

Zoning for Aesthetics

by Christopher J. Duerksen, Esq.

Today, more than ever, community leaders and citizens are searching for ways to make their cities and towns more distinctive and more livable. Improving the quality of life in the community can, in turn, help attract economic development. Firms increasingly put a high value on livability in making locational decisions. Not surprisingly, this quest for distinctiveness and livability is often played out before planning and zoning commissions in the form of aesthetic-based regulations — historic preservation ordinances, design review standards, view protection regulations, sign controls, and tree protection measures.

Over the past two decades, much of the focus of planning has been on environmental and economic issues. What is the environmental impact of a project on a wetland or other critical resource area? Can the stormwater be handled and will it pollute? Will the development pay its own way? But officials are finding that despite the important strides in these areas, citizens still complain about the overall quality of development. Thus today we find more and more questions being asked about the visual and aesthetic impact of a project. How does it fit with its neighbors from a design point of view? Is the scale appropriate? Is it attractive? Of course, aesthetic issues are often closely intertwined with environmental concerns, as in the case of tree protection.

These new aesthetic-based land-use and zoning initiatives raise a host of important legal and administrative issues that regulatory bodies must come to grips with if their efforts are to be effective, efficient, and fair.

THE LEGAL BASIS OF AESTHETIC REGULATION

"You can't zone for aesthetics. It is not within the purview of the police power."

That is a familiar refrain heard often by planning commissions as they consider adopting aesthetic-based zoning regulations. While that statement might have been true in a good many jurisdictions thirty years ago, today almost all local governments have the authority to adopt strong sign controls, design standards, and other similar ordinances.




Views from Cranmer Park are protected by Denver's mountain view protection ordinance.




"Scenic" highway views in Allegheny County/Pittsburgh, Pennsylvania.


Aesthetic regulations are hardly new or a passing fad. As early as 1888, a New York court approved an 80-foot height limitation on residential structures along parkways. In 1904, the City of Baltimore adopted a 70-foot maximum height regulation to maintain the character of its neighborhoods and commercial areas. The same year, Boston — which had grown sensitive to the need for preservation when, in the late 1800s, many historic buildings were destroyed — enacted similar legislation.

Cities were also beginning to regulate billboards about this time. In one early

case, the court upheld local sign regulations on the grounds that billboards could be a haven for trash, illicit sex acts, and other indiscreet behavior. Another court actually approved such controls on the grounds that unsafe billboards might topple and kill passersby!  *Billboard Battles*, p. 11

Thus, while courts of this era were generally sympathetic to aesthetic regulations such as sign controls and height restrictions, they generally clothed such enactments in terms of fire protection, safety, and economics. Aesthetics were considered to be a matter of luxury and taste. Courts generally struck down laws if they were based solely on aesthetic considerations.  *Kansas Citys Parkways...*, p. 10

This approach to aesthetic regulation — the so-called "aesthetics-plus" doctrine — was dominant into the 1950s, although it had begun to erode earlier when cities like Charleston and New Orleans adopted preservation laws restricting demolition of historic buildings.

Aesthetics finally began to stand on its own two feet in the 1950s when the United States Supreme Court in the *Berman v. Parker* case gave strong support for government action based solely on aesthetic considerations. As the Court noted: "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 the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."  *Berman v. Parker*, p. 10

Of course, each locality must research the enabling authority it possesses for any land-use regulations, aesthetic or otherwise. But clearly under the Constitution, aesthetic-based controls are valid, and

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Kansas City's Parkways:

MERGING AESTHETICS WITH COMMUNITY BENEFITS

In 1923 the Missouri Supreme Court upheld a Kansas City ordinance which, among other things, established a 35 foot setback line for all properties bordering a three-mile stretch of Gladstone Boulevard. The Court quoted with approval from the trial testimony of George Kessler, one of America's most renowned landscape architects, that: "Attractive surroundings always give a greater consciousness of the better things in a community and ... through that very attractiveness increase and sustain the city's growth and the comfort and welfare of the people." *Kansas City v. Liebi*, 252 S.W. 404 (1923). In fact, many of the beautiful urban and rural parkways built early in the century were premised on a belief of the "City Beautiful" movement that attractive design would lead to economic benefits for the community. [Editor's Note: For more on the City Beautiful movement, see Larry Gercken's article "Community Aesthetics ..." on page 12 of this issue].



The Legacy of Berman v. Parker:

Relying on *Berman v. Parker*, courts began to uphold billboard controls, historic preservation regulations, and height restrictions on aesthetic grounds alone. By 1978 things had evolved so quickly that the United States Supreme Court, in a case upholding the validity of local landmark protection laws, could say: [W]e emphasize what is not in dispute. . . This court has recognized, in a number of settings, that states and cities may enact land-use regulations or controls to enhance the quality of life by preserving the character and the desirable aesthetic features of a city . . . " *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

A sampling of some recent court decisions bears witness to how supportive courts have generally been to aesthetic-based local regulations:

- **Design Review:** The Florida Court of Appeals upheld, on aesthetic grounds alone, an ordinance that employed landscaping and design regulations to protect an important environmental and historic area. *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. App. 1990).

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most jurisdictions will find authorization for such regulations in home-rule authority, zoning enabling legislation, and other sources. Today, only a few die-hard states do not permit local governments to adopt aesthetic-based police power regulations, while some — such as Utah — specifically recognize aesthetics as a legitimate goal in state enabling legislation.

However, while establishing the legal basis for aesthetic regulations will usually not be difficult, the same legal rules that apply to all land-use controls are also applicable. Thus if an aesthetic-based regulation, such as a historic preservation ordinance which bans demolitions, results in a severe economic deprivation, the regulation may be subject to challenge on the grounds that it results in an unconstitutional "taking" of property. Such issues have to be analyzed on a case-by-case basis.

ADMINISTRATIVE ISSUES

As aesthetic regulation becomes more commonplace, local governments and plan commissions need to take all possible steps to anticipate criticism that such controls are inherently subjective and that review procedures are burdensome. Experience from communities across the United States suggests that the following steps can make the difference between a successful effort and one that runs into political and legal problems:

1. *Careful identification of what is worth protecting.* Be it a tree protection ordinance, a view protection law, or historic preservation regulations, an essential first step is to inventory resources and carefully identify what it is the community wants to protect. Does the community want to protect large trees or is it more concerned with large stands of vegetation? Is a specific view of a mountain critical or is the concern more over keeping development off ridgelines? Should a few significant buildings be protected or should a larger historic district be preserved, including structures which may not be significant if considered individually.

2. *Careful tailoring to fit local circumstances.* Copying a tree protection law from

an east coast town may be sheer nonsense for a western community with different species of vegetation and a dramatically different climate and rainfall pattern. Regulators need to work with affected professionals and business interests to see what makes sense locally. Economic impacts need to be assessed and incentives considered in certain circumstances where the regulatory burden appears significant.

3. *Explicit, detailed review standards.* Many older ordinances fail to give applicants sufficient guidance about what is expected of them. For example, a design review law may simply say that new construction must be "compatible" with existing structures. While this may be sufficient from a legal perspective, more guidance should be given to define "compatibility" in terms of height, bulk, materials, roof pitch, and similar considerations.

4. *A well-qualified review board supported by adequate staff resources.* Application of review standards by an expert board that includes design and similar professionals will go a long way towards supporting the reasonableness of the regulatory process. Of equal importance, the review board must have resources available to it in establishing and administering standards. For example, if a community is serious about tree protection, it should have staff expertise or seek outside advice in evaluating development proposals. Similarly, in the area of view protection and design review, planning officials and staff should have access to tools such as computer-generated graphics and other visual assessment techniques, particularly for major projects. Project applicants may be asked to provide support for such expertise.

5. *Visual aids and illustrated guidebooks.* The local government should prepare succinct summary sheets that provide a quick overview of the aesthetic regulatory process, how it works, what the key decision points are, and other practical pointers that are hard to glean from reading an ordinance. Moreover, written review standards should be supplemented with visual aids and guidebooks to make clear what the community desires, thus reducing the uncertainty for applicants. An

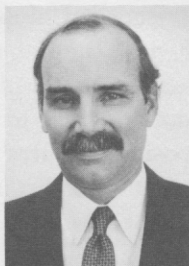
increasing number of communities are publishing illustrated design books, tree planting guides, and the like and are undertaking education efforts in the development community to help reduce delays when applications are submitted.

6. *Integration with other planning goals and regulations.* Care should be taken that aesthetic-based regulations are coordinated and compatible with other community land-use regulations, and with the local comprehensive plan. For example, it does little good to enact strong preservation controls when the underlying zoning encourages demolition of historic structures. Similarly, tree protection controls may be ineffective unless the community regulates predevelopment site clearing activities.

SUMMING UP:

Aesthetic-based zoning and land-use regulations are here to stay and can do much to improve the overall quality of life in a community and ensure that new development is compatible with the existing character of the community. While local governments and plan commissions have generally been granted wide latitude by state legislatures and the courts in adopting a wide variety of such controls, careful drafting and administration will ensure that aesthetic-based regulations work in practice.

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Resources:

Aesthetics and Land-Use Controls, by Christopher J. Duerksen (American Planning Association, 1986) can be ordered from the APA Planners Bookstore, (312) 955-9100. Also available from the APA Bookstore is *Icons and Aliens*, by John J. Costonis, a thought-provoking book about the regulation of aesthetics.

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• **Historic Preservation:** In New York City, the Court of Appeals upheld controls on the demolition of church property, despite the fact that they significantly diminished the property's value, and arguably had an impact on religious practices protected by the 1st Amendment. *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990).

• **View Protection:** The Colorado Supreme Court approved, on aesthetic grounds alone, a mountain view protection ordinance, despite a serious loss of development value. *Landmark Land Company v. City and County of Denver*, 728 P.2d 1281 (Colo. 1986). See also *Lai v. City of Honolulu*, 841 F.2d 301 (9th Cir. 1988) (upholding height restrictions designed to protect views of historic Punchbowl Crater).



Editor's Note: Billboard Battles

Probably the longest-running and most widespread "battle" involving aesthetic regulation relates to outdoor advertising—in particular, billboard signs along roads and highways. States, localities, and the federal government have wrestled with the issue. Lady Bird Johnson even made it part of the campaign which led to enactment of the Federal Highway Beautification Act in 1965 (though, ironically, 1978 amendments to the law actually made it much more difficult for municipalities to remove billboards along federal highways).

Over the years, courts have generally supported efforts to regulate outdoor advertising, often invoking economic grounds. In Florida, for example, the State Court of Appeals upheld a local sign control ordinance which prohibited all advertising along U.S. Route 1 in the city of Ormond Beach, noting that the ordinance helped promote tourism—critical to the city's economy. *Lamar-Orlando Outdoor Advertising v. City of Ormond Beach*, 415 So.2d 1312 (Fla. App. 1982). Similarly, the Arizona Court of Appeals noted the especially strong judicial support of aesthetic regulation "where, as here, the ordinance is expressly tied to the interests of the city in maintaining the economic and general well-being of the community" *City of Scottsdale v. Arizona Sign Ass'n*, 564 P.2d 922 (1977).

For those of you interested in following the latest efforts of communities to regulate outdoor advertising, take a look at *Sign Control News*, a quarterly newsletter published by Scenic America, 216 7th Street, S.E., Washington, D.C. 20003; (202) 546-1100. The re-

cently adopted federal Intermodal Surface Transportation Efficiency Act, summarized on page 8 of this issue of the *Journal*, also contains important provisions relating to billboards.

Regulating Building Materials

by Garland H. Stillwell, Esq.

The Maryland Court of Special Appeals recently upheld the Prince George's County Planning Board's requirement that a proposed residential subdivision consist of a specific percentage of dwelling units constructed with brick, wood, stone or stucco. *Coscan Washington v. The Maryland-National Capital Park and Planning Commission*, 590 A.2d 602 (1991). The Planning Board reasoned that these materials would be more compatible with the rural character of the surrounding environment and an adjacent historic resource than aluminum or vinyl siding—the materials preferred by the developer. Of note, the Planning Board's decision was *not* grounded in historic preservation regulations.

In upholding the Planning Board's action, the Court noted that the applicant had sought approval through a "comprehensive design zone" (similar to a planned residential development district) which was specifically created for the purpose of enhancing design elements in proposed developments. The Court also recognized that the comprehensive design zone regulations, as well as the County's General Plan, sought improvement in the overall quality of the residential environment. Lastly, the Court gave weight to citizen testimony presented to the Planning Board that the project's design should be compatible with the adjacent historic resources and surrounding environment. As the Court observed: "It defies common sense to require the Planning Board to consider building design in a vacuum. Building design can only be evaluated effectively in the context of the environment in which the buildings will ultimately exist."

Garland Stillwell, the author of this sidebar, is Associate General Counsel for the Maryland National Capital Park and Planning Commission, and handled the *Coscan* litigation. The *Coscan* case illustrates how far at least one court will go in allowing aesthetic regulation.