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ZONING LAW: ARCHITECTURAL APPEARANCE ORDINANCES AND THE FIRST AMENDMENT

"If we want our children to grow up in pleasant purlieus, we must give up some... of the freedom of the individual to use his land as he chooses."1

I. INTRODUCTION

During the summer of 1946, the Village of Fox Point, Wisconsin,2 passed a local ordinance that stated:

No building permit... shall be issued unless it has been found... by the building board... that the exterior architectural appeal and functional plan of the proposed structure will, when erected, not be so at variance with either the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood or the character of the applicable district... as to cause a substantial depreciation in the property values of said neighborhood... .3

2. The Village of Fox Point, incorporated in 1926, is an approximately two and one-half square mile suburb on the North Shore of Milwaukee, Wisconsin. State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 265, 69 N.W.2d 217, 219, cert. denied, 350 U.S. 841 (1955). The Supreme Court of Wisconsin described it as a "highly desirable residential village, almost entirely built up of single family residences." Id.
3. FOX POINT, WIS., ORDINANCE 129, § I (1946), quoted in Wieland, 269 Wis. at 265, 69 N.W.2d at 219. The full text of Section I reads as follows:

No building permit for any structure for which a building permit is required shall be issued unless it has been found as a fact by the building board by at least a majority vote, after a view of the site of the proposed structure, and an examination of the application papers for a building permit, which shall include exterior elevations of the proposed structure, that the exterior architectural appeal and functional plan of the proposed structure will, when erected, not be so at variance with either the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood or the character of the applicable district established by Ordinance No. 117 [the general zoning ordinance of the village], or any ordinance amendatory thereof or supplementary thereto, as to cause a substantial depreciation in the property values of said neighborhood within said applicable district.

Id.
Eight years later, a local relator in Fox Point applied for a building permit to erect a single family residence.\(^4\) The village architectural review board denied the permit on the grounds that the proposed structure's exterior architectural appeal and functional plan were so at variance with other homes in the immediate neighborhood that substantial depreciation in property values would result if the proposed home were built.\(^5\) On appeal to the Wisconsin Supreme Court, the relator challenged the constitutionality of the ordinance on several grounds. The most significant question presented was whether the objectives of the village ordinance fell within the state's police power to promote the general welfare of the community.\(^6\)

Citing a recent United States Supreme Court decision,\(^7\) the Supreme Court of Wisconsin, in a groundbreaking decision, \textit{State ex rel. Saveland Park Holding Corp. v. Wieland},\(^3\) upheld the ordinance. The court recognized that the state's police power had developed to the point that aesthetic considerations would be sufficient to justify the exercise of police power.\(^9\) In the name of protecting the public's general welfare, the court denied the

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\(^4\) Wieland, 269 Wis. at 264, 69 N.W.2d at 217.

\(^5\) Id. at 264, 69 N.W.2d at 217. For a detailed description of a proposed permit that was rejected by an Ohio board, see infra note 46.

\(^6\) Wieland, 269 Wis. at 266-67, 69 N.W.2d at 219-20.

\(^7\) Berman v. Parker, 348 U.S. 26 (1954) (sustaining a District of Columbia urban renewal ordinance despite a Fifth Amendment challenge).

\(^8\) 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955).


\(^10\) Wieland, 269 Wis. at 266-67, 69 N.W.2d at 222. The Wisconsin court upheld the ordinance primarily on the ground that protection of property values is within the state's power to promote the general welfare of the village. \textit{Id.}
landowner's opportunity to construct a home because a local architectural appearance review board had deemed that the proposed home's appearance would lower property values in the community.

This Comment examines a hypothetical scenario: What if the landowner in Wieland had challenged Fox Point's ordinance on the grounds that the appearance and design of a home is protected speech under the First Amendment of the United States Constitution? This Comment argues that although a free speech challenge to an architectural appearance review ordinance is plausible, it inevitably would fail. Section II provides a brief background on zoning law before exploring the history and present status of aesthetics generally and architectural appearance regulation specifically. Section III examines whether architecture falls under the protection of the First Amendment by determining who would have standing to challenge an architectural appearance ordinance and under what classification of speech or expression architecture might fall.

Assuming that architecture would be afforded protected speech status, Section IV determines which test might be used to review governmental restrictions on architectural expression. Architectural appearance ordinances are analyzed under a content-neutral time, place, and manner restriction test. Using this test, the justifications for architectural appearance regulation are explored. Then, the significant governmental interests in restricting architecture are weighed. Finally, alternative communication channels for architectural expression are examined. This Comment concludes that although freedom of speech is a fundamental right, the interests of communities in protecting their residents from the secondary effects of architectural expression justify the use of architectural appearance regulations.

II. THE EXERCISE OF THE POLICE POWER THROUGH ARCHITECTURAL APPEARANCE REVIEW REGULATION: A BACKGROUND

A. Zoning in General

Regulation through zoning\(^1\) or other land use controls is an exercise of the state police power limited by procedural and substantive due process concerns. To regulate under this power, a state or municipality must promote those "public goods" that are legitimate objectives and within the per-

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11. The terms "zoning," "control," "regulation," and "limits" will be used interchangeably in this Comment.
missible scope of the state's interest. The specific authority for local governments to zone is derived from state zoning statutes that typically provide: "[S]uch regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality." Traditionally, courts have been permissive of land use regulations. Even during the Lochner v. New York era, the United States Supreme Court, in Village of Euclid v. Ambler Realty Co., held that zoning laws are a valid exercise of the police power to promote the public welfare despite the effect these laws have on the rights of individuals to use their property. The Court deferred to the legislature's judgment and presumed that this type of legislative enactment was constitutional.

Through its holding in Euclid, the Supreme Court gave the "green light" to local governments to enact ordinances regulating for appearance or aesthetic purposes. "The significance of Euclid was the introduction into zoning considerations of the concept of 'utilitarianism,' which balances individual interests against the general welfare of the community." The


14. See, e.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915) (Landowner lost appeal after land classification changed by zoning law from brick yard to residential use.). In Hadacheck, the Court recognized the lower court's presumption of validity for the legislative act of zoning. Id. at 409.

15. 198 U.S. 45 (1905) (employing economic substantive due process theory to actively scrutinize state regulation of property and contract rights).

16. 272 U.S. 365, 388, 395 (1926) (upholding validity of zoning because classifications used were "fairly debatable" and not "clearly arbitrary and unreasonable").

17. Id. at 367; see Ralph Artigliere, Comment, Freedom of Expression in the Land Use Planning Context: Preserving the Barrier of Presumptive Validity, 28 U. FLA. L. REV. 954, 964-65 & n.65, 967 & n.82, 982 n.191 (1976).


Legislatures at all levels of government have passed regulations ranging from Congress's attempts to preserve old Georgetown, to Louisiana's state constitutional protection of New Orleans's French Quarter, to Philadelphia's municipal council's regulation of its historic political sites. Anderson, supra note 13, at 26-27 & nn.8-10.

only substantive condition on this new zoning power was stated in a subsequent decision. The Court explicitly re-emphasized that the police power to regulate the character of an individual's use of his land was not unlimited, but rather was required to "bear a substantial relation to the public health, safety, morals or general welfare." However, the Supreme Court then avoided controversial zoning issues for almost forty years, forcing the states to define the limits of the public's general welfare.

B. Zoning for the General Welfare: Aesthetics

Although zoning affects the appearance of a community, traditional land use regulations such as density, height, or size requirements do not necessarily protect a community from aesthetic problems. Some commentators have argued that traditional regulations alone exert more influence upon a home's design than the architect; yet, after Euclid, more and more communities continued to go beyond traditional zoning to ensure community control over the appearance of their neighborhoods. Zoning out a proposed design is less costly than providing just compensation for the land involved. The government always has the option of using the state's eminent domain power to achieve an aesthetically pleasing environment, subject, of course, to the Takings Clause. However, communities have preferred to use zoning laws to achieve aesthetic goals such as architectural appearance.

Initially, the courts were openly hostile to zoning that was based even partially on aesthetic considerations. One court declared: "Aesthetic con-

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21. Norman Williams & Holly Ernst, Commentary, And Now We Are Here on a Darkling Plain, 13 VT. L. REV. 635, 638 (1989) ("Starting in 1974, the Supreme Court suddenly re-entered the field of planning law, and since then has decided about twenty cases, more than one per year.").
22. Id. at 665 (indicating that by 1974, state courts decided nearly 12,000 zoning cases).
24. Id. at 26 & n.1 (citing Eli Goldston & James H. Scheuer, Zoning of Planned Residential Developments, 73 HARV. L. REV. 241, 243 (1959)).
25. Theodore Guberman, Comment, Aesthetic Zoning, 11 URB. L. ANN. 295, 295 (1976) ("Zoning restrictions on the private use and enjoyment of property for the benefit of the community are employed virtually everywhere in this country today."); see also infra note 46 (offering particular examples of architectural appearance zoning).
26. See Berman v. Parker, 348 U.S. 26 (1954) (sustaining a District of Columbia urban renewal ordinance against a Fifth Amendment challenge). Another option for the government or a private party is a nuisance law approach. See infra note 54.
27. See infra note 44.
Considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." Because the belief was that "beauty is in the eye of the beholder," regulations that were based solely upon aesthetic considerations were usually held invalid. Those courts that were not openly hostile to aesthetics usually relied upon nonaesthetic reasons for upholding regulations grounded in aesthetic motivation. The most popular nonaesthetic general welfare justification was, and still is, the protection of property value. Other justifications relied upon by the courts include promotion of tourism or protection of public health and safety. If a rationalization other than aesthetics could be found, the courts tended to use it.

After the Supreme Court's 1954 decision in *Berman v. Parker*, lower courts began to uphold zoning regulations on aesthetic grounds alone. In dictum, the Court unequivocally expanded the definition of general welfare to include aesthetics:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that

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A classic example of such reasoning is in St. Louis Gunning Advertising Co. v. City of St. Louis, 137 S.W. 929 (Mo. 1911), appeal dismissed, 231 U.S. 761 (1913). The court upheld a billboard regulation, stating, "The signboards . . . endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants." *Id.* at 942.


Subsequent decisions in other jurisdictions have followed the Wisconsin court's lead. See, e.g., State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970); Reid v. Architectural Bd. of Review, 192 N.E.2d 74 (Ohio Ct. App. 1963).

33. Rowlett, *supra* note 32, at 633, 635; see also Welch v. Swasey, 214 U.S. 91 (1909) (upholding a height restriction designed to serve architectural symmetry purposes as a fire-control measure); Thomas Crumplar, Comment, Architectural Controls: Aesthetic Regulation of the Urban Environment, 6 Urb. Law 622, 624-25 (1974) ("[C]ourts . . . uphold even blatant aesthetic regulations as long as the slightest connection [can] be made to the traditional police powers of health, safety, and public morality.").


the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.\textsuperscript{36}

A more positive reaction to aesthetics emerged after Berman. Courts increasingly upheld regulations based only partially on nonaesthetic concerns, usually including aesthetic considerations as dicta.\textsuperscript{37} The Wieland decision is a classic example of this approach.\textsuperscript{38}

Gradually, aesthetics as a sufficient justification grew in acceptance. Today, a majority of states allow land use regulation justified solely by aesthetic considerations.\textsuperscript{39} Wisconsin explicitly joined the majority in 1968.\textsuperscript{40} The remaining states are either undecided or require more than a pure aesthetic basis in order to exercise the police power.\textsuperscript{41} In 1984, the United States Supreme Court affirmed aesthetics as a proper basis for the exercise

\textsuperscript{36} Berman, 348 U.S. at 33 (citation omitted) (emphasis added). The Court's decision did not address a state's power to zone under the police power since the case arose under federal jurisdiction and concerned the eminent domain power. \textit{Id.} However, the Court's rationale has been utilized in many police power exercise cases. \textit{See, e.g.}, Wieland, 269 Wis. at 62, 69 N.W.2d at 217.

\textsuperscript{37} \textit{See, e.g.}, United Advertising Corp. v. Borough of Metuchen, 198 A.2d 447 (N.J. 1964) (holding that aesthetics is relevant zoning consideration).

\textsuperscript{38} \textit{Wieland}, 269 Wis. at 264, 69 N.W.2d at 219. The Wisconsin Supreme Court stressed that the protection of property values was an objective that properly pursued the general welfare of the community rationale. \textit{Id.} at 267, 69 N.W.2d at 222. The court reasoned that any depreciation in the property values of a limited area of the community necessarily adversely affected the general welfare of the entire community. \textit{Id.}

\textsuperscript{39} \textit{See Bufford}, supra note 12, at 131-64 (The article analyzed all 50 states' positions on aesthetic-based zoning in 1980. Sixteen states authorized regulation based on aesthetics alone, while nine had not recognized aesthetics as a sole basis of zoning, and another 16 states remained undecided); Karp, supra note 9, at 313 n.35 (“In the ten years since [Bufford’s] article was written even more states have adopted the majority rule. . . . Thirty-one states have either held or indicated strongly in dicta that aesthetics can stand alone.”); Pace, supra note 31, at 584 (indicating that more jurisdictions have authorized regulation based solely on aesthetics); see also Russ Ver-Steeeg, Iguanas, Toads and Toothbrushes: Land-Use Regulation of Art as Signage, 25 GA. L. REV. 437, 437 n.1 (1991) (“The cases and literature discussing the judicial acceptance of aesthetic zoning as a constitutionally permissible objective are now literally voluminous.”); Ghent, supra note 30.

\textsuperscript{40} Racine County v. Plourde, 38 Wis. 2d 403, 157 N.W.2d 591 (1968) (preserving a pleasant view from a roadway fell within the public’s interest and general welfare). The court stated that “we are cognizant that aesthetic considerations alone may now be sufficient to justify a prohibited use in a zoning ordinance.” \textit{Id.} at 412, 157 N.W.2d at 595.

\textsuperscript{41} \textit{See supra} note 39. But see Kenneth Regan, Note, \textit{You Can’t Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review}, 58 FORDHAM L. REV. 1013 (1990). The author asserts that “[c]urrently, twelve states do not permit zoning based solely on aesthetics while eleven states allow zoning based on aesthetic factors alone.” \textit{Id.} at 1014-15 (citations omitted). The author, however, fails to cite many significant recent state decisions. \textit{See id.} at 1014-15 nn.11-13. Regarding Wisconsin, for example, the author cites \textit{Wieland}, but fails to recognize any case since 1955, particularly \textit{Racine County v. Plourde}. \textit{Id.} at 1014-16 nn.11-15.
of state police power for the general welfare in *City Council v. Taxpayers for Vincent.*

C. Architectural Appearance Zoning in Particular

The Court's acceptance of the importance of aesthetics-based zoning generally coincided with increased legislation in the architectural appearance area. By 1974, a mere twenty years after *Berman,* at least 150 jurisdictions were using architectural controls to regulate historical districts, and over 500 municipalities had authorized architectural design review boards to regulate on a community-wide basis.

Typically, architectural appearance review ordinances control the architectural appearance of residential homes by limiting "excessive dissimilarity" or "similarity." They usually require "conformity" or "harmony" with the community's "existing" or even "desired" architecture.

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42. 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance [aesthetic values."); see also Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981) (plurality opinion) ("[N]o substantial doubt [exists] that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals.") (citation omitted). Justice Brennan's concurring opinion did not disagree with this statement. Brennan assumed that the "twin goals" were substantial interests of the state, but found that in this case San Diego failed to show that the ordinance was part of a comprehensive plan to make the city more attractive. *Id.* at 531-33 (Brennan, J., concurring).


Two Wisconsin communities, Wauwatosa and Whitefish Bay, were among the first in the United States to enact architectural review boards in 1945. Poole, *supra,* at 290 n.10. By 1949, 40 communities utilized such boards, see *id.,* and 17 of these communities, including Wauwatosa and Whitefish Bay, were profiled in *American Society of Planning Officials.* *Id.*


46. *See, e.g., Babcock, supra* note 44 (offering specific examples of "harmony," "desired," "character of neighborhood," "similarity," and "dissimilarity"). Babcock mentions, for example, that an ordinance in Greenfield, Wisconsin requires buildings to be *both not "so at variance with nor so similar to" either the exterior architectural appeal and functional plan of the structures already constructed. Id.* at 7.

For an excellent illustration of a proposal that was excessively dissimilar from its intended neighborhood, see *Reid v. Architectural Bd. of Review,* 192 N.E.2d 74 (Ohio Ct. App. 1963).

The neighborhood of Cleveland Heights, Ohio, the site of Mrs. Reid's proposed structure, featured homes that were "dignified, stately and conventional structures, two and one-half stories high." *Id.* at 77. In contrast, the Ohio Supreme Court described Mrs. Reid's proposal as:

[A] flat-roofed complex of twenty modules, each of which is ten feet high, twelve feet square and arranged in a loosely formed "U" which winds its way through a grove of trees. About sixty per cent of the wall area of the house is glass and opens on an enclosed garden;
usual method of implementation is through a board of architectural review. These boards consider all proposed buildings in a jurisdiction and hold the authority to disapprove a design and deny a building permit if the requirements of the ordinance are not met.\textsuperscript{47} The purposes for, effects from, and motivations of architectural review do not necessarily coincide. Each specific purpose for architectural appearance review ordinances is related to the general goal of maintaining an aesthetic environment.\textsuperscript{48} A dissimilarity requirement seeks to avoid endless blocks of almost identical houses.\textsuperscript{49} A similarity, conformity, or harmony prerequisite attempts to encourage some homogeneity or identifiable character in a neighborhood. One goal of all architectural appearance zoning in suburban areas is to protect the community from the harmful side effects of inappropriate architecture. Municipalities typically seek to avoid the widely held perception that identical box-type homes, or a chaotic mix of inconsistent architectural designs and styles will result in some harm (usually economic) to property owners in the neighborhood.\textsuperscript{50}

Both courts and legislatures have recognized that a community’s architectural appearance, as well as its aesthetics in general, can make a powerful impact on those in the community, whether a message is intentionally con-

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\item the rest of the walls are of cement panels. A garage of the same modular construction stands off from the house, and these two structures, with their associated garden walls, trellises and courts, form a series of interior and exterior spaces, all under a canopy of trees and baffled from the street by a garden wall.
\item A wall ten feet high is part of the front structure of the house and garage and extends all around the garden area. It has no windows. Since the wall is of the same height as the structure of the house, no part of the house can be seen from the street.
\end{itemize}

\textit{Id.} Accordingly, the court found the proposal structure to be unacceptable: “From all appearances, [the proposal] is just a high wall with no indication of what is behind it. Not only does the house fail to conform in any manner with the other buildings but presents no identification it is a structure for people to live in.” \textit{Id.}

\textsuperscript{47} Kolis, \textit{supra} note 45, at 276. Architectural review boards usually consist of three or more residents of the municipality with most requiring or preferring at least one architect. \textit{See, e.g.}, State \textit{ex rel.} Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970) (board by ordinance composed of three architects); Reid \textit{v. Architectural Bd. of Review}, 192 N.E.2d 74 (Ohio Ct. App. 1963) (board composed of three architects); State \textit{ex rel.} Saveland Park Holding Corp. \textit{v. Wieland}, 269 Wis. 262, 265, 69 N.W.2d 217, 219, \textit{cert. denied}, 350 U.S. 841 (1955) (board made up of three village residents, two of whom were architects).

\textsuperscript{48} \textit{See} Poole, \textit{supra} note 44, at 293 (tract housing); Regan, \textit{supra} note 41, at 1019 n.35 (citing examples of local New York ordinances); Rubin, \textit{supra} note 13, at 179.

\textsuperscript{49} Regan, \textit{supra} note 41, at 1019.

\textsuperscript{50} \textit{Norman Williams, Jr. & John M. Taylor, American Land Planning Law} § 71C.01, 57 (1988) (“Here, the prime consideration is not the pleasure of the residents or of visitors; it is the enhancement of real estate values.”).
Architectural controls may reinforce a community's snobbish attitude, protect neighborhood real estate values, or merely have the perceived effect of protecting a neighborhood's property and other "values." However, the motives behind architectural appearance ordinances and the secondary intended effects are immaterial to the constitutionality of the ordinances. In addition, the architecture of a community only conveys a "message" when it is perceived by its residents and visitors. The clearest example of the perception of the "message" of architecture is a structure that rises to the level of nuisance. However, architectural appearance ordinances confront architecture that fails to rise to this level.

Architectural appearance ordinances have been challenged on many grounds. Courts have rejected contentions that these ordinances exceed the scope of their constitutional or statutory authority, unlawfully delegate power to administrative architectural review boards, deprive land

For example, the Wisconsin Supreme Court assumed that the proposed structure in Wieland would cause a substantial reduction in property value in the immediate area. See Wieland, 269 Wis. 262, 69 N.W.2d 217. "[I]f an accurate method were formulated for measuring the effect on the value of neighboring property caused by an obstruction of view or an unsightly use of land, judicial non-recognition of the aesthetic nuisance action would be difficult to justify." George P. Smith & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENVTL. L. REV. 53, 75 n.123 (1992). "According to one expert: '[There is] no lack of data for making adjustments based on aesthetic factors. View and proximity to a noxious use are just another variable in the marketplace the measurement of which is not more subjective than many other factors commonly valued.' " *Id.* at 77 & n.130; see also Frank Michelman, *Toward a Practical Standard for Aesthetic Regulation*, PRAC. LAW., Feb. 1969, at 36, 37.

See *Poole*, *supra* note 44, at 294.

When the Court examines an architectural appearance ordinance to determine if it unconstitutionally restricts First Amendment protected speech, the Court will not inquire into the motives of a municipality as long as it appears that the ordinance is genuinely based. United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). For a comprehensive look at motives in zoning laws, see Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1 (1988). Brownstein asserts: "[U]nder current federal standards, motive inquiries are clearly irrelevant to the adjudication of substantive due process or equal protection challenges to the reasonableness of land use regulations and first amendment actions directed against dispersal zoning laws." *Id.* at 123-24.


Kolis, *supra* note 45, at 284 & n.41 ("Procedural due process claims are . . . unsuccessful because adequate procedures in the review of architectural design are generally provided for by municipalities.").


*Id.* at 1406-07; see, e.g., State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970).
owners of the equal protection of law,\textsuperscript{58} or are unconstitutionally vague.\textsuperscript{59} Whether these ordinances relate to the legitimate objectives of the police power has been litigated with mixed results depending on the court's opinion of whether aesthetics is a proper justification.\textsuperscript{60}

Nevertheless, reported cases addressing the legitimacy of architectural appearance regulation as a proper exercise of the police power are few in number.\textsuperscript{61} Besides the increasing acceptance of aesthetics,\textsuperscript{62} several practical reasons account for the small number of reported cases concerning architectural appearance. First, someone must be denied a permit before a suit can be brought. Lake Forest, Illinois, for example, like many municipalities, uses negotiation to avoid denying a permit, and therefore avoid litigation.\textsuperscript{63} Second, the potential costs of a legal battle with a wealthy suburb may outweigh the benefits sought by a landowner who at most can win a building permit.\textsuperscript{64} Third, many landowners, builders, and developers are concerned about the eventual resale of any home built,\textsuperscript{65} a pyramid-shaped house, for instance, would be difficult to resell in any location. Furthermore, most home buyers must still obtain financing from a conservative

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\item \textsuperscript{58} Ghent, \textit{supra} note 56, at 1407-08; see, \textit{e.g.}, City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13 (N.M. 1964).
\item \textsuperscript{59} Ghent, \textit{supra} note 56, at 1408-09; see, \textit{e.g.}, Novi v. City of Pacifica, 169 Cal. App. 3d 678, 215 Cal. Rptr. 439 (1985) (ordinance requiring "variety in architectural design" is not void for vagueness). \textit{But see} Hankins v. Borough of Rockleigh, 150 A.2d 63 (N.J. Super. Ct. App. Div. 1959) (holding denial of permit for flat-roofed residence unreasonable in light of existence of flat-roofed homes and additions throughout municipality); City of W. Palm Beach v. State \textit{ex rel.} Duffey, 30 So. 2d 491 (Fla. 1947) (ordinance impermissibly vague).
\item \textsuperscript{60} Ghent, \textit{supra} note 56, at 1403-06; see, \textit{e.g.}, Berkeley, 458 S.W.2d at 305; \textit{Gamble-Skogmo, Inc.}, 389 P.2d at 13; \textit{State ex rel.} Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 276, 69 N.W.2d 217, 224, \textit{cert. denied}, 350 U.S. 841 (1955) (all holding architectural control ordinances valid); Board of Supervisors v. Rowe, 216 S.E.2d 199 (Va. 1975); City of W. Palm Beach v. State \textit{ex rel.} Duffey, 30 So. 2d 491 (Fla. 1947).
\item \textsuperscript{61} See Anderson, \textit{supra} note 13, at 43; Ghent, \textit{supra} note 56, at 1399.
\item \textsuperscript{62} See \textit{supra} notes 39-42 and accompanying text.
\item \textsuperscript{63} Poole, \textit{supra} note 44, at 338. Lake Forest, Illinois, utilizes an architectural review board with the power to deny a building permit. However, Lake Forest's experience has been not to deny a permit, but rather to negotiate with landowners over points of disagreement. \textit{Id.} Compare Lake Forest to Ladue, Missouri, which allows appeal of a building permit denial to the city council. \textit{See} Rubin, \textit{supra} note 13, at 179 n.4.
\item \textsuperscript{64} As Stephen Williams explained in reference to Reid v. Architectural Bd. of Review, 192 N.E.2d 74 (Ohio Ct. App. 1963), Mrs. Reid "alone bore the costs of delay—her property lay idle, her need for alternative housing dragged on, and construction costs might well have been rising faster than her wealth." Stephen F. Williams, \textit{Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation}, 62 MINN. L. REV. 1, 32-33 (1977-78).
\item \textsuperscript{65} Poole, \textit{supra} note 44, at 338-39 ("Community rejection is certainly one measure of market response to design.").
\end{itemize}
local bank.66 Fourth, people tend not to buy land in conservative suburban areas like Fox Point or Lake Forest if they prefer radical architecture.67 In addition, the community itself can intimidate a potential neighbor. The hostility and resentment a landowner may feel after a controversial house is built over strong objections and after a heated court battle financed by neighborhood tax dollars is deterrence enough for some builders.68

Finally, another reason exists for the lack of litigation surrounding architectural appearance regulations and the First Amendment: Many people are unaware that these regulations may intrude upon a fundamental liberty.69 Because architecture is functional, many do not view its regulation as a free speech concern.70 Nevertheless, these reasons do not prevent a freedom of speech challenge to an architectural control ordinance.

III. PROTECTION OF EXPRESSION UNDER THE FIRST AMENDMENT: THE CASE FOR ARCHITECTURE

The United States Supreme Court has not addressed the question of whether architecture is speech. However, "one finds near unanimous support in the literature among those scholars who have addressed architecture as a protected expression question" for the idea that architecture is protected speech.71 Addressing the question of whether architecture is speech is a separate article in itself.72 Therefore, this Comment is limited to a brief analysis of the issues presented in order to support the assumption made in Section IV that architecture would be accorded First Amendment protected status.

In general, defining what constitutes expression or speech, and which types should be protected, has been problematic. As one author noted: "[T]he United States Supreme Court has had great difficulty both in defining the contours of [the classes of protected speech], and in applying these contours to particular facts, even when the definitional boundaries were

66. See Williams, supra note 64, at 33 ("[T]he banks exercise a private regulatory veto. The risk, then, is of an unusually rich property owner, indifferent to the dissipation of his wealth, who happens also to have what the community regards as monstrous taste.").

67. Poole, supra note 44, at 339.

68. Id. at 338. Poole calls this phenomena the "community intimidation" factor. Id.; see also Anderson, supra note 13, at 43 (stating that architectural review ordinances have persuasive purposes also).

69. Poole, supra note 44, at 338.

70. See Kolis, supra note 45, at 279 ("The fact that architecture is also functional ... should be irrelevant to the threshold constitutional inquiry.") (footnotes omitted).

71. Poole, supra note 44, at 308. Poole briefly examines the issue. Id. at 307-11; see also Kolis, supra note 45, at 278-81; Rubin, supra note 13, at 181-88.

72. Poole, supra note 44, at 307.
considered relatively precise."73 Similarly, Justice Rehnquist stated: "In a case where city planning commission and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court’s treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn."74 Because the Supreme Court lacks a principled method of deciding what is expression or speech, it may be forced to recognize architecture as speech.75 However, no matter how architecture is categorized, the parties bringing suit must first have standing to sue.

A. Standing

If a landowner, developer, or architect is to be successful in a First Amendment challenge to an architectural appearance zoning law, the threshold requirement of standing must be met. "Protecting architecture through a right of expression would arguably restrict the range of parties with standing to complain of a violation."76 Builders and developers of tract housing probably lack a sufficient personal interest to claim a frustration of their expression.77 Whether an architect lacks standing depends upon the definition given to expression.78 A hired architect usually molds his work to the wishes of whomever commissioned the work.79 Nonetheless, "[a]n analogy may be made to the protection afforded a book: the First Amendment will protect the author’s freedom of expression whether the book is written for the author’s own benefit or commissioned for the benefit of another individual."80

This Comment limits the issue to a challenge brought by an individual residential landowner and/or builder with or without an architect. It is assumed that the standing requirements can be met by at least the landowner. Whether an architect could claim that his commercial freedom of

75. Lori E. Fields, Note, Aesthetic Regulation and the First Amendment, 3 VA. J. NAT. RESOURCES L. 237, 246 (1984); see Poole, supra note 44, at 308. ("Even if a principled method is absent, a strong case may be marshalled, based on analogy and common sense, for including architecture within the ambit of first amendment expression.").
76. Rubin, supra note 13, at 181 n.10. Furthermore, Rubin notes that "a court could limit protection largely to private residential architecture." Id.
77. Id.
78. Id.
79. Id.
80. Kolis, supra note 45, at 280-81 n.25.
speech to advertise his work product was unjustifiably infringed upon by architectural controls will only be considered when this claim coincides with the landowner's cause of action. Because the Court apparently equated the degree of protection given to traditionally unprotected nonobscene speech, such as commercial or offensive speech, with that of traditionally protected speech in City Council v. Taxpayers for Vincent, the distinction between an architect's freedom of commercial expression suit and a landowner's offensive or political speech cause of action has been greatly diminished, if not eliminated.

Architecture is not one of the traditional forms of pure speech. In order to fall under the protection of the First Amendment, architecture, at a minimum, must be nonobscene. Assuming it is, architecture could conceivably be classified under any one of three speech categories: artistic expression, self-expression, or symbolic and/or political expression. An analysis under each category follows.

81. 466 U.S. 789, 817 (1984); Quadres, supra note 73, at 443, 447.

The Supreme Court has not elevated offensive and commercial speech, but has lessened the protection given to political speech. Id. at 447; see also Debra J. VanMark, Casenote, 22 LAND & WATER L. REV. 567, 568-69 (1987). But see Kolis, supra note 45, at 290-91 ("Yet [architecture] should not be subject to the stricter regulations imposed upon commercial speech for it is expression more ideological than commercial.") (footnotes omitted).


The Court's determination that commercial advertising of the kind at issue here is not "wholly outside the protection of" the First Amendment indicates by its very phrasing that there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other. . . .

Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services.

Id. at 779-80 (footnotes omitted); see also Quadres, supra note 73, at 447.

83. Kolis, supra note 45, at 289-90 ("Architecture expression cannot be accorded the same protection afforded 'pure speech' since it necessarily involves some action apart from the expression.") (citations omitted).

84. Obscene expression is not protected under the First Amendment. See Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) ("W[e] recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . .") (emphasis added); Roth v. United States, 354 U.S. 476, 485 (1957). An example of obscene architecture would be a phallic-shaped house. Like a nuisance, this type of proposed obscene building is not beyond all possibility, although it is highly unlikely.

85. Rubin, supra note 13, at 182-88. The analysis herein follows the form adopted by Rubin, but differs significantly in light of United States Supreme Court interpretations of the First Amendment since 1975.
B. Architecture as Artistic Expression

Throughout history, architecture has been recognized as an important art form. The Third Reich's use of Albert Speer's architecture for symbolism and propaganda purposes is an example. Architecture is similar to artistic expression; just as a painter uses canvas or a writer uses words, a landowner, through an architect and a builder, uses brick and mortar. Architecture's functionalism is irrelevant to the determination of whether it is art or artistic expression. Since the Court is willing to protect many nonverbal art forms as expression because it can find some "serious literary, artistic, political or scientific value" in it, the Court certainly could accord architecture the same recognition. "The Court has left vague what constitutes 'serious artistic value.'" However, one aspect of the analysis is clear: "The effect of the art on the viewing public is probably more important than the intent of the Presenter." Thus, regardless of a builder's or architect's subjective intent, architecture should be considered expression with serious artistic value that is protected by the First Amendment.

C. Architecture as Self-Expression

When a landowner and an architect express preferences and project images through architectural design, the architecture is self-expressive.
"[A]rchitecture is often a conscious attempt to make a meaningful aesthetic statement." For example, "a house's exterior appearance often expresses the resident's personality." However, not all intentional expression of one's self is protected under the First Amendment.

The issue is not so much whether architecture is self-expression (even Plato recognized that architecture has expressive qualities), but rather whether self-expression is a recognized form of speech protected by the First Amendment. After citing a concurrence in Roe v. Wade, an author concluded in reference to architecture that "protection for the expression of one's personality and the development of one's interests finds legitimacy in both the First Amendment and the related right to privacy." However, a majority of the Court has never held this view, and today's Court is unlikely to expand any part of Roe or the protection of self-expression. Therefore, with a consensus lacking as to the viability of a purely self-expressive justification based upon only "penumbras" in the Constitution, other classifications of speech appear to have more promise if architecture is going to be accorded any First Amendment protection.

D. Architecture as Symbolic and Political Speech

Architecture might be classified as a form of symbolic declaration. The Court, in United States v. O'Brien, rejected the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Yet, the

97. Id. at 22 (footnote omitted).
99. Williams, supra note 64, at 22 n.68 (citing THE REPUBLIC OF PLATO 85 (B. Jowett trans., rev. ed. 1901)). Plato argued that architecture should be censored precisely because of its expressive quality. Id.
103. Rubin, supra note 13, at 185 & n.32.
104. 391 U.S. 367 (1968) (draft card burning).
105. Id. at 376.
Court often assumes that a particular conduct is symbolic speech. In *Clark v. Community for Creative Non-Violence*, the Court assumed that camping in a public park was expression that fell under the First Amendment. In *Texas v. Johnson*, the Court again extended the protection of the Free Speech Clause to nonverbal conduct (flag burning) because it carried with it a significant element of symbolic expression. In *Spence v. Washington*, the Court examined "the nature of the appellant's activity, combined with the factual context and environment in which it was undertaken," and concluded that the display of a flag with a peace sign attached was protected expression. Using the *Spence* test, the Court could hold that architecture is symbolic expression.

The Court also might find that architecture is symbolic political speech. Regarding architectural design, Samuel E. Poole III speculated that the neighbors of the landowner in *State ex rel. Stoyanoff v. Berkeley* interpreted a proposed pyramid-shaped home in their prestigious St. Louis suburb as a political statement of rebellion against the community's traditional values. The architectural "message" was a rejection of the Western notion of a stately manor keeping vigil over an estate and was a rejection of the neighborhood. This interpretation and the conclusion that construction of a pyramid-shape design should be protected as political expression is difficult to accept.

Architecture is not political discourse in the same way as displaying a flag with a peace sign, wearing a black armband, or even burning an American flag. Architecture rarely constitutes a "particularized

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108. *Id.* at 293.
110. *Id.* at 406; *see* Smith, *supra* note 98, at 800-02 & n.42.
112. *Id.* at 409-10.
113. 458 S.W.2d 305 (Mo. 1970).
114. Poole, *supra* note 44, at 309.
115. *Id.*
message" that is common to symbolic political speech. Obviously, the requirement of expressive character would be rendered meaningless if one could meet it by simply telling people what his behavior was intended to communicate." As the Supreme Court indicated in Spence, the likelihood must be great that the message will be understood by those who view it in order to fall under the protection of the First Amendment. Whether the Court would protect architecture as symbolic or political speech is difficult to predict.

In the end, architecture may or may not be protected by the First Amendment. If some expressions that do not clearly contain a particularized message and that "may involve only the barest minimum of . . . expression" are protected, a strong case can be made for the protection of architectural expression. Nevertheless, a determination that architecture is protected speech does not foretell whether a regulation or zoning law controlling architectural appearance impermissibly abridges the First Amendment.

119. Williams, supra note 64, at 22-23. "Moreover, the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." Spence, 418 U.S. at 410 (citation omitted). "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Id. at 410-11. The message of architecture is not as easily understood by those who view it.

120. See Spence, 418 U.S. at 410-11; see also Stromberg v. California, 283 U.S. 359 (1931) (display of red flag).

121. Williams, supra note 64, at 48-49 & n.186. "Because the [draft] card is small, observers might not recognize what was being burned. . . ." Id. O'Brien did not clearly resolve this ambiguity. See United States v. O'Brien, 391 U.S. 367, 369 n.1 (1968); Williams, supra note 64, at 22-23 & n.70; see also Poole, supra note 44, at 315-16. But see Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 97 (1977) (holding that "for sale" and "sold" signs in residential areas in New Jersey are protected by the First Amendment).

122. Spence, 418 U.S. at 410.

123. If Robert Bork's definition of protected speech is adopted by the Court, architectural expression would have to be considered pure political speech to fall under the protection of the First Amendment. See Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971).

124. Williams, supra note 64, at 23-24 (citing Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975)).

125. At least four authors have argued that architecture should be protected expression. Poole, supra note 44, at 307-11; Williams, supra note 64, at 21-24; Kolis, supra note 45, at 22; Rubin, supra note 13, at 181-88.
IV. REGULATION OF ARCHITECTURAL APPEARANCE THROUGH TIME, PLACE, AND MANNER RESTRICTIONS ON ARCHITECTURAL EXPRESSION

Under the First and Fourteenth Amendments, a "[s]tate may not choose means that unnecessarily restrict constitutionally protected liberty." Therefore, if architecture is a form of constitutionally protected expression under any of the classifications presented in Section III, an architectural appearance review ordinance has the potential to unconstitutionally infringe upon a landowner's freedom of expression. Since Hadacheck v. Sebastian, courts have accorded zoning laws a presumption of validity. This validity principle usually places the burden on the individual attacking the ordinance to prove its unconstitutionality. However, when a governmental act seeks to limit a First Amendment right, the presumption usually is reversed, and the legislation is presumed to be invalid.

Depending on the categorization of an architectural appearance ordinance, the presumption of the ordinance's invalidity will either continue if the act attempts to regulate in a content-based manner, or it will shift again toward a less demanding balancing of the interests involved if the regulation is a content-neutral, time, place, and manner restriction. Time, place, and manner restrictions on protected speech are weighed with

127. 239 U.S. 394 (1915).
128. Id. at 414 (such ordinances are entitled to a presumption of validity, a presumption that shifts the burden to the party attacking an ordinance to show its invalidity); see also Bufford, supra note 12, at 129.
130. E.g., Carey v. Brown, 447 U.S. 455, 462-63 & n.7 (1980); Police Dept. v. Mosley, 408 U.S. 92, 95 (1972); cf. Kovacs v. Cooper, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring) ("I deem it a mischievous phrase... that any law touching communication is infected with presumptive invalidity.").
131. "This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46-47 (1986) (emphasis added).
regard to the substantial governmental interests involved, but they do not have to overcome a presumption of invalidity and strict scrutiny by the Court. Therefore, in order to sustain an architectural appearance ordinance, a municipality should attempt to show that its architectural appearance ordinance is merely a time, place, and manner restriction on architectural expression. Whether these ordinances are content-neutral is the first determinative issue.

A. Reasonable Time, Place, and Manner Restrictions on Architectural Expression

Because architectural expression, like all expression or speech, is subject to reasonable time, place, and manner restrictions, the Supreme Court will hold an architectural appearance ordinance valid, even though it may restrict some architectural expression, if the ordinance meets the three requirements of the content-neutral time, place, and manner restriction test most recently applied in Clark v. Community for Creative Non-Violence. "Restrictions of this kind are valid provided that [1] they are justified without reference to the content of the regulated speech, that [2] they are narrowly tailored to serve a significant governmental interest, and that [3] they leave open ample alternative channels for communication of the information." 136

133. See supra note 132 and accompanying text. But see Poole, supra note 44, at 317 n.139 ("The Court has imposed a higher degree of scrutiny on ordinances with aesthetic (community appearance) purposes.") (citations omitted).

134. See, e.g., Southern Entertainment v. City of Boynton Beach, 736 F. Supp. 1094 (S.D. Fla. 1990) (holding that ordinance was a valid time, place, and manner restriction, but that city's failure to follow statutory notice requirements rendered it null and void.) In the alternative, even if the Court were to reject the argument that architectural appearance ordinances only restrict on a content-neutral basis, these ordinances would receive almost the same type of examination: "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 370 (1968).

The Court has apparently equated the O'Brien test with the content-neutral time, place, and manner restriction test. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 n.8 (1984). If this is the case, the analysis herein would be the same whether architectural expression restrictions were content-based or content-neutral. See also infra note 136.

For a discussion of four other ways to analyze zoning and First Amendment freedom of speech conflicts, see Artigliere, supra note 17.

135. Clark, 468 U.S. at 293.

136. Id. (emphasis added). The Court formulated a test to define when the government may restrict "symbolic" speech. O'Brien, 391 U.S. at 377. The test provides that a governmental regulation is sufficiently justified if: (1) the ordinance is within the constitutional power of the government; (2) the regulation is unrelated to the suppression of free speech (Under the O'Brien test, "unrelated to the suppression" means that a regulation must be "content-neutral."); (3) the
At first glance, an architectural appearance ordinance may appear to be a content-based restriction on expression. It may appear that these ordinances prohibit or restrict architectural designs based on the architecture's expression. Although they do treat architectural designs differently, a closer examination of these ordinances shows that they are content-neutral under the test currently used by the Court.

1. Justification Without Reference to Content: The Renton Test

The first requirement under Clark is to show the justifications for the ordinance. The Supreme Court, in City of Renton v. Playtime Theaters, Inc., established a test to determine whether an ordinance's deferential treatment of expression is justified without reference to the expression's content. The Renton justification test, as applied to architecture, is whether the ordinance is aimed not at the content of the architectural expression, but at the secondary effects on the surrounding community. In other words, it is whether the municipality's "predominate concerns were with the secondary effects of" architectural expression.

The typical architectural appearance ordinance passes the Renton test. Architectural appearance ordinances are merely a decision to treat certain architecture differently based on whether the architecture causes harmful secondary effects to the surrounding neighborhood. In the same way that an architectural appearance ordinance treats certain architectural expres-

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137. John J. Costonis, for instance, concludes summarily that "aesthetic measures that regulate or ban new entrants [architectural designs] are content-based restrictions, not time, place, or manner restrictions." Costonis, supra note 9, at 447. However, he continues: "The Court might also characterize the [design] as a hybrid of noncommunicative and communicative elements, and if it opted for this course, it would likely invoke the time, place or manner analysis that is used in United States v. O'Brien." Id. at 449-50.

138. This analysis adopts the method applied in City Council v. Taxpayers for Vincent, 466 U.S. 789 (1989). As Harold L. Quadres explained: "In Vincent, the Court isolated each element [of the time, place, and manner restriction test], decided whether that element posed an issue in the case, and dealt with that issue independently of the others." Quadres, supra note 73, at 453.


140. Id. at 49 (emphasis added). The Court examined an ordinance restricting "adult motion picture theaters" from locating near any residential zone, church, park, or school. Id. at 44. Under the ordinance, an adult theater was defined as a building that was used for the exhibition of visual media that emphasized "specific sexual activities" or "specified anatomical areas." Id. In holding that the regulation was not content-based, the Court found "the Renton ordinance [to be] completely consistent with [the] definition of 'content-neutral' speech regulations," because it was "justified without reference to the content of the regulated speech." Id. at 48 (citations omitted).

141. Renton, 475 U.S. at 47.
sions differently, the ordinance in Renton treated differently those theaters specializing in adult films.\textsuperscript{142} The Renton Court explained by quoting Justice Powell's concurring opinion in Young v. American Mini Theaters: "We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings.\textsuperscript{143} Architectural appearance ordinances are not necessarily aimed at the content of architectural expressions; a community may not care what particular design a building takes, but it is concerned with the effects that a design will have on the neighborhood. Architectural appearance ordinances are aimed at the effects of architectural design because the predominate concern of municipalities that enact architectural controls is the promotion of the community's general welfare.

Architectural appearance ordinances are justified by state interests in protecting the community from the secondary effects of architecture. Under Renton, only the predominate concern or intent of the statute is considered for purposes of the analysis.\textsuperscript{144} Therefore, if an architectural appearance ordinance includes content-based aesthetic justifications, it still meets the content-neutral test of Renton if the content-based interests are not the predominate justifications for the ordinance.\textsuperscript{145}

Aesthetic zoning in general, and nonresidential architectural appearance regulations in particular, can be justified without reference to content because they promote the general welfare in ways that typical residential architectural appearance ordinances clearly do not.\textsuperscript{146} For example, historic preservation architectural appearance regulations are sometimes justified as promoting the public's general welfare interests in tourism\textsuperscript{147} and historical education.\textsuperscript{148} These justifications are inapplicable to residential regulations unless one attempts to argue that the typical suburb has substantial tourism or historical value that warrants protection.\textsuperscript{149}

\textsuperscript{142} Id.
\textsuperscript{143} Id. at 49 (emphasis added).
\textsuperscript{144} Id. at 48. For a discussion of communities' motives in enacting zoning laws, see supra text accompanying notes 45-50.
\textsuperscript{145} See infra text accompanying notes 162-81.
\textsuperscript{146} See Rowlett, supra note 32, at 633-38; see also Poole, supra note 44, at 292-94 (discussing seven purposes of architectural appearance ordinances).
\textsuperscript{147} See Rowlett, supra note 32, at 633-35.
\textsuperscript{148} See Anderson, supra note 13, at 26-30; see, e.g., City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13 (N.M. 1964).
\textsuperscript{149} Coral Gables, Florida, created by George Merrick in the 1920s to be "America's most beautiful suburb," Poole, supra note 44, at 300 (citation omitted), is a possible exception. Located just west of Miami, Coral Gables is organized into small villages, each with a different Mediterranean-style architectural requirement by deed. Id. Poole examines this unique suburb as one of his examples. Id. at 300-02.
Residential architectural appearance ordinances typically assert two predominate interests or concerns: protection of taxable property value and protection and preservation of the quality of the neighborhood. For example, the Fox Point architectural appearance ordinance's express purpose is to avoid "a substantial depreciation in the property values of said neighborhood." Similarly, Lake Forest, Illinois seeks to stop the destruction of "a proper balance in relationship between taxable value of real property in such areas and the cost of municipal services provided." The Lake Forest ordinance's specific purpose is to preserve and protect the quality and character of the neighborhood. It seeks to avoid structures that adversely affect "the most appropriate use," "development," and "desirability of immediate and neighboring areas." Clearly, these typical ordinances are justified without reference to architectural expression. They are content-neutral under the Renton test and meet the first prong of the three-part Clark test.

2. Narrowly Tailored to Serve Substantial Governmental Interests

The second part of the Clark test is whether the regulation is narrowly tailored to serve or further a significant governmental interest. This requirement involves two subissues: an ordinance's degree of tailoring to the interest served and the substantiality of the state interest served by the ordi-
nance. Architectural appearance ordinances are as narrowly tailored as possible. Additionally, they serve three significant and substantial government interests. Two are the same interests that justify architectural appearance ordinances without reference to its content: the protection of property value and the protection and preservation of the quality of the neighborhood. The third substantial interest is not expressly stated by the ordinances but is reflected in the name given to these ordinances: the protection of the community’s aesthetic appearance from the secondary effects of unaesthetic architecture.

(a) Narrow Tailoring

In *Schneider v. State*, an ordinance prohibiting handbilling was justified by the public’s significant interest in maintaining a litter-free aesthetic environment. Because the Supreme Court found that the city could adequately protect the aesthetic appearance of the community by punishing those who actually littered, rather than those who attempted to speak through handbills, it held that the ordinance was not narrowly tailored.

In contrast, the substantive evil of architectural expression—harm to property value, neighborhood quality, and community aesthetic interests—is not a byproduct of architectural expression. Free speech problems in architecture are created by the medium of expression itself because “[a]rchitecture’s unity of medium and message precludes alternate means of expression.” Architecture is more like a billboard or a campaign sign that affects the landscape through its physical presence alone, regardless of the content matter that it promotes. Architectural appearance ordinances that respond precisely to the problems secondarily caused by architectural expression are narrowly tailored to restrict no more expression than necessary to achieve their goals.

The Supreme Court has upheld ordinances that are broader in scope than architectural appearance ordinances. For example, a majority of the Court concluded in *Metromedia, Inc. v. City of San Diego* that a prohibition on all off-site commercial billboards was narrowly tailored to the visual evil the city sought to correct. Further, in *City Council v. Taxpayers for...*

154. 308 U.S. 147 (1939).
155. *Id.* at 162.
156. *Vincent*, 466 U.S. at 810 (allowing restrictions on campaign sign locations because of the effect of signs, not political message contained).
159. *Id.* at 508.
Vincent, the Court found that "the City did no more than eliminate the exact source of the evil it sought to remedy," by prohibiting the posting of all signs on public property within the city. In comparison, prohibition of architectural expression is more narrowly tailored to prohibit only those structures that do not meet the requirements of the local architectural appearance ordinance.

(b) The Substantiality of the Interests Served

The Supreme Court previously sanctioned only time, place, and manner restrictions on semi-protected speech. It has begun to accept these same state interests as sufficient to limit any expression. The Court has recognized each of the interests served by municipal architectural appearance ordinances as significant interests to be advanced by the use of the police power. In City of Renton v. Playtime Theaters, Inc., the Court not only recognized the “interest in attempting to preserve the quality of urban life,” but asserted that the interest “must be accorded high respect.” After a plurality in Metromedia, Inc. v. City of San Diego recognized a legitimate and substantial state interest in pure aesthetics, the majority in City Council v. Taxpayers for Vincent reaffirmed this interest as a substantial and significant government interest. These cases indicate that the municipalities have a weighty, essentially [a]esthetic interest in proscribing intrusive and unpleas-

160. Vincent, 466 U.S. at 808.
161. Id. at 808-10. The Court in Vincent noted: "In Metromedia, a majority of the Court concluded that a prohibition on billboards was narrowly tailored to the visual evil San Diego sought to correct." Id. at 808 n.27 (citations omitted).
162. In Cohen v. California, 403 U.S. 15 (1971), the Supreme Court gave offensive but non-obscene speech constitutional protection, but then realized that this new protected expression would imperil certain state interests. Quadres, supra note 73, at 443 & n.19; see also FCC v. Pacifica Found., 438 U.S. 726 (1978) (prohibition of indecent language on radio broadcast justified by state interest in protecting children and unwary listeners in their homes).
163. See Quadres, supra note 73, at 445 & n.29; see supra note 81.
165. Id. at 50.
166. Id. at 51 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 80 (1976) (Powell, J., concurring)).
The Court has not explicitly held that protection of property values is a substantial government interest to be promoted. However, the broad language of holdings such as Renton and Vincent and the dicta in Berman v. Parker are indicative of the Court’s willingness to follow Wisconsin’s lead in State ex rel. Saveland Park Holding Corp. v. Wieland and recognize this specific interest as a significant and substantial interest.

The substantiality of the community’s interest in protecting the general welfare was examined in Erznoznik v. City of Jacksonville. Jacksonville’s ordinance prohibited nudity on outdoor drive-in motion picture screens. The Court held the ordinance to be an unconstitutional infringement on speech after balancing the interests of passersby with the First Amendment rights of the drive-in. The Court reasoned that the passersby could avert their eyes from the nudity, and therefore, the city’s interests were less than substantial.

In Erznoznik, the Court failed to take into account the substantial and significant interests of the drive-in’s permanent landowning neighbors. As with a sound blasting from a roving truck in Kovacs v. Cooper, the government has a strong interest in protecting its citizens from unwelcome and unavoidable intrusions, especially those that affect a captive audience such as an individual in his home. An architectural design may not offend a neighbor to the degree that nudity on a full-size outdoor screen may or in the way a sound blasting from a truck clearly does, but in each case homeowners are not in a position to avert his eyes (or ears) to avoid the unwanted expression. This makes the government interest in restricting architectural expression even more significant and substantial.

169. Id. at 806.
170. 348 U.S. 26 (1954); see supra note 26 and accompanying text.
172. 422 U.S. 205 (1975).
173. Id. at 206-07.
174. Id. at 208-18.
175. Id. at 208-12.
176. Id. at 212 n.9 ("We are not concerned in this case with a properly drawn zoning ordinance restricting the location of drive-in theaters or with a nondiscriminatory nuisance ordinance designed to protect the privacy of persons in their homes from the visual and audible intrusions of such theaters.").
177. 336 U.S. 77 (1949).
178. Id. at 86-87.
180. See Kovacs, 336 U.S. at 79-81.
181. In contrast, an individual may avoid the expression of the handbiller by not accepting or reading the bill. A neighbor may not avoid the expression from a permanent neighboring house. See generally Schneider v. State, 308 U.S. 147 (1939).
Finally, the Supreme Court has addressed the situation when a municipality may not be able to clearly show that its legislation actually advances the substantial state interests. In *City of Renton v. Playtime Theaters, Inc.*, 182 the Court held: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, as long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 183 Therefore, although a municipality's architectural appearance review board cannot point to tangible evidence that a rejected architectural design will reduce property value, lower the quality of the neighborhood, or even destroy the aesthetic appearance of the entire community, a court may find that the ordinance is narrowly tailored to serve substantial governmental interests. Clearly, municipalities believe that architectural appearance ordinances serve important, substantial, and significant interests of the community. Two of these concerns are expressly stated in these ordinances. 184

In reference to the third substantial interest, protection of the aesthetics of the neighborhood, the Court in *Paris Adult Theater I v. Slaton* 185 held: "The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not sufficient to find that statute unconstitutional." 186 Municipalities reasonably believe their assumptions about all three public welfare interests. 187

3. The Availability of Alternative Channels for Expression

When balancing a time, place, and manner restriction, the Court not only considers the captive audience problem inherent in architectural expression questions, but also considers the opposing side of this issue. The third prong of the *Clark* time, place, and manner restriction test is whether architectural appearance ordinances "leave open ample alternative channels for communication of the information." 188 The issue, then, is whether

183. *Id.* at 51-52.
184. The two were the protection of taxable real estate values and the preservation of the quality of the neighborhood. See *supra* notes 150-52 and accompanying text.
185. 413 U.S. 49 (1973) (plurality opinion).
186. *Id.* at 62 (plurality opinion).
landowners who wish to express or speak through architecture have ample alternative channels for expression.

In *City of Renton v. Playtime Theaters, Inc.*, the Court considered whether the ordinance allowed reasonable alternative avenues of communication within the City of Renton in terms of the amount of available land open for use as sites for the expression. In the case of architectural appearance ordinances, this requirement may pose a significant problem. An ordinance that regulates architecture because of its secondary effects may preclude an architectural design from the entire community; a pyramid-shaped home may be excluded city-wide. Architectural appearance ordinances do not regulate architectural expression by requiring it to be concentrated in confined areas of the city as demonstrated in *Renton*, or by dispersing it as noted in *Young v. American Mini Theaters, Inc.* Architectural expression is prohibited by architectural appearance ordinances anywhere within a community where it causes substantial harm to the general welfare of the community.

A reasonable alternative site for architectural expression is any location that does not cause harmful secondary effects on the community. "The First Amendment requires only that [the community] refrain from effectively denying . . . a reasonable opportunity" to build a design. Under *Renton*, if a community has only five percent of its land available for expressive architecture it satisfies this part of the test. It is conceivable that there are some areas of a municipality where no property value, neighborhood quality, or aesthetic appearance harms would occur no matter what design was built. However, this alternative is unlikely. In addition, the opposite, a subdivision of pyramid-shaped homes, is even more unlikely to exist.

Nearby communities that lack architectural appearance controls offer ample alternative opportunities for architectural expression. In *Schad v. Borough of Mount Ephraim*, the Court stated that it "may very well be true" that similar uses were amply available in nearby communities, but

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190. Id. at 53-54.
191. Id. at 44.
192. 427 U.S. 50, 52 (1976) (plurality opinion).
194. Id. at 53-54 ("That respondents must fend for themselves in the real estate market, on equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.").
made no findings on this point. If one community regulates architectural expression through time, place, and manner restrictions, but another nearby community does not, reasonable alternatives for expression are available. If alternative sites are available, the question remains as to the degree of availability the Court will require. As the Court said in *Erznoznik v. City of Jacksonville*, “each case ultimately must depend on its own specific facts.”

V. CONCLUSION

Architectural appearance ordinances restrict expression through architecture. The most promising way to avoid a ruling of unconstitutionality is for an architectural appearance ordinance to fall under the time, place, and manner content-neutral exception. A strong case can be made that architectural appearance ordinances are merely content-neutral attempts to promote the general welfare of the community, whether it is the protection of property value, maintenance of the community’s quality, or mere aesthetic enhancement of the overall community. They are justified without any reference to the content of architectural expressions restricted. They are narrowly tailored to serve several substantial and important community interests. With reasonable alternatives available, architectural expression will not be suppressed; it will be restricted when outweighed by community values.

Faced with a First Amendment challenge to an architectural appearance ordinance, like the hypothetical presented in this Comment, the Court should use the time, place, and manner test to hold that architectural appearance regulation is constitutional and a reasonable restriction on architectural expression. If it does not, a landowner may have no recourse but to

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196. *Schad*, 452 U.S. at 76. (“[The Borough’s] position suggests the argument that if there were countywide zoning, it would be quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential communities. . . . This may very well be true, but the Borough cannot avail itself of that argument in this case.”). *But see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (quoting Schneider v. State, 308 U.S. 147, 163 (1939)) (“‘[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.’”).

197. Note, supra note 9, at 1461 (“So long as unregulated areas exist where architects may build as they please, it is arguable that architectural nonconformity is not unduly restricted control.”).

198. 422 U.S. 205 (1975).

199. *Id.* at 209. Because “[t]he inexperience of the Supreme Court in dealing with zoning matters is strikingly illustrated by the . . . opinion in which only four cases dealing with land use controls were cited,” prediction of the course the Supreme Court will take in this area is difficult. Artiglieri, supra note 17, at 967 n.84 (citing Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)).
sell his home at a economic loss and move away when his soon-to-be neighbor successfully begins construction of a pyramid-shaped house next door.

An author concluded in 1970 with a message that is still pertinent today: "What is done today in land use planning will determine the landscape of the future. Should we fail to act in a unified, well directed manner in our demand for aesthetic concepts in zoning ordinances, the eyesores of today will exist and multiply in the years to come." 200

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200. See Steinbach, supra note 19, at 186.