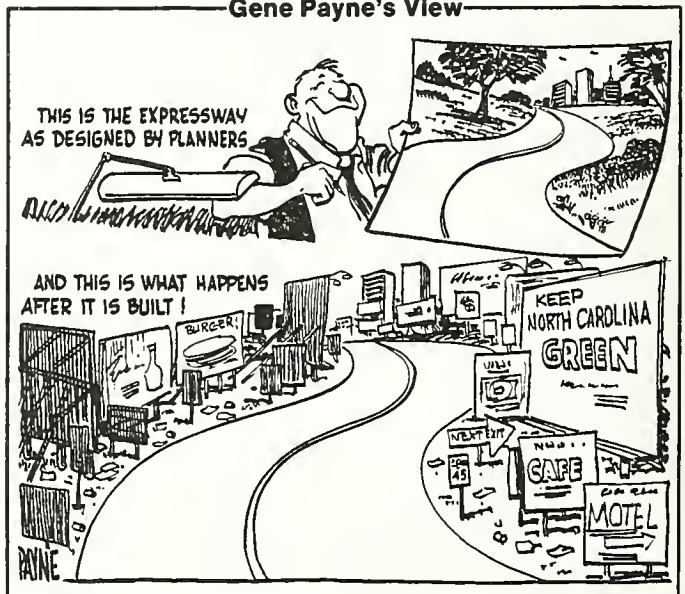
Other than junkyard shielding requirements, this balancing test doesn't provide significant and specific guidance as to what types of regulations the expanded scope of the police power announced in *Jones* will include.

Status of Aesthetic Considerations in Regulations in Other States

The expansion of the permissible range of the police power in North Carolina to allow regulation based on aesthetic considerations follows the national trend that started with *Berman v. Parker*, 348 U.S. 26 (1954). The U.S. Supreme Court in *Berman* removed any federal constitutional objections to regulations based on aesthetic considerations. More states are finding the reasoning of *Berman* persuasive and have been adopting it in the interpretation of state constitutions.¹ Nineteen jurisdictions now explicitly allow regulations based on aesthetic considerations,² with approximately six jurisdictions joining this trend in the past ten years.³ Eight states expressly prohibit regulations based solely on aesthetics.⁴ In other states the question is unresolved or there are no reported cases addressing the question of exclusively aesthetic-based regulation.

No state will hold an ordinance invalid because it is based partially on aesthetic considerations. Often there is no functional difference between states that purport to uphold regulations solely on aesthetic considerations while cautioning that the regulations must be a reasonable use of the police power, and states that purport to invalidate regulations based solely on aesthetic considerations, while upholding regulations based in part on aesthetic concerns. One court may rule that a junkyard regulation is valid solely due to aesthetic considerations in shielding the junkyard while another court will rule that aesthetic concerns along with enhanced public safety or beneficial effects on property values will justify the regulation. In both courts, a regulation related to aesthetics that is considered unreasonable or insufficiently related to the general welfare will be struck down.

Gene Payne's View



In the Southeast, judicial acceptance of aesthetic considerations as a basis for the exercise of the police power has been mixed. Tennessee, North Carolina, and Georgia will uphold a reasonable regulation based solely on aesthetic considerations. All three states have reversed a more restrictive policy within the last three years.

The Georgia Supreme Court has ruled that "municipalities may enact and enforce reasonable sign ordinances under the general public welfare aspect of its police power, specifically aesthetics." H & H Operations, Inc. v. City of Peachtree City, 248 Ga. 500, 283 S.E. 2d 867 (1981). In an earlier case, Rockdale County v. Mitchell's Used Auto Parts, Inc., 243 Ga. 465, 254 S.E. 2d 846 (1979), the Georgia Court upheld the constitutionality of reasonable junkyard regulations as a traditional police power function without crossing the issue of whether a regulation based solely on aesthetic considerations would be valid.

Tennessee has also recently reinterpreted the permissible scope of the police power in Tennessee to authorize regulations based on aesthetic considerations alone. State v. Smith, 618 S.W. 2d 474 (Tenn. 1981). In a challenge to an ordinance quite similar to the Buncombe County ordinance challenged in State v. Jones, the Tennessee Supreme Court held that "in modern society aesthetic considerations may well constitute a legitimate basis for the exercise of police power, depending upon the facts and circumstances." Id., at 477.

Virginia is the only southeastern state that explicitly prohibits the exercise of the police power for solely aesthetic purposes. The Virginia Court, however, does not completely disregard aesthetic factors in its consideration of the validity of police power regulations. The current rule in Virginia is stated in Kenyon Peck, Inc. v. Kennedy, 210 Va. 60, 168 S.E. 2d 117 (1969). The fact that aesthetics may have played a role in adopting the ordinance did not invalidate the ordinance since the public safety element in the regulation upholds the exercise of the police power.

Possible Extent of the Police Power in Land Use Regulation in North Carolina

The important policy question presented by Jones is what type of ordinance is likely to be permissible in North Carolina following the Jones decision. Obviously, reasonable regulations governing junkyard and automobile graveyard establishments will be reviewed favorably.

Also, since the Jones decision, the North Carolina Court of Appeals has upheld an ordinance that prohibits off-premise commercial signs. As noted by the Court of Appeals "the primary purpose of the ordinance is to eliminate



structures which block and detract from the town's scenic beauty." R.O. Givens, Inc. v. Town of Nag's Head, 58 N.C. App. 697, 294 S.E. 2d 388 (1982), appeal dismissed, 307 N.C. 127, 297 S.E. 2d 400 (1982). In determining that the off-premise commercial sign ban was permissible, the Court noted the economic importance of tourism to the municipality and, citing Jones, held that aesthetics constituted a valid basis for the exercise of the police power to prohibit commercial off-premise signs.⁵

Cases from other state supreme courts cited with approval by the North Carolina Supreme Court in the Jones decision provide some influence if a similar challenge is brought in North Carolina. One may speculate that North Carolina courts will look favorably upon such an ordinance.

The Tennessee case State v. Smith, discussed earlier and cited with approval in Jones upheld a state statute prohibiting the establishment of automobile graveyards within 1000 feet of state roadways without a vehicle junkyard concealment control permit.

The final case of significance cited in Jones was a New Jersey decision holding that a municipal ordinance prohibiting the use of "For Sale" signs was unconstitutional; but that to prohibit "Sold" signs in front of houses already purchased was a proper zoning exercise in order to prevent commercial advertising in residential areas since the value of such information was outweighed by the significant government interest in the promotion of aesthetics. Berg Agency v. Township of Maplewood, 163 N.J. Super. 542, 395 A.2d 261 (1978). The burden that the regu-

lation placed on the marketability of the real state was held to outweigh the municipal interest while the home was for sale; however, after the property was sold the owner's interest no longer outweighed the municipal interest.

Regulations that have been held to upheld in other states expressing tests similar to the test enunciated in Jones, while not at all binding on the North Carolina courts, are informative as to the types of regulatory schemes that may be generally acceptable in states that claim to allow regulations that are based solely on aesthetics factors.

New Jersey has upheld an ordinance that restricts the location within a quarry where products and equipment can be stored, on the grounds that the police power includes the ability to regulate unsightly conditions. Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren, 142 N.J. Super. 103, 361 A.2d 12 (App. Div. 1976) affirmed, 74, N.J. 312, 377 A.2d 1201 (1977).

Wisconsin courts have upheld on aesthetic grounds an ordinance that prohibits the storage of junked automobiles within 750 feet of a highway. Racine County v. Plourde, 38 Wis. 2d 403, 157 N.W. 2d 591 (1968). Wisconsin has also upheld a zoning ordinance requiring a finding that the exterior architectural appearance of a proposed structure would not cause substantial depreciation in property value nearby, before a building permit will be issued.

Conclusion

The decision of the the North Carolina Supreme Court in State v. Jones has the effect of enlarging the permissible scope of the police power in a limited, albeit substantial, range of regulations. The functional effect is to allow local governments to regulate the appearance of junkyards, automobile graveyards and various other obvious eyesores, and to give local governments more latitude in regulating the proliferation of outdoor advertisement structures.

The Court is cautious in its acceptance of aesthetic-based regulation. The opinion indicates that a regulation based on aesthetics is not acceptable if the benefits to the public of the regulation, both direct and corollary, do not outweigh the diminution in an individual's property value. The Court sets out several factors to be considered in applying the balancing test to determine the validity of an aesthetic regulation. These factors include the nature and extent of the damage to an individual property owner, the purpose of the regulation, the regulation's relation to the purpose; plus the corollary benefits of the regulation such as protection of property values, promotion of tourism, and preservation of community character.

Footnotes

- 1) For further information, see Bufford, "Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation," 48 University of Missouri at Kansas City Law Review 125 (1980).
- 2) California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Massachusetts, Michigan, Mississippi, Montana, New Jersey, North Carolina, New York, Ohio, Oregon, Utah, and Wisconsin.
- 3) Georgia, Michigan, Montana, North Carolina, Tennessee, and Utah.
- 4) Illinois, Maryland, Nebraska, Rhode Island, Texas, Vermont, Pennsylvania, and Virginia.
- 5) It is important to note the other important considerations in municipal or county sign ordinances. These include consistency requirements with the N.C. Outdoor Advertising Control Act and the Federal Highway Beautification Act, compensation to sign owners, and First Amendment freedom of speech issues. These are each addressed in the Givens case.



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