McMansions & the Geometry of Zoning

by Timothy D. Bates, Esq.

Many historic communities find themselves besieged by intense development that threatens their character. As land values have risen and taste for ever-larger houses has grown, it is not uncommon for someone to purchase an old house, tear it down, and replace it with a "McMansion" that is out of scale with its surrounding neighborhood.

Rather than deterring this trend, classical zoning often exacerbates it. Zoning regulations usually seek to limit size through setback and height restrictions, but this typically fails to prevent McMansions, which maximize volume by expanding to setback lines and the maximum height limitations. Similarly, typical floor area ratio (FAR) regulations – based on measurements of actual floor size – can allow for house sizes much larger than one would expect since the FAR calculations do not take into account the impact of volume-expanding features such as cathedral ceilings and open stairways.

Some communities have sought to fight off McMansions through tightening their regulations. For example, Naperville, Illinois, links allowable side yard setbacks to lot width, requiring a certain percentage of open space and minimum yard size to save side yard views. Naperville also regulates front yard setbacks, not through a fixed measure, but in relation to the line generally established on a street by existing houses.

Other places have experimented in advanced geometry. Aspen, Colorado, created a "cubic content ratio," which it defines as "a measure of land use intensity, expressing the mathematical relationship between the cubic content of a building and the unit of land."

There are also communities that rely on special permit criteria in seeking to control McMansions. Lincoln, Massachusetts, for example, requires special permit review for any residence in excess of 4,000 square feet in floor area. However, zoning regulations which govern the appearance – as opposed to the geometry – of residential properties, have not been commonplace. In large part, the reluctance of municipalities to create design review criteria derives from older court opinions opposing aesthetic zoning.

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REGULATING AESTHETICS

The United State Supreme Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) grounded zoning in the police powers of "public health, safety, and welfare" and subsequent cases held that " … the predominant objective of a regulation could not be aesthetic." Rohan, *Zoning Land Use Controls*, Section 16.01[1].

However, as zoning evolved during the twentieth century, courts began to recognize that the "general welfare" aspect of the police power may include aesthetics. In its landmark 1954 ruling in *Berman v. Parker,* 348 U.S. 26, 33 (1954), the Supreme Court upheld massive urban renewal, premised on elimination of blight, stating, "It is within the power of the legislature to determine that their communities should be beautiful, as well as healthy. ... "

Similarly, the Supreme Court authorized the complete prohibition of billboards through zoning regulations on aesthetic grounds. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). And courts across the country have consistently upheld the regulation of cell towers on aesthetic grounds. See, e.g., *American Tower LP v. City of Huntsville*, 295 F2d 1203 (11th Circuit 2002).

While it could be argued that the regulation of billboards, cell towers, and even blighted neighborhoods does not necessarily justify design review of private homes, other land use regulations have also authorized public review of private taste. Historic district regulations – which regularly limit exterior design components visible from the public right-of-way – have passed muster as ways of maintaining "property value." See *Maher v. City of New Orleans*, 516 F2d 1051 (5th Circuit 1975), upholding the architectural control ordinance protecting the "tout ensemble" (overall character) of the Vieux Carre in New Orleans.

Environmental controls, which protect natural resources but have the effect of regulating appearance, have also been upheld. In *Southview Associates Limited v. Bongartz*, 980 F2d 84 (2nd Circuit 1992), the Second Circuit upheld Vermont's comprehensive land use statute, which prevented an open field from being developed as a ski resort in order to protect an area for deer grazing. In *McCormick v. Lawrence*, 387 NYS2d 919 (Sup. Ct. App. Div. 3rd Dept. 1976), the court affirmed denial of a permit for a dock extending into a State waterway, in part because the appearance would disrupt the "pristine" view of a wooded peninsula from the water.

DESIGN REVIEW IN STONINGTON, CONNECTICUT

Emboldened by this trend, certain communities have incorporated design

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Stonington's design review regulations are based on a desire to encourage development consistent with the borough's existing scale and character.

review into the zoning approval process. The Borough of Stonington, Connecticut, is an old fishing village, sitting on a peninsula extending into Fishers Island Sound. Its almost urban density, combined with expansive views of the Sound, has attracted weekend residents from the Boston-New York corridor.

In the 1990s, one such resident purchased a small fishing shack on Hancock Street and proposed to "restore it." Effectively taking advantage of the classical zoning regulation, she utilized cathedral ceilings, open staircases, and existing non-conformities to expand the shack into a McMansion. The Zoning Commission initially denied the proposal, but on appeal, determined it had to allow it because it conformed to the regulations.

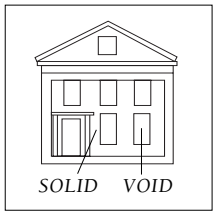
Several years later, a New Jersey architect purchased another small fishing shack adjacent to the borough lighthouse and proposed to "restore" it into a modern-looking structure with a large glass façade. This time, the Zoning Commission denied the initial proposal, though its ruling was based on a non-conforming rear yard, not on aesthetics. While its decision was being contested, however, the Commission adopted design controls in an attempt to protect the historic integrity of the Borough.

The architect's proposed redesign did not meet those regulations. In protest, he painted his house entirely black on Halloween eve. However, he subsequently redesigned the structure to conform to the regulations. It sits today adjacent to the lighthouse as a charming, appropriately-scaled building.

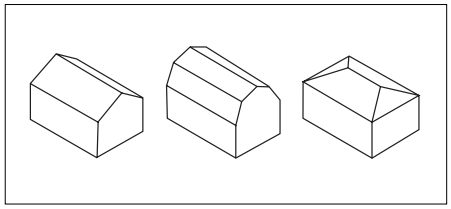
What do Stonington review requirements mandate? In the regulated area of the Borough, applicants need to inventory all structures within 200 feet of any proposed new building or renovation and compare their proposal to those structures. The regulations discourage destruction of any historic qualities or distinctive architectural features. At the same time, they also warn against creating "faux" historic structures, requiring any renovation to reflect its own time.

Exterior building materials are to be similar to materials used by surrounding properties, and the architectural designs, scales, proportions, and spacings shall be compatible with surrounding buildings.

The regulations even include simple illustrations to assist the applicant in understanding the requirements. For example, the regulations define the "rhythm of solids to voids in the façade" as "an ordered recurrent alteration of openings to solid walls" and then provide the following graphic:



Similarly, a very simple illustration of basic gable, gambrel, and hip roof shapes is included (since applicants are asked to compare their proposal "to the majority of roofs within 200 feet").



While Stonington's regulations, adopted in 2000, have not yet been challenged substantively, it is fair to say that within the community they have been a success. Applicants have been encouraged to work with the Commission during the design process to make sure the owners and the Commission understand the neighborhood and what would be required.

The fact that the Zoning Enforcement Officer is an architect has helped; he has been able to counsel applicants to explore alternatives and seek professional assistance when necessary (he does not makes specific architectural suggestions, nor can he provide his own services). The regulations have also gained acceptance because they are limited to the densest, most historic area, where teardowns and McMansions could have the greatest impact.

Stonington could have turned to historic district regulations or village zoning under Connecticut law, but both of these approaches would have created another level of review – an historic district commission, or a design review expert or panel. By keeping design review regulations within zoning, applicants only need one approval and do not have to reconcile different opinions between different boards.

Inevitably, design review regulations will invite legal challenges. Some applicants may argue that their houses are receiving undue, arbitrary scrutiny from planning or review boards, resulting in violation of their procedural and due process rights. Others may seek to challenge the regulations as void because of their vagueness. However, if the regulations are premised on existing, documented conditions – especially if those conditions have historical and environmental elements associated with them – they will likely be upheld in court. ◆

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