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# Aesthetic Nuisance: The Time Has Come To Recognize It

## INTRODUCTION

Nuisance law protects one landowner from the activity of another landowner when that activity substantially<sup>1</sup> and unreasonably interferes with the use and enjoyment of his or her land.<sup>2</sup> The overwhelming bulk of actionable nuisances involve four types of harm: noise,<sup>3</sup> like that generated from a factory;<sup>4</sup> odor,<sup>5</sup> like that produced from a piggery;<sup>6</sup> dust, like that coming from coal trucks;<sup>7</sup> and, a safety hazard, like that present from an explosives factory.<sup>8</sup> An interference with the plaintiffs' use and enjoyment of land is unreasonable when the harm to the plaintiff exceeds the value to the defendant and the community of the offensive activity.<sup>9</sup>

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\*B.A., University of Chicago; J.D., University of Michigan; Member, State Bar of New Hampshire. This article stems in part from a nuisance suit in Placitas, New Mexico involving a noisy and unattractive oil pipeline pump station located in a scenic residential area, which suit the author worked on when a member of the State Bar of New Mexico.

1. See *Robie v. Lillis*, 112 N.H. 492, 299 A.2d 155, 158 (1972). "Substantial harm is that in excess of the customary interferences a land user suffers in an organized society. It denotes an appreciable and tangible interference with a property interest." A-6 AMERICAN LAW OF PROPERTY, § 28.25, at 73 (A. J. Casner ed. 1954).

2. See generally Restatement (Second) of Torts §§ 821D-F 822 (1979).

The use of nuisance law is broad. "There is simply no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse. Nuisance actions have involved pollution of all physical media—air, water, land—by a wide variety of means. . . . Nuisance actions have challenged virtually every major industrial and municipal activity which is today the subject of comprehensive environmental regulation—the operation of land fills, incinerators, sewage treatment facilities, activities at chemical plants, aluminum, lead and copper smelters, oil refineries, pulp mills, rendering plants, quarries and mines, textile mills and a host of other manufacturing activities. . . . Nuisance theory and case law is [sic] the common law backbone of modern environmental and energy law." W. Rodgers, Jr., *Handbook on Environmental Law* § 2.1, at 100 (1977).

3. See, e.g., *Hooks v. International Speedways, Inc.*, 263 N.C. 686, 140 S.E.2d 387 (1965) (church enjoined construction of an automobile race track due to noise interfering with church services).

4. See *Powell v. Bentley & Gerwig Furniture Co.*, 34 W.Va. 804, 12 S.E. 1085 (1891).

5. See, e.g., *Gerrish v. Wishbone Farm of N.H., Inc.*, 108 N.H. 237, 231 A.2d 622 (1967) (chicken farmer enjoined from disposing of chicken manure on property due to odor).

6. See *Jewett v. Deerhorn Enter. Inc.*, 281 Or. 469, 575 P.2d 164 (1978). Although noise and flies were also part of the plaintiff's complaint in this case, these problems were incidental to the odor problem.

7. See *West v. National Mines Corp.*, 168 W. Va. 578, 285 S.E.2d 670 (1981).

8. See *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 21 S.E. 1035 (1895).

9. See generally Restatement (Second) of Torts § 826 (1979).

An interesting recent case of balancing of interests involved a soup kitchen. In *Amory Park Neighborhood Ass'n v. Episcopal Community Servs.*, 148 Ariz. 1, 712 P.2d 914 (1985) (en banc), the court held: "The evidence of the multiple trespasses upon and defacement of the residents' property supports the trial court's conclusion that the interference caused by the defendant's operation was unreasonable despite its charitable cause." *Id.*, 712 P.2d at 921.

When a nuisance exists, a court may either enjoin the activity,<sup>10</sup> or award damages for the harm caused by the activity.<sup>11</sup>

Traditionally, courts have refused to hold the unsightly or visually aesthetically displeasing aspects of a neighbor's property as an actionable nuisance.<sup>12</sup> For example, in *Mathewson v. Primeau*,<sup>13</sup> the accumulation of old automobiles, crates, boxes, lumber, and discarded household appliances on a neighbor's land, although deemed unsightly by the Washington Supreme Court, was not actionable. The court reasoned that injunctive actions based purely on aesthetic considerations are "a great enlargement of the powers of the courts over the properties and customs of the people."<sup>14</sup> In other words, courts traditionally have held that a landowner has the right to do what he will with his property, and a judge should not use his subjective notions of ugliness to interfere with that property right.

Recently, however, there has been evidence of a judicial rebellion against allowing aesthetically displeasing activities to go unchecked on a neighbor's land. One significant case is the decision of the Colorado Court of Appeals in *Allison v. Smith*.<sup>15</sup> In that case, the plaintiffs owned a small recreational cabin in the mountains which they visited on weekends and vacations. Directly across from the plaintiffs' front porch, defendant landowner began to stockpile old cars, scrap metal, petrochemical drums, litter and other "obnoxious debris."<sup>16</sup> The plaintiffs consequently ceased using their property because the psychic benefit they got from going to the cabin had been destroyed. They filed suit for injunctive relief and damages. The court found the "unsightly eyesore"<sup>17</sup> actionable, and ordered that the property be returned to its prior vacant state. The court stated: "legitimate but unsightly activity such as the accumulation of debris on land or the operation of a junkyard . . . may become a private nuisance if it is unreasonably operated so as to be unduly offensive to its neighbors."<sup>18</sup>

This article evaluates the merit of allowing a landowner to enjoin a

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10. See, e.g., *Gerrish v. Wishbone Farms of N.H., Inc.*, 108 N.H. 237, 231 A.2d 622 (1967) (enjoining chicken farmer from disposing of chicken manure on property due to odor).

11. See, e.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870 (1970) (awarding permanent damages for pollution caused by cement plant); *Pate v. City of Martin*, 614 S.W.2d (Tenn. 1981) (awarding damages for reduced rental value due to nuisance).

12. See generally 58 AM. JUR. 2d *Nuisances* § 44 (1971). ("It is not in itself sufficient to create a nuisance that a thing is unsightly or that it offends the aesthetic sense.")

13. 64 Wash. 2d 929, 395 P.2d 183 (1964).

14. *Id.*, 395 P.2d 189 (quoting *Parkersburg Builders Material Co. v. Barrack*, 118 W.Va. 608, 192 S.E. 291 (1937) (concurring opinion)).

15. 695 P.2d 791 (Colo. Ct. App. 1984).

16. *Id.* at 793.

17. *Id.* at 794.

18. *Id.*

neighbor's activity which is aesthetically displeasing. The first section examines the growing influence of aesthetic considerations in nuisance cases. The second section explains why courts should consider aesthetic concerns in nuisance actions. The final section discusses desirable limitations on employing aesthetics concerns in nuisance suits.

#### THE GROWING INFLUENCE OF AESTHETIC CONCERNS IN JUDICIAL DECISIONMAKING

The first judicial opinion which expressly recognized that aesthetic qualities should be routinely taken into account as a factor in nuisance cases was the New Hampshire Supreme Court's 1972 decision in *Robie v. Lillis*.<sup>19</sup> At issue was whether to enjoin the maintenance of a boat storage shed located in a residential area adjacent to a lake. The defendants would move boats in and out of the shed along a narrow access road during three months of the year. The court found insufficient evidence of any safety hazard to children using the access road, of the shed being a fire hazard, or of an unreasonable amount of dust or noise being produced by the activity of the defendants. More importantly, the court did not accept the plaintiffs' "strongest contention"<sup>20</sup> that the shed was unsightly as located in this particular residential area. The court reached this result only because the shed was not sufficiently ugly. The court forewarned that "the unaesthetic quality of an activity is . . . an important consideration"<sup>21</sup> in nuisance cases.

A few years later the New Hampshire Supreme Court was presented with a factual situation which the court found warranted relief under a nuisance theory largely due to aesthetic concerns. In *Heston v. Ousler*,<sup>22</sup> the defendant constructed a dock on a lake which bordered plaintiffs' shorefront property. The dock "totally obscure[d]" the plaintiffs' view of the lake from their home.<sup>23</sup> The court also found that the use of the dock would create a safety hazard for the plaintiffs when swimming in their own waterspace. Emphasizing aesthetic considerations, the court ordered that the dock be moved. The New Hampshire Supreme Court has since used aesthetic concerns as a factor in deciding other nuisance cases.<sup>24</sup>

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19. 112 N.H. 492, 299 A.2d 155 (1972).

20. *Id.*, 299 A.2d, at 160.

21. *Id.*

22. 119 N.H. 58, 398 A.2d 536 (1979).

23. *Id.*, 398 A.2d, at 538. ("The configuration of the shoreline is such that when the plaintiffs look out to the open lake from their home, the defendants' dock is directly in front of them and it totally obscures their view.")

24. See, e.g., *Dunlop v. Daigle*, 122 N.H. 295, 444 A.2d 519, 521 (1982) (kennel constructed near cottage and business enjoined in part because "the kennel detracts from the appearance of the premises").

Prior to *Robie* and *Heston*, one court, the West Virginia Supreme Court, cited aesthetic qualities of an activity in its nuisance decisions. That court, however, did not give aesthetic considerations the emphasis the New Hampshire high court would. In *Martin v. Williams*,<sup>25</sup> for example, the West Virginia court enjoined the operation of a used car lot in a residential area primarily because it was noisy, cast light, and lowered property values. The court also noted, however, that the lot would cause a "destruction of the aesthetic nature of the neighborhood."<sup>26</sup> The West Virginia Supreme Court has mentioned aesthetic concerns in a modest way in other decisions.<sup>27</sup>

The first court to state that aesthetic considerations alone may warrant injunctive relief in a nuisance suit was the Oregon Supreme Court in its 1975 decision of *Hay v. Stevens*.<sup>28</sup> In that case, the plaintiff owned a summer home and motel near a beach. The defendant owned unimproved land between the plaintiff's land and the beach, and constructed a "hog-wire" fence on his land. The plaintiff sued in nuisance solely on aesthetic grounds. The court stated that "in the appropriate case recovery will be permitted under the law of nuisance for an interference with visual aesthetic sensibilities."<sup>29</sup> Nevertheless, the court declined to order the removal of the fence because it was not "definitely offensive."<sup>30</sup>

The first court to enjoin a landowner's unaesthetic activity solely due to its unsightliness was the Virginia Supreme Court in its 1982 decision of *Foley v. Harris*.<sup>31</sup> In that case, the court enjoined keeping wrecked automobiles on a lot<sup>32</sup> in a residential area because the "junk" automobiles were extremely ugly.<sup>33</sup> The court based its actions on a restrictive covenant

25. 141 W.Va. 595, 93 S.E.2d 835 (1956).

26. *Id.*, 93 S.E.2d, at 844.

27. See, e.g., *Mahoney v. Walter*, 157 W.Va. 822, 205 S.E.2d 692, 699-700 (1974) "[t]he unsightliness of the [salvage] yard itself, the noise necessitated by the preparing of the junked automobiles for removal, the possible danger of flammable materials, the possible danger to children from the unprotected nature of the area, and the prevalence of rodents and insects justified the trial court in finding that a nuisance existed regardless of whether the area was exclusively or primarily residential." *Id.*, 205 S.E.2d, at 699-700.

28. 271 Or. 16, 530 P.2d 37 (1975).

29. *Id.*, 530 P.2d, at 39.

30. *Id.* Note that the plaintiffs also claimed that the unsightly fence would cause a loss in rental income from its motel because potential customers did not want to view the fence out of their windows. The court, however, treated this claim of damage as incidental to the aesthetic nuisance claim since the harm to the view is the alleged source of all damage. This approach seems proper and has been used in explaining zoning decisions. See, *Rowlett, Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 VAND. L. REV. 603, 614 (1981).

31. 223 Va. 20, 286 S.E.2d 186 (1982).

32. The lot contained: "'old abandoned cars' and an 'old van that is used as a tool shed. . . . [S]ome cars were moved off and others moved onto the lot, that the number on the property at any one time varied from 6 to 16, and that at the time of the hearing there were 6, 4 of which could not be moved under their own power." *Id.*, 286 S.E.2d, at 187.

33. The plaintiffs also complained about a drop in property values, but the court properly treated it as part of the aesthetic question. See *supra* note 30.

in the deed to the defendant's lot which contained the clause that "[n]o nuisance shall be maintained."<sup>34</sup> The court then applied the common law of nuisance to determine whether keeping the "junked, abandoned, or disabled vehicles"<sup>35</sup> on the lot was disallowed by the covenant. The court found that aesthetic considerations were relevant to ascertaining whether a particular activity was a nuisance. This interpretation of such a restrictive covenant is highly significant because subdivision and condominium owners are increasingly using restrictive covenants that prohibit lot purchasers from maintaining nuisances on their land.<sup>36</sup>

Although the *Foley* case was the first case to expressly hold that an unaesthetic activity, without more, may warrant injunctive relief under a nuisance theory, there may have been many cases involving funeral homes in which courts have covertly taken into account important aesthetic considerations. In these cases, funeral homes proposed for construction in residential areas were enjoined, not because they were noisy or presented a health hazard, but because of the reaction they elicit upon view.<sup>37</sup> As the Arkansas Supreme Court noted, a funeral home's "continuous suggestion of death and dead bodies tends to destroy the comfort and

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34. The complete text of the restrictive covenant is: "No nuisance shall be maintained upon the lot hereby conveyed nor upon any lot on Forest Road. . . ." *Foley v. Harris*, 223 Va. 20, 286 S.E.2d 186, 187 (1982).

35. *Id.*, 286 S.E.2d, at 190.

36. The restrictive covenants for Rio Rancho Estates, Inc. in Sandoval County, N.M., e.g., include the following provisions:

10. No billboard, unsightly objects, or nuisance shall be erected, placed or permitted to remain on any lot, nor shall any lot be used in any way or for any purpose which may endanger the health or unreasonably disturb other lot owners.
12. Nor shall any lot be used in whole or in part for the storage of any property or object that will cause such lot to appear on an unclean or untidy condition or that will be obnoxious to the eye.

37. See, e.g., *Travis v. Moore*, 377 So.2d 609 (Miss. 1979). "The chancellor found that the proposed construction would not create noises, unusual odors, slamming of doors, the ringing of telephones, unusual and unnecessary automobile noises, the display of caskets and other burial paraphernalia and would not be conducted in an unsanitary area. . . . The chancellor found that the only injury complained of by the appellants was that the conduct of the funeral home business at the proposed site would have a depressing effect upon them and their families by reason of its frequent reminder of death and that such was not sufficient to deny construction of a lawful and necessary business, since he interpreted the law to require that the injury complained of be physical, as distinguished from purely imaginative. The learned chancellor misinterpreted the Mississippi rule . . . [which] relates to mental depression and anxiety rather than physical injury. We hold that appellants reside in an essentially residential neighborhood and that they are entitled to be protected in the enjoyment of their property rights without the intrusion of the funeral home business in their midst." *Id.* at 612. See also *Rockenbach v. Apostle*, 330 Mich. 338, 47 N.W.2d 636 (1951). "Funerals, hearses, coffins . . . are conducive to depression, and sorrow, and deprive a home of the comfort and repose to which its owners are entitled. It is not necessary to show damage from disease or unpleasantness of odors arising from maintenance of such a business in order to enjoin it. Emotions, caused by the constant contemplation of death . . . are more acute in their painfulness, in many cases, than suffering perceived through the senses." *Id.*, 47 N.W.2d at 642. See also *Jack v. Torrant*, 136 Conn. 414, 71 A.2d 705 (1950). "As a result of the operation of this funeral business . . . [it] had an immediate and continuing depressing effect upon them [plaintiffs] which substantially decreased their quiet and peaceful enjoyment of their home." *Id.*, 71 A.2d at 711.

repose sought in home ownership."<sup>38</sup> Thus, what has really happened is that courts have probably always considered the aesthetic quality of the activity but are only now expressly deciding nuisance cases on aesthetic grounds.

In conclusion, the cases reviewed in this section, in addition to the Colorado decision of *Allison v. Smith* noted in the introduction, have evidenced a trend toward expressly recognizing aesthetic concerns as the basis for a nuisance suit. The next section explores the rationale behind this trend.

#### THE RATIONALE FOR TAKING AESTHETIC CONSIDERATIONS INTO ACCOUNT IN NUISANCE SUITS

Courts have traditionally avoided recognizing aesthetics as the basis for a nuisance action because courts have tended to belittle aesthetic concerns. What the courts have said is that judges should not venture into such an area which is fraught with subjectivity and could interfere with valuable property rights.<sup>39</sup> In the recent decision of *Ness v. Albert*,<sup>40</sup> for example, the defendant had accumulated various items of "junk" on his property including old sinks and stoves and a partially burned house trailer. The plaintiff neighbor sued solely on aesthetic grounds and got a damages award from a jury.<sup>41</sup> The Missouri appellate court reversed this decision saying unsightliness alone cannot create a cause of action. The court explained:

Aesthetic considerations are fraught with subjectivity. One man's pleasure may be another man's perturbation. . . . Judicial forage into such a nebulous area would be chaotic. Any imaginary good from doing so is far outweighed by the lurking danger of unduly circumscribing inherent rights of ownership of property and grossly intimidating their lawful exercise.<sup>42</sup>

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38. *Powell v. Taylor*, 222 Ark. 896, 263 S.W.2d 906, 907 (1954).

39. See, e.g., *Mathewson v. Primeau*, 64 Wash.2d 929, 395 P.2d 183 (1964); *Mahlstadt v. City of Indianola*, 251 Iowa 222, 100 N.W.2d 189 (1959).

40. 665 S.W.2d 1 (Mo. Ct. App. 1983).

41. The jury awarded \$4,000 in compensatory damages and \$8,500 in punitive damages. *Id.* at 1.

42. *Id.* at 2.

43. See, e.g., *National Used Cars, Inc. v. City of Kalamazoo*, 61 Mich. App. 520, 233 N.W.2d 64 (1975) (junkyard zoning ordinance decision). "We are advised by the plaintiff that an aesthetic standard . . . involves subjective evaluation. Modern thinking seems to refute this notion however and 'recent studies have demonstrated that there is consensus in matters of aesthetics and that aesthetic judgments can be supported by appeal to publicly ascertainable facts.'" *Id.*, 233 N.W.2d at 67 (quoting Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1442 (1973)).

Underlying this reasoning is a disrespect by these courts for aesthetic concerns. This rationale assumes that aesthetically displeasing activity cannot possibly create a substantial interference with a landowner's property interest. Yet the response of those courts recognizing aesthetic considerations would be that ugliness can destroy the very purpose of owning property and this can be objectively determined.<sup>43</sup> In *Allison v. Smith*,<sup>44</sup> for example, the plaintiffs stopped using their mountain cabin because the psychological benefit they got from the scenery had been ruined. Similarly, the dock in *Heston v. Ousler*<sup>45</sup> ruined the plaintiff's view of the lake, a primary reason for owning their home. In short, "offensive and unsightly conditions do have adverse effect on people."<sup>46</sup> These cases do not involve any subjectivity, but involve objectively determined unreasonable conduct. These cases lead to the conclusion that judges can effectively use an objective standard of whether an activity is "unneighborly according to contemporary community standards."<sup>47</sup>

The likelihood that more courts will now recognize the importance of aesthetic considerations in nuisance cases is evidenced by the recent judicial recognition of aesthetic concerns as a proper purpose for zoning<sup>48</sup>—the state's method for regulating land use. By the early 1980s a majority of states changed their position and held that aesthetics alone can justify

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44. See *infra* notes 15-18 and accompanying text.

45. See *infra* notes 22-23 and accompanying text.

46. *Diemeke v. State Highway Comm'n*, 444 S.W.2d 480, 484 (Mo. 1969). See also *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 144, 646 P.2d 565 (1982). "Aesthetics . . . provides for comfort, happiness, and enhancement of the citizens' cultural life and sustains the value of property." *Id.*, 646 P.2d at 571. See also *City of Independence v. Richards*, 666 S.W.2d 1 (Mo. Ct. App. 1983). There is "an emergent public awareness that an unsightly environment impinges adversely on human sensibility." *Id.* at 5. See also *Sun Oil Co. v. City of Madison Heights*, 41 Mich. App. 47, 199 N.W.2d 525 (1972). "The modern trend is to recognize that a community's aesthetic well-being can contribute to urban man's psychological and emotional stability." *Id.*, 199 N.W.2d at 529. See generally Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982). "[T]he environment is a visual commons impregnated with meanings and associations that fulfill individual and group needs for identity confirmation. . . . The cultural stability hypothesis views controversies about 'beauty' as surrogates for disagreements about environmental change itself. Aesthetic policy, therefore, serves a role in the social system similar to that which homeostatic mechanisms serve in the human body. . . . [I]ndividuals and groups must cope with threats to their personal and social identity and, hence, to cultural stability when new entrants imperil existing resources. What they seek when they press aesthetic demands upon governmental policymakers are measures that will function, in essence, as socially homeostatic devices. From their perspective, the goal of these measures is to regulate the pace and character of environmental change in a manner that precludes or mitigates damage to their identity." *Id.* at 419-20.

47. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Controls*, 40 U. CHI. L. REV. 681, 732 (1973).

48. See *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982) (describing the shift among jurisdictions). See generally Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 U.M.C. L. REV. 125 (1980).



zoning regulation of junkyards,<sup>49</sup> billboards,<sup>50</sup> and trash.<sup>51</sup> This trend is likely to spill over into future nuisance decisions because now courts are more confident that land use issues affecting aesthetic values can be objectively determined.

In conclusion, visually offensive conditions on a neighbor's property can substantially interfere with the use of one's own property. Therefore, aesthetic considerations should be taken into account in nuisance actions. Nevertheless, some limitations are needed.

### THE LIMITS OF AN AESTHETIC NUISANCE CAUSE OF ACTION

As a practical matter, most nuisance cases having an aesthetic component will also involve more traditional types of harm like noise, odor, or safety hazards which may warrant injunctive relief. This would be true, for example, in many junkyard cases.<sup>52</sup> Therefore, the question of whether an activity can be enjoined solely on aesthetic grounds will not often arise. When the question is raised, however, the two elements a plaintiff must prove in a nuisance case is that the nuisance is substantial and that it is unreasonable.

The Colorado court in *Allison v. Smith* warned of the substantiality requirement when it stated "it is not enough that a thing such as accumulated debris and rubbish be unsightly or that it offends one's aesthetic senses."<sup>53</sup> Rather, it must be "unduly offensive" to its neighbors.<sup>54</sup> In addition, it must be offensive to a "normal person in the community,"<sup>55</sup> not to one of peculiar sensibilities. Perhaps a more practical test is whether the alleged unaesthetic activity defeats the primary psychological benefit the normal property owner derives from his property. Under this reasoning, a funeral parlor is always enjoinable when proposed for construction in a residential area, but a junkyard might not be depending on the quality of the area and extent of junk.

An interesting borderline case highlighting the substantiality require-

49. See, e.g., *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982); *State v. Smith*, 618 S.W.2d 474 (Tenn. 1981); *State v. Bernhard*, 173 Mont. 464, 568 P.2d 136 (1977); *Buhler v. Stone*, 533 P.2d 292 (Utah 1975); *Jasper v. Commonwealth*, 375 S.W.2d 709 (Ky. 1964); *Deimeke v. State Highway Comm'n.*, 444 S.W.2d 480 (Mo. 1969); *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965); *National Used Cars, Inc. v. City of Kalamazoo*, 61 Mich. App. 520, 233 N.W.2d 64 (1975).

50. See, e.g., *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 646 P.2d 565 (1982); *City of Wales v. Lamar Adv. Ass'n*, 414 So.2d 1030 (Fla. 1982); *Goodman Toyota, Inc. v. City of Raleigh*, 63 N.C.App. 660, 306 S.E.2d 192 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 884 (1984); *Westfield Motor Sales Co. v. Town of Westfield*, 129 N.J. Super. 528, 324 A.2d 113 (1974).

51. See, e.g., *City of Independence v. Richards*, 666 S.W.2d 1 (Mo. Ct. App. 1983).

52. See *Mahoney v. Walter*, 157 W.Va. 822, 205 S.E.2d 692 (1979).

53. *Allison v. Smith*, 695 P.2d 791, 794 (Colo. Ct. App. 1984).

54. *Id.*

55. *Foley v. Harris*, 233 Va. 20, 286 S.E.2d 186, 191 (1982).

ment is *Acadian Heritage Realty v. City of Lafayette*,<sup>56</sup> a Louisiana appellate court decision. In that case, a solid waste disposal mound placed by the city in a residential subdivision reached thirty feet in height. The mound, termed "Mount Everest," was ordered by the trial court to be lowered to five feet solely because of its unaesthetic nature.<sup>57</sup> The appeals court reversed, stating that the "unsightliness" was only an "inconvenience,"<sup>58</sup> and cited a statute which states that each landowner must endure "some inconvenience to his neighbor."<sup>59</sup> The court simply felt that the substantiality factor was not met. Implicit in this decision, however, may be a recognition that a city needs to have an efficient landfill operation. This suggests the second limiting factor in aesthetic nuisance cases: that the nuisance be unreasonable.

A nuisance is unreasonable when the harm to the plaintiff exceeds the value to the defendant and the community of the offensive activity.<sup>60</sup> Notably, in those cases where an activity has been enjoined on aesthetic grounds the cost to the defendant has been minimal. In *Foley v. Harris*, the Virginia junkyard case, the court found that it "would be 'very simple and inexpensive' for the Foleys to remove the cars."<sup>61</sup> In *Allison v. Smith*, removing the stockpiled items would not interfere with the business activities of the defendants. Therefore, a court is more likely to find an actionable aesthetic nuisance when the cost to the defendant is minimal.

### CONCLUSION

The judicial movement toward recognizing aesthetic considerations as a factor in nuisance actions, and even as a sole basis for a nuisance action, has emerged. Some courts, however, still balk at taking aesthetic concerns into account on the ground that it is too subjective an area for judicial tampering with property rights.<sup>62</sup> Such cases will increasingly become the minority view because courts increasingly believe that aesthetic con-

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56. 451 So.2d 17 (La. Ct. App. 1984).

57. The trial court found "that a thirty foot hill of garbage rising from the flat countryside sticks out like a 'sore thumb,' and a lowering to a height of five feet above the ground would lessen the blight on the countryside." *Id.* at 23.

58. *Id.* at 24.

59. *Id.* The complete statute reads as follows: "Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one [sic] has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor. Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of [neighbor's] house, because this act occasions only an inconvenience, but not real damage." The statute is LSA-CC art. 668.

60. See *supra* note 9.

61. *Foley v. Harris*, 223 Va. 20, 286 S.E.2d 186, 191 (1982) (quoting the lower court).

62. See *supra* notes 39-40 and accompanying text.

cerns are legitimate and can be objectively defined using a community neighborliness standard.

The words of West Virginia Supreme Court Justice Maxwell, spoken in 1937, are finally ringing true:

Happily, the day has arrived when persons may entertain appreciation of the aesthetic and be heard in equity in vindication of their love of the beautiful, without becoming objects of opprobrium. Basically, this is because a thing visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes, and may produce a decided reduction in property values. Courts must not be indifferent to the truth that within essential limitations aesthetics has a proper place in the community affairs of modern society.<sup>63</sup>

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63. *Parkersburg Builders Material Co. v. Barrack*, 118 W.Va. 608, 191 S.E. 368, 371 (1937).