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Aesthetic Regulation: State v. Jones

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NOTES

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I. INTRODUCTION

A growing number of American communities have become concerned about the negative effect automobile junkyards, garish signs, and similar land uses have on the appearance of their urban and rural landscapes. Frequently, however, a community's desire to do something about these problems is blunted by assertions that the police power cannot properly be applied to achieve aesthetic objectives. For many years, the majority view in America and the view in North Carolina has been that the police power may not be used to further aesthetic interests.[1] Recently, however, a number of states have held aesthetics to be a valid regulatory interest.[2]

In *State v. Jones*[3] the North Carolina Supreme Court recognized aesthetics as a valid basis for the exercise of the police power.[4] *Jones* overruled the court's previous cases including *State v. Brown*[5] to the extent that these previous cases prohibited aesthetic considerations, either alone or in combination with other interests, as a basis for governmental regulation.[6] Prior to *Jones*, aesthetic considerations had, except for the limited area of historic district regulations,[7] either been left out of regulations, stated in regulations as inconspicuously as possible without justification,[8] or included in regulations under the guise of recognized interests such as public safety or protection of property values.[9]

1 Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125, 126 (1980).

2 *Id.* at 127

3 305 N.C. 520, 290 S.E.2d 675 (1982).

4 *Id.* at 530, 290 S.E.2d at 681.

5 250 N.C. 54, 108 S.E.2d 74 (1959).

6 State v. Jones, 305 N.C. 520, 530, 290 S.E.2d 675, 681 (1982).

7 *See* A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

8 For example, consider subdivision regulations requiring side lot lines to be perpendicular to the street right-of-way and regulations requiring a minimum width or frontage for residential lots. Although not stated, these requirements and others contained in subdivision ordinances are often motivated by aesthetic concerns. *See generally* Annot., 21 A.L.R.3d 1222 (1968) under "frontage requirements" and "width and area of lots."

9. *See* State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972), where a screening requirement's stated purpose was to insure community safety and acceptability, but the court stated that "we see no reasonable basis for supposing that the construction of such a fence along the boundary of the automobile wrecking yard will promote safety on the adjacent roads." *Id.* at 523, 189 S.E.2d at 156

The recognition in *Jones* of aesthetics as a valid regulatory interest provides needed support for existing aesthetically oriented regulations and provides the basis for certain aesthetic regulations which could not have been adopted in the past because their objectives were either purely or primarily aesthetic. In addition, *Jones* provides a test for determining the validity of aesthetic regulations.[10] The application of this test in future litigation will establish the limits within which aesthetic objectives can be pursued. While case law applying the *Jones* test is limited,[11] an analysis of the test itself along with an examination of case law in other majority jurisdictions suggests some of the contours of this area of the law. This note explores some of the implications of the *Jones* decision by examining the reasonableness test set forth in the opinion. An analytical framework within which aesthetic regulation cases may be more clearly understood and compared is also outlined and is applied to *Jones*. This framework permits the validity of aesthetic regulations to be more accurately predicted. In addition, the framework reveals the relatively benign nature of most aesthetic regulations thus dispelling, to some degree, the apprehension that has tended to surround this aspect of the law.

II. THE CASE

On July 29, 1980, the defendant, Mack H. Jones, was charged with a violation of Buncombe County Ordinance Number 16401 as amended.[12] This states, in part, that "[j]unkyards or automobile graveyards may be operated and/or maintained without restrictions if and providing that said junkyard or automobile graveyard shall be entirely surrounded by a fence, or by a wire fence and vegetation . . . ."[13] The defendant failed to erect the required fence to enclose his junkyard, known as Mack's Used Car and Truck Parts, from the adjacent residential area.[14] The defendant moved to quash the warrant on the grounds that the ordinance was unconstitutional as written and as applied, and that the enactment and enforcement of the ordinance was outside the county's statutory authority.[15] The district court granted the

10 State v. Jones, 305 N.C. 520, 530, 290 S.E.2d 675, 681 (1982). *See infra* text accompanying notes 48-55

11 *See* R.O. Givens, Inc. v. Town of Nags Head, — N.C. App. —, 294 S.E.2d 388, 391 (1982) (citing *Jones*)

12. Plaintiff-Appellant's Brief at 2, State v. Jones, 53 N.C. App. 466, 281 S.E.2d 91 (1981), *aff'd*, 305 N.C. 520, 290 S.E.2d 675 (1982).

13. Record at 10, State v. Jones, 53 N.C. App. 466, 281 S.E.2d 91 (1981), *aff'd*, 305 N.C. 520, 290 S.E.2d 675 (1982).

14 Plaintiff-Appellant's Brief at 2, State v. Jones, 53 N.C. App. 466, 281 S.E.2d 91 (1981), *aff'd*, 305 N.C. 520, 290 S.E.2d 675 (1982)

15 Record at 3, State v. Jones, 53 N.C. App. 466, 281 S.E.2d 91 (1981), *aff'd*, 305 N.C. 520, 290 S.E.2d 675 (1982).

defendant's motion to quash the warrant after finding the ordinance unconstitutional.[16] The State of North Carolina appealed the district court's decision to the superior court which upheld the lower court's finding.[17] The State appealed again to the Court of Appeals of North Carolina.[18] The court of appeals examined the recent holdings of the North Carolina Supreme Court on the subject of aesthetic regulation and reversed and remanded after concluding that "the trend in the cases decided by our Supreme Court is such that *Brown* no longer governs."[19] The defendant then petitioned the Supreme Court of North Carolina for discretionary review from the judgment of the court of appeals.[20] The supreme court specifically overruled *State v. Brown*, finding the ordinance constitutional and held "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 of each case."[21]

III. BACKGROUND

The 1959 decision of the North Carolina Supreme Court in *State v. Brown* established the rule in North Carolina that aesthetic considerations alone were insufficient to support the use of the police power.[22] In *Brown*, the court held a state statute requiring the screening of certain junkyards unconstitutional because it was based upon aesthetic grounds.[23] The court commented:

> We are in sympathy with every legitimate effort to make our highways attractive and to keep them clean; even so, we know of no authority that vests our courts with the power to uphold a statute or regulation based purely on aesthetic grounds without any real or substantial relation to the public health, safety or morals, or the general welfare.[24]

16 *Id.*

17 *Id.*

18. *Id.*

19. State v. Jones, 53 N.C. App. 466, 470-71, 281 S.E.2d 91, 94 (1981), *aff'd*, 305 N.C. 520, 290 S.E.2d 675 (1982).

20. Petition for Discretionary Review Under N.C. GEN. STAT. § 7A-31, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

21 State v. Jones, 305 N.C. 520, 530-31, 290 S.E.2d 675, 681 (1982).

22. State v. Brown, 250 N.C. 54, 59, 108 S.E.2d 74, 78 (1959). Prior to *Brown*, the North Carolina Supreme Court indicated, in Turner v. City of New Bern, 187 N.C. 541, 543-47, 122 S.E. 469, 470-73 (1924), that aesthetic considerations could be a proper motive for the enactment of municipal regulations. However, such aesthetic objectives had to be combined with other considerations more closely related to the police power. If they were not so combined, the aesthetic regulation could be sustained only if compensation was provided under the right of eminent domain. Also, in Hinshaw v. McIver, 244 N.C. 256, 259, 93 S.E.2d 90, 92 (1956), the North Carolina Supreme Court recognized the statutory power of a municipality to regulate the operation of junk yards. This case, however, did not consider the issue of aesthetics.

23. 250 N.C. at 59, 108 S.E.2d at 78.

24. *Id.*

This view was reiterated in two subsequent cases: *Little Pep Delmonico Restaurant, Inc. v. City of Charlotte*[25] and *Horton v. Gulledge*.[26] In *Delmonico Restaurant*, the court said that "[i]f it appears the ordinance is arbitrary, discriminatory, and based solely on aesthetic considerations, the court will not hesitate to declare the ordinance invalid."[27] The court's opinion in *Horton* recognized the United States Supreme Court's comment in *Berman v. Parker*[28] that "[i]t 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."[29] However, the *Horton* opinion went on to say that:

> [A] decision of the Supreme Court of the United States construing the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, though persuasive by reason of our respect for the views of that Court, does not control our interpretation of the Law of the Land Clause in the Constitution of North Carolina.[30]

The first suggestion of a possible change in the 1959 rule came in *State v. Vestal*[31] when the court again considered the constitutionality of a regulation requiring the screening of auto wrecking yards and other similar uses. The *Vestal* court found the ordinance unconstitutionally vague, and stated that it could not find a reasonable basis for assuming that the screening requirement would promote the alleged purpose of highway safety.[32] Since the screening requirement was presented to the court as having the singular objective of highway safety, the question of aesthetics as a possible basis was not before the court.[33] Despite the absence of the issue of aesthetics, the *Vestal* court went on to comment that "[w]e express no opinion [on the validity of a requirement based upon aesthetic considerations alone], though we note the growing body of authority in other jurisdictions to the effect

25 252 N.C. 324, 113 S.E.2d 422 (1960) (ordinance prohibiting business signs over sidewalks)

26 277 N.C. 353, 177 S.E.2d 885 (1970) (Housing Commission order requiring demolition of a dwelling) (stating that "we have held that even the State, itself, may not, under the guise of the police power, regulate the use of property for aesthetic reasons which have no real or substantial relation to the public health, safety or morals, or to the general welfare."). *Id.* at 359, 177 S.E.2d at 889

27 252 N.C. at 326, 113 S.E.2d at 424

28 348 U.S. 26 (1954).

29 *Id.* at 33.

30. 277 N.C. at 359, 177 S.E.2d at 889. The "law of the land clause" in the Constitution of North Carolina reads as follows:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. CONST. art. I, § 19.

31 281 N.C. 517, 189 S.E.2d 152 (1972)

32 *Id.* at 521-23, 189 S.E.2d at 156.

33 *Id.* at 524, 189 S.E.2d at 157.

that the police power may be broad enough to include reasonable regulation of property use for aesthetic reasons only."[34]

Between the North Carolina Supreme Court's consideration of *Vestal* in 1972 and its consideration in 1979 of *A-S-P Associates v. City of Raleigh*,[35] the majority rule in the United States on aesthetic regulation changed.[36] The former majority rule that aesthetic interests alone could not support an exercise of the police power became the minority rule.[37] As in *Vestal*, the court's opinion in *A-S-P Associates* noted this growing body of authority in other jurisdictions recognizing the validity of aesthetic considerations as a basis for use of the police power.[38] This time, however, the court held "that the police power encompasses the right to control the exterior appearance of private property when the object of such control is the preservation of the State's legacy of historically significant structures."[39] While aesthetics was recognized as a valid interest, the historic district regulations were not upheld on this basis alone. Other legitimate interests such as the preservation of the historic and cultural heritage of the community for educational purposes were significant in justifying the use of the police power.[40] The *A-S-P Associates* opinion is important because it outlines a test for determining the validity of a governmental regulation of private property when the regulation is challenged on the ground that it is an invalid exercise of the police power.[41] This test was later adopted by the court within the broader context of *State v. Jones*.[42] Soon after *A-S-P Associates*, the Court of Appeals of North Carolina, in *County of Cumberland v. Eastern Federal Corporation*,[43] held that the Cumberland County sign ordinance could properly be based upon aesthetic concerns.[44] When the Court of Appeals of North Carolina considered *State v. Jones*[45] one year later, the court commented that "[w]e do not believe we can affirm the superior court in the case sub judice consistently with Cumberland County."[46] The court went on to say that "[w]e believe the trend in the cases decided by our Supreme Court is such that *Brown* no longer governs."[47]

34 *Id.*
35 298 N.C. 207, 258 S.E.2d 444 (1979).
36 Bufford, *supra* note 1, at 127.
37. *Id.*
38. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 216, 258 S.E.2d 444, 450 (1979)
39 *Id.*
40. *Id.*
41. *Id.* at 214, 258 S.E.2d at 448-49.
42. State v. Jones, 305 N.C. 520, 530, 290 S.E.2d 675, 681 (1982).
43. 48 N.C. App. 518, 269 S.E.2d 672 (1980).
44. *Id.* at 524, 269 S.E.2d at 676.
45. 53 N.C. App. 466, 281 S.E.2d 91 (1981), *aff'd*, 305 N.C. 520, 290 S.E.2d 675 (1981).
46. *Id.* at 470, 281 S.E.2d at 94.
47 *Id.* at 470-71, 281 S.E.2d at 94.

IV. ANALYSIS

In analyzing *State v. Jones*, this note first examines the reasonableness test set forth in the opinion. Following this, a framework within which aesthetic regulation cases may be compared is outlined. The *Jones* case is analyzed in relation to this framework, and in relation to other aesthetic regulation cases which, according to the analytical framework, are either similar to or different from *Jones*.

A. *The Reasonableness Test*

In *State v. Jones* the North Carolina Supreme Court recognized aesthetic considerations as a valid basis for exercise of the police power subject to the test set forth in *A-S-P Associates*.[48] In describing the test, the *Jones* court said "[w]e do not grant blanket approval of all regulatory schemes based upon aesthetic considerations. Rather, we adopt the test expressed in *A-S-P Associates* that the diminution in value of an individual's property should be balanced against the corresponding gain to the public from such regulation."[49] The court identified factors to be considered in applying the test. These factors include private concerns such as confiscation of all or part of the value of the property and depriving the property owner of the reasonable use of the property, and public concerns such as the regulation's purpose and the manner in which the purpose sought is to be achieved.[50]

In order to understand the *Jones* test, it is useful to refer to the manner in which the test was outlined in *A-S-P Associates*:

> Several principles must be borne in mind when considering a due process challenge to governmental regulation of private property on grounds that it is an invalid exercise of the police power. First, is the object of the legislation within the scope of the police power? Second, considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable? . . . This second inquiry is two-pronged: (1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?[51]

For regulations based on aesthetics, *State v. Jones* eliminates future

48. State v. Jones, 305 N.C. 520, 530, 290 S.E.2d 675, 681 (1982).

49. *Id.*

50. *Id.* The court also listed a number of corollary community benefits which would be factors to be entered into the balancing equation. These factors include "the 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 area residents." *Id.*

51. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 214, 258 S.E.2d 444, 448-49 (1979).

concern about the first part of the *A-S-P Associates* test since the *Jones* opinion expressly recognizes that aesthetics is within the scope of the police power.[52] The second part of the *A-S-P Associates* test, consisting of a two-pronged test of reasonableness, remains therefore as the essential part of the test adopted by *Jones*.

The first prong of the reasonableness test examines the means selected to implement the regulation's objective. The application of this prong of the test is illustrated in *A-S-P Associates* where the court found that the historic district regulations were "the only feasible manner in which the historic aspects of the entire district can be maintained."[53] The second prong of the reasonableness test consists of the balancing of the diminution in value of the owner's property against the public concerns. In applying this portion of the test, the court in *A-S-P Associates* found it significant that the ordinance did not prohibit the construction of new structures but only regulated the manner in which they were to be constructed.[54] The court further noted that "the mere fact that an ordinance results in the depreciation of the value to an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid."[55]

It is helpful to observe that the *A-S-P* test closely parallels the classic test for constitutional due process first enunciated by the United States Supreme Court in *Lawton v. Steele*[56] and revived in *Goldblatt v. Town of Hempstead*.[57] *Lawton* held that, first it must appear "that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[58] A review of the literature discussing the *Lawton* test is useful in identifying the constitutional issues shared by the two tests by virtue of their similarity.[59]

1. Implications of the Reasonableness Test

While the diminution in value prong of the test in *Jones* provides a useful framework within which to consider conflicting interests, the inability to quantify aesthetic objectives and the existence of differing

52. 305 N.C. at 530, 290 S.E.2d at 681.
53. 298 N.C. at 217, 258 S.E.2d at 450-51.
54. *Id.* at 218, 258 S.E.2d at 451.
55. *Id.*
56. 152 U.S. 133, 137 (1894).
57. 369 U.S. 590, 594-95 (1962).
58. 152 U.S. at 137.
59. *See generally* 1 A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING § 2.01 (4th ed. 1983); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 443-44 (1978); D. MANDELKER, LAND USE LAW 22 (1982).

opinions leaves doubt that the test will in and of itself resolve the difficult questions inherent in the area of aesthetic regulation. Even in the non-aesthetic areas of land use law the adequacy of the diminution in value test has been questioned.[60]

In some cases, such as *A-S-P Associates* (upholding historic district regulations), the reasonableness test illuminates the legal questions and aids in a clear articulation of the reasoning supporting the holding.[61] In another group of cases, exemplified by *States v. Jones* (upholding screening requirements for junkyards), the test again provides a useful methodology for dealing with the conflicting interests. The application of the test, however, offers little in the way of a rationale to support what is basically an obvious result once it has been determined that aesthetics is a proper basis for regulation and that junkyards are offensive. In other words, the test provides little help in making the determination that junkyards are the sort of thing that warrant appearance-oriented regulations. This latter group of cases is characterized by the fact that there is a commonly held opinion that the use is visually offensive. This public perception is generally accepted by the court, as it was in *Jones*, and is sometimes reinforced by referring to the use as a nuisance.[62] While *Jones* sets forth the test for determining the validity of aesthetic regulations, the supreme court opinion gives little attention to the application of the test to the facts of that particular case. The requirements of the test, however, are met. The required screening does effectively lessen the offensive nature of the use, and the cost of the screen and the percentage of the land required to accommodate it appear to be reasonable in relation to the public benefit.[63] A third group of cases represents the situation where the basis for comparing or weighing the conflicting interests cannot be identified. These cases are characterized by the fact that: (1) more abstract aesthetic principles or objectives are the subject of regulation; and (2) there is less unanimity as to the wisdom of the legislative undertaking. Examples include cases involving: (1) decisions of architectural control boards established to approve the design of dwellings within residential neighbor-

60. *See generally* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV L REV 1165 (1967); Department of Ecology v. Pacesetter Const., 89 Wash 2d 203, 571 P 2d 196 (1977).

61. *See* 298 N.C. at 216-18, 258 S.E.2d at 450-51.

62. 3 P. ROHAN, ZONING AND LAND USE CONTROLS § 16.03, at 16-26 (1982).

63. When the Court of Appeals of North Carolina considered Jones, reference was made to a balancing of the public and private interests. The court said "[i]n reaching this conclusion, we take into account that the duty on the defendant to build a fence or grow a hedge is not too burdensome as compared to the public benefit to Buncombe County in improving the appearance of the highways." State v. Jones, 53 N.C. App. 466, 470, 281 S.E.2d 91, 94 (1981), *aff'd*, 305 N.C. 520, 290 S.E.2d 675 (1982).

hoods;[64] (2) regulations totally excluding mobile home parks from the list of permitted land uses;[65] and (3) regulations excluding cemeteries from certain areas.[66] It is precisely these cases that reveal the limitations of the reasonableness test in resolving the conflicting issues.[67]

The reasonableness test therefore appears to vary in its ability to contribute to the actual formulation of the judicial opinion. In some cases, such as *A-S-P Associates*, the test is helpful in illuminating the issues. In another set of cases, such as *Jones*, the determination that the use warrants regulation is more likely attributed to public perception than legal analysis. The test in these cases, however, can be useful in determining whether the private landowner is unreasonably burdened. The third situation is where the interests are so subjective that they elude application within a balancing test.

2. Other Factors Influencing Reasonableness

The concern that aesthetic matters were not capable of being evaluated according to objective standards was one factor underlying the early rejection of aesthetics as a proper basis for exercising the police power.[68] In certain areas of aesthetic regulation such as historic districts, it is particularly important for standards to be adopted.[69] Generally the greater the discretion available to the administrators, the more advisable it is to develop standards. An issue related to the matter of standards is the question of who will make the judgments necessary to administer the regulation. Again, in the area of historic district regulation, where the amount of discretion is relatively broad, the State of North Carolina requires that a majority of the members of the Commission demonstrate special interest, experience or education in history or architecture.[70] Similar considerations are advisable for other situations in which considerable discretion must be exercised. Where there

64 *See generally* E. YOKLEY, ZONING LAW AND PRACTICE § 4-7, at 186 (4th ed. 1978).

65 *See generally* Annot., 42 A.L.R.3d 598 (1972).

66 *See generally* Annot., 96 A.L.R.3d 921 (1979).

67 The difference between the second and third categories (see text accompanying notes 61-66) is that the second includes uses generally recognized and reasonably considered to constitute a nuisance. For uses in the third category, however, the unfavorable perception of the use is not as uniformly shared, and the opinion is less objectively based. For example, while many communities exclude mobile homes from their zoning jurisdiction for appearance reasons, it is difficult to support classification of this form of housing as a nuisance—especially given the growing need to rely on mobile homes as a form of shelter.

68 3 P. ROHAN, *supra* note 62, at 16-28; P. GREEN, JR., CASES AND MATERIALS ON PLANNING LAW AND ADMINISTRATION ch. 14, at 14-15 (1962).

69. See A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979) where the court stated that "[t]he architectural guidelines and design standards incorporated into the Oakwood ordinance . . . provide an analysis of the structural elements of the different styles and provides additional support for our conclusion that the contextual standard of 'incongruity' is a sufficient limitation on the Historic District Commission's discretion." *Id.* at 223, 258 S.E.2d at 454.

70 N.C. GEN. STAT. § 160A-396 (1982). The Supreme Court of North Carolina discussed

is no discretion, such as where there is total prohibition of a use without exception, there is little need for either standards or aesthetic expertise.

B. *Analyzing Aesthetic Regulation Cases*

1. Cases According to Asserted State Interest and Jurisdictional Approach

One obvious and important distinction to make in analyzing an aesthetic regulation case is to determine whether the regulation is founded on aesthetic considerations alone or aesthetics in combination with other interests which have been recognized by the courts as valid bases for the use of the police power.[71] It is necessary to then determine whether the jurisdiction recognizes aesthetics alone as a valid basis for the exercise of the police power, recognizes aesthetics as a legitimate interest only when combined with other police power interests, does not recognize aesthetics in any form, or has yet to determine the validity of aesthetic regulation.[72] For example, in *State v. Jones*, had the regulation simply required a fence to be built around the junkyard, the regulation could have been successfully upheld on the basis of public safety without raising the question of aesthetics. However, it was the ordinance's requirement that the fence or fence in combination with landscaping screen the contents of the junkyard from the view from an adjoining public right-of-way that raised the issue of aesthetics.[73] Since the visual screening function of the fence requirement could only be justified as an aesthetic consideration, the court was impelled to examine one of the aesthetic concerns closest to the category of nuisance—junkyards—under a rule formulated in *Brown* which gave no weight at all to aesthetic considerations. It is clear therefore that either the ordinance or the former rule had to yield and, as reflected in the *Jones* opinion, the court adopted the view that aesthetics alone was sufficient for the exercise of the police power.

Compare the opinion adopted by the court in *Jones*, which recognized aesthetics alone as a valid interest, to the other alternatives noted above. The court could have adopted the view that aesthetics is a valid interest when combined with other recognized bases for the exercise of the police power. This view is more supportive of aesthetic regulation than *Brown* but is not as broad as *Jones*. However, had this view been

the requirements of this statute in A-S-P Associates v. City of Raleigh, 298 N.C. 207, 223, 258 S.E.2d 444, 454 (1979).

71. Annot., 21 A.L.R.3d 1222, 1225-26 (1968).

72. *See generally* Bufford, *supra* note 1, at 130.

73. The requirements of the Buncombe County Ordinance are set out in the *Jones* opinion State v. Jones, 305 N.C. 520, 521-22, 290 S.E.2d 675, 676-77 (1982)

adopted, the court could not have upheld the Buncombe County ordinance without finding that screening the contents of the junkyard from the view of the public right-of-way somehow achieved some valid economic objective such as protection of property values or protection of local tourism. Alternatively, the court could have chosen to continue to recognize aesthetics as a valid exercise of the police power on a category-by-category basis continuing the approach taken by the court in *A-S-P Associates* and *County of Cumberland*.[74] The fact that the court chose the aesthetics alone approach in *State v. Jones* appears to indicate the court's support for the interests achieved by reasonable aesthetic regulations.

2. Cases According to Category

A second approach to analyzing aesthetic regulation cases is to understand the case in relation to certain generally accepted categories.[75] The validity of this approach is based upon each category tending to possess common "bundles" of aesthetic and non-aesthetic interests. For example, historic district regulation cases are generally similar in their common concern with cultural and educational interests.[76] These two interests are generally absent from screening and fencing cases.[77] The *Jones* case falls within the category of screening requirements and more specifically screening requirements for a land use that approaches classification as a nuisance. As noted in the previous section, the public interests in *Jones*, at least by implication, include aesthetics (the concern for the appearance of the area), public safety (keeping the public, especially children, out of the junkyards),[78] and protecting the value of surrounding property. On the other side of the equation, the property owner's concerns include the cost and maintenance of the screening and the loss of any land area needed to accommodate the screening especially where landscaping and buffer strips are required. The "bundle of interests" identified above in *Jones* are as a general rule also found in other screening cases. This tendency of categories to share common interests should provide a useful means of predicting the outcome of a case especially when the cases are further distinguished according to the asserted interests and the rule of the jurisdiction as discussed in the previous section.

74. *See infra* text accompanying notes 43-47.

75. *See generally* Annot., 21 A.L.R.3d 1222 (1968) for an overview of some categories.

76. *See infra* text accompanying note 40.

77 *See generally* Annot., 1 A.L.R.4th 373 (1980).

78 The requirement of a solid screen as opposed to a wire fence, however, is related to the aesthetic interest. *See infra* text accompanying note 73.

3. Cases According to Aesthetic Concern

A third method of analyzing aesthetic regulation cases is according to the regulation's aesthetic concern or objective. Artistically, these aesthetic concerns are generally referred to as scale, style, unity, harmony, rhythm, proportion, sequence and composition.[79] From a mathematical point of view, these concerns can be understood according to the concepts of number, type, and relation.[80] For purposes of analyzing aesthetic regulation cases, the artistic and mathematical approaches can be merged into three categories.

The first category of cases represents a quantitative concern or concern with magnitude and includes within it the artistic concept of scale. For example, billboard regulations generally attempt to reduce the magnitude of the visual impact such uses have on the viewer or, in other words, reduce their visual dominance on the landscape. This magnitude of visual impact can be reduced by minimum spacing requirements between billboards, limitations on their size, or by a total prohibition of the use. Each of these regulatory techniques achieves the aesthetic objective of reducing the visual impact of billboards—a use which has often been identified as visually offensive. It follows then that by reducing the visual impact of billboards, an area becomes more visually pleasing. In *State v. Jones*, the regulation being challenged attempted to reduce the magnitude of the junkyard's visible impact by screening the use from the view of the general public. Just as in the billboard example, the aesthetic objective in *Jones* could have been approached through other methods such as placing a maximum land area limitation on the use, adopting minimum spacing requirements between junkyards (although this technique is probably not appropriate in the case of junkyards) or prohibiting junkyards entirely. Each of these techniques represents an approach to achieving the same aesthetic objective, i.e., reducing the magnitude of the visual impact junkyards have on the environment.

The above analysis is useful in determining whether the regulation meets the first part of the reasonableness test set forth in *A-S-P Associates*, i.e., whether the statute in its application is ". . . reasonably necessary to promote the accomplishment of a public good."[81] In *Jones* the screening requirement is reasonably necessary because it is one of

79. *See generally* E. RASKIN, ARCHITECTURALLY SPEAKING (1966).

80. *See generally* L. VON BERTALANFFY, GENERAL SYSTEMS THEORY (1968). "In dealing with complexes of 'elements,' three different kinds of distinction may be made—i.e., 1. according to their *number*; 2. according to their *species*; 3. according to the *relations* of the elements." *Id.* at 54.

81. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 214, 258 S.E.2d 444, 449 (1979).

the few effective alternatives which can be applied to an existing use without placing a serious burden on the property owner.

State v. Jones then falls within this first category of aesthetic concern, i.e., reducing the magnitude of the visual impact junkyards have on the landscape. After examining the remaining two categories, it will be seen that the first category, which deals with quantity, is the least perplexing. This is because it generally deals with instances in which a use has been identified by a community as being visually undesirable and regulations have been adopted to abate the magnitude of its visual impact.[82] Therefore, aesthetic regulation cases falling within this first category should in general be upheld by the court, provided the techniques employed are reasonable. However, the result may be less clear when the regulatory technique used to decrease the magnitude of the visual impact is total prohibition.[83] Where the use does not serve a necessary function within the community or can be achieved by other means, total prohibition may be appropriate. Where the use serves some "important" purpose, however, total prohibition may be too strong a technique. In these cases a more appropriate regulatory approach may be to allow the use within the community and minimize its adverse visual impact through one or more less restrictive techniques.

Other examples falling within this first category of aesthetic concern include *People v. Stover*[84] (upholding an ordinance prohibiting the placing of clotheslines in any yards which abut a street), *Oregon City v. Hartke*[85] (sustaining a zoning ordinance provision prohibiting automobile wrecking yards within a city), *People v. Goodman*[86] (upholding an ordinance limiting commercial signs to a maximum area of four square feet), *Livingston v. Marchev*[87] (upholding an ordinance prohibiting any trailer or camp car from being parked on any street or on any premises within the town except for purposes of repair or storage within a building), and *People v. Berlin*[88] (sustaining a zoning ordinance regulation limiting hedges and fences to a maximum height of six feet along rear property lines).[89]

The remaining two categories, which will now be identified as the second and third categories of aesthetic concerns are not directly rele-

82. *See infra* text accompanying note 62.

83. *See* State v. Jones, 53 N.C. App. 466, 281 S.E.2d 91 (1981), *aff'd*, 305 N.C. 520, 290 S.E.2d 675 (1982). "If the automobile graveyard had been forbidden at this location, [instead of requiring it to be screened] we might have reached a different result." *Id.* at 470, 281 S.E.2d at 94.

84. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963).

85. 240 Or. 35, 400 P.2d 255 (1965).

86. 31 N.Y.2d 252, 290 N.E.2d 139, 338 N.Y.S.2d 97 (1972).

87. 85 N.J. Super. 428, 205 A.2d 65 (1964).

88. 62 Misc. 2d 272, 307 N.Y.S.2d 96 (1970).

89. In each of these cases, note that the aesthetic objective is concerned with reducing the magnitude of a use which has been determined to have undesirable visual attributes.

vant to the *Jones* case. However, each category will be described briefly to give additional perspective to illustrate how the aesthetic objective in *Jones* compares to the objectives in the other categories of cases.

The second category entails quality rather than quantity or magnitude. The category includes the aesthetic concepts of style and harmony, and many of the cases pertain to regulations seeking either sameness or differentiation. Examples of cases within this category of aesthetic concern include *State ex. rel. Saveland Park Holding Corp. v. Wieland*[90] (upholding a zoning ordinance regulation making issuance of a building permit conditional upon a finding that the exterior appearance and plan of a proposed structure not be so at variance with existing structures as to cause a substantial reduction in property values), *State ex. rel. Stoyanoff v. Berkley*[91] (sustaining an ordinance which allowed an architectural board to deny issuance of a building permit to construct a pyramid-shaped residence with triangular windows within a neighborhood consisting of conventional residences), *Reid v. Architectural Bd. of Review*[92] (upholding the disapproval of a permit to construct a contemporary residence within a residential area consisting of stately traditional homes), and *A-S-P Associates v. City of Raleigh*[93] (upholding the creation of a historic district). Each of the above cases pertains to a qualitative as opposed to a quantitative aesthetic concern. Since quality is a subjective determination, the resolution of legal issues within this second category of aesthetic concern should in general prove to be somewhat more difficult and less predictable than in the first category. One exception to this is the area of historic district regulation where the existence of cultural, educational and aesthetic interests provides strong support for the style-oriented regulations.

The third category, perhaps the most abstract of the three categories, focuses on relationships. This category includes the artistic concepts of sequence, rhythm and composition and has two applications. The first application includes concern about the spatial relationship of buildings, or other objects, to one another. For example, some historic district ordinances not only attempt to maintain the style of architecture within an area (which would come within the second category of quality, discussed above) but seek to maintain the relationship of buildings to one another—such as their spacing along the street. Another example of the first application of this category is the design of the highway land-

90 269 Wis. 262, 69 N.W 2d 217 (1955)
91 358 S W.2d 305 (Mo. 1970).
92. 119 Ohio App. 67, 192 N.E.2d 74 (1963).
93 298 N C. 207, 258 S.E.2d 444 (1979)

scape.[94] The second application is represented by a regulation requiring the approval of a building's exterior design, not in relation to its harmony or lack thereof with the surrounding buildings (which would come within the second category of quality) but as an artistic composition in and of itself.[95] It is this application of the third category that most strongly embodies the fears of those courts which have concluded that aesthetics is too subjective an interest to justify use of the police power.[96] This latter example could be further complicated by first amendment freedom of expression questions.[97]

The above analysis of cases according to aesthetic concerns reveals that most litigation has been within the first two categories dealing with magnitude and quality. These categories for the most part do not involve overwhelming aesthetically-based philosophical questions but present questions no more difficult than those arising in other areas of litigation. It is only the third category that embodies difficult aesthetic questions and, until more regulations in this category are adopted, there is little to fear in the further evolution and propagation of aesthetic regulations.

V. CONCLUSION

The opinion in *State v. Jones* gives relatively strong support to aesthetic regulation efforts in North Carolina. The opinion will have its greatest impact in those areas of aesthetic regulation which are purely or principally aesthetic in their objectives. Included in this category are entranceway ordinances[98] and other special appearance districts.[99] *Jones* will also give important support to those regulations already on

94 For an example of how these aesthetic concepts are applied to highway landscapes, see D. APPLEYARD, K. LYNCH & J. MYER, THE VIEW FROM THE ROAD (1964).

95 Within the third category, the first application (exemplified by some historic district regulations and the design of the highway landscape) refers to the land use's relationship to things other than itself. The things surrounding the particular use and the particular use itself are seen as an artistic composition within which the use must spatially conform. The conformity desired, however, refers to the use fitting into the artistic composition, e.g., concern with sequence and rhythm, and not simply achieving sameness which falls within the second category, i.e., quality or style. In the second application, the use is being regulated as an artistic composition in and of itself. The concept of *relationship* comes in here because in order to evaluate a use as an artistic composition, the relationship of its elements must be examined, e.g., solids related to voids, and one shape related to another.

96 *See, e.g.*, Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842 (1925).

97 For example, an architect might argue that a community's regulations infringe upon his right to express himself creatively.

98 An entranceway ordinance is a set of regulations designed to achieve aesthetic objectives along the major thoroughfares leading into a community. A principal reason behind the ordinance is that visitors generally receive their first impression of a community along these entranceways.

99 A special appearance district is a geographical area within which a set of aesthetic-oriented regulations is being administered. A historic district is a form of special appearance district. A community may want to create a special appearance district in an area lacking historic qualities

the books which have aesthetics as their unstated objective. In addition, the *Jones* opinion may be significant in encouraging communities to adopt a bolder attitude toward aesthetic regulation.

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In this case, strong support for aesthetic regulation is needed since the historic preservation justification for the district is not available.