Aesthetic Regulation

Shekoofah Khedhri

Content

I. Introduction

The term ñaestheticsò is commonly used in the legal community when dealing with zoning and regulations. It has become extraordinarily popular in recent years. Cities, towns, and national governments have passed ordinances regulating everything from vegetation planted, to the display of goods on sidewalks, all in the name of ñaestheticsò.[1] Many questions arise when addressing the fundamental understanding of ñaesthetic regulationsò, questions like: What is ñaestheticsò? What does the word ñaesthetic regulationò mean to our communities and environment we live in? Does ñaestheticò promote public welfare? What is the purpose of appearance review ordinance? And if aesthetics are important, can they be protected by the United States Constitution? Or are aesthetics sufficient justification for the exercise of police power?.

To answer these questions, this paper is developed by first addressing the general understanding of the word ñaestheticsò and the major difficulties associated with ñDesign Review Ordinancesò. Recognizing the importance of the visual message given by community appearance, the paper also presents an overview of architectural ordinance purpose. When Justice Douglas stated: ñé 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 protectedò [2] he presented the importance of such ordinance to our community, and reported the responsibility of legislature to protect it.

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[1] Bunting, Stephanie L., ñ*Unsightly Politics: Aesthetics, Sign Ordinances, and Homeowners Speech in City of Ladue v. Gilleo*,ñ 20 Harv. Envt. l. L. Rev. 473 at pp1

[2] Delaney. John J., Abrams. Stanly D. and Schundiman. Frank, *Land Use Practice & Forms: Building the land Use Case*, (2nd Edition, 1997). at 16-23

It is inevitable when studying ñaesthetic regulationsò, to study how local police power and zoning ordinances adapted regulations for aesthetic purposes. Chronologically presenting different doctrines would help demonstrate how the court of law in the United States transitioned from a complete denial to full recognition of aesthetics as an independent public purpose for police power regulation of land use.

Next the paper addresses how architecture is a form of artistic nonverbal expression protected in the court of law under the First Amendment, which states: ñCongress shall make no law ... abridging the freedom of speech, or express...ò.

II. Understanding Aesthetics

A- Aesthetic as English Term

The word ñAestheticò as described in Oxford Dictionary has two meanings. One is a set of principles concerned with the nature of beauty, especially in art. Second is the branch of philosophy which deals with questions of beauty and artistic taste.[3]

Architectural aesthetics are the visual image of a structure such as: the shape, arrangement, color, and texture of residential, business, institution, and service structures in a particular neighborhood or community.[4]

[3] Oxford Dictionary, 2005

[4] Poole, Samuel C. and Kobert, Ilene Katz, ñ *Architectural Appearance Review Regulations and the First Amendment: The Constitutionally Inform "Excessive Difference" Test*, Zoning and Planning Law Report, Vol12, No.1 (1989) at P. 90

The difficulty of using aesthetics as a principal basis for land use regulation is that the meaning of ñaestheticsò is unclear to most people. Perhaps that is not surprising when we learn that the term itself is derived from a Greek word that means perception. In fact, originally, the term ñaestheticsò did not exclude the concept of ugliness. The 1970 edition of the Oxford English Dictionary defines ñaestheticò as a criticism of taste as a science of philosophy. But it is the second definition that invokes the concept of beauty: ñof or pertaining to the appreciation of criticism of the beautifulò. [5] It has also been defined as ñwhat is, or not, pleasing to the sense of sightò. [6]

B- Problem with Design Review Ordinances

One of the knottiest problems that both design professionals and real property attorneys have to deal with in their practices is the reconciliation of conflicting design viewpoints between owners, design professionals, neighbors, and municipalities. There is a growing trend in the United States in which the granting or denial of a building permit can rest entirely on a neighbor or design review boardsô subjective aesthetic opinion of the design. [7] The boards or commission have the power to decide, based on usually vague standards, what type of architecture can be built in their community. Some architectural appearance regulations are nothing more than a communityôs distaste monitor which in single terms state ñdonôt design anything too different because we donôt

[5] Blaesser, Brian W., ñ*Discretionary Land Use Control: Avoiding Invitations to Abuse of Discretion*ò. (West Publishing Co. 1997), pp. 364
[6] William, Norman, *Scenic Protection as a Legitimate Goal of Public Regulation*, 38 Wash. U. J. Urb. & Contemp. L. 3, 3 (1990)
[7] Weinberg, Paul J. and McGuire, Paula , ñ*Design Regulation and Architecture: Collision Course*?ò, Zoning and Planning Law Report, Vol122, No.10 (1999) at p. 89

like things that are differentò. While most of us fancy ourselves as good judges of architecture (or at least we know bad architecture when we see it), the prospect of good architectural design as determined by a citizensô committee seems an unwholesome perversion of an otherwise benign habit. [8]

A. Lack of Enabling Authority for Design Review

The fact that land use regulations for ñaesthetics onlyò purposes is now viewed by most state courts as a proper exercise of police power does not mean that local governments in every state are free to fashion aesthetic-based design review programs. The right of local communities to exercise police power for zoning and other land use purposes is derived from state. This right is based on ñDillonôsô rule,ò namely, that local governments have no inherent powers but are limited to those powers granted by the state constitution or legislature[9]. Absent a state constitutional or statutory grant of additional ñhome-ruleò authority, which gives local government broader powers of self-government, courts have construed Dillonôs rule to require strict adherence to the scope of land use regulation and procedures established by state.[10]

[8] Poole, Samuel C. and Kobert, Ilene Katz, ñ*Architectural Appearance Review Regulations and the First Amendment: The Constitutionally Inform "Excessive Difference*ò Test, Zoning and Planning Law Report, Vol12, No.1 (1989) at p. 89-90

[9] Dillonôs rule is used to construe statutes that delegate authority to local government:

> (A municipal corporation posses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation ï not simply convenient, but indispensableé .

[10] Blaesser, Brian W., ñ*Discretionary Land Use Control: Avoiding Invitations to Abuse of Discretion*ò. (West Publishing Co. 1997), pp. 370

B. Improper Delegation of Power to Impose Design Review

Local legislative bodies may not delegate their legislative or policy-making power to administrative boards, commissions, or committees. In other words, if legislative power is improperly delegated to an administrative body, no amount of due process can cure the problem. In design review ordinances or appearance codes, it is not uncommon to find that the city council has delegated policy making authority to a design review administrative body. [11]

C. Vague, Meaningless Standards

Lack of clarity or certainly in the language of regulation violates the void for vagueness doctrine which is derived from constitutional right to notice under the due process clause of the Fourteenth Amendment. The purpose of this due process right is to limit the arbitrary implementation of the law by decision makers. The following are some examples of these types of problems:

1. Failure to use commonly understood terms: the use of terms that do not give meaningful guidance to those who are expected to implement and comply with the regulations, such as the public officials, the applicants, and the design professionals who frequently are appointed to serve on design review bodies or hired to assist applicants. [12]

[11]Blaesser, Brian W., ñ*Discretionary Land Use Control: Avoiding Invitations to Abuse of Discretion*ò. (West Publishing Co. 1997), pp. 370 - 371
[12]Ibid at pp. 374

2. Failure to use precise language: such as saying ñsigns that demand public attention rather than invite attention should be discouragedò.

3. Failure to use language that has practical application: sometimes language appears to have a commonly understood meaning, but when applied to actual circumstances, is still inadequate to give meaningful guidance. [13]

C- Overview of Architecture Appearance Review Purpose

Architectural appearance review ordinances are recognition that visual images are powerful statements. The shape, arrangement, color, and texture of residential, business, institution, and service structures are assembled into a statement about that particular neighborhood or community. It recognizes the significance of visual images and attempts to shape that image, either by positive design requirements or by design prohibitions. Architectural review ordinances have been created to shape images in number of ways: [14]

- *To prevent the construction of buildings which are excessively different* from nearby buildingsé This form of control is principally suburban. It is frequently used to protect existing mid-and upper-level income, single-family neighborhoods from intrusion of radically different architectural design.
- *To prevent construction of buildings that are excessively similar*. This form of architectural control is also a suburban concern, originally with the explosive

[13]Blaesser, Brian W., ñ*Discretionary Land Use Control: Avoiding Invitations to Abuse of Discretion*ò. (West Publishing Co. 1997), at pp. 376

[14] Poole, Samuel C. and Kobert, Ilene Katz, ñ *Architectural Appearance Review Regulations and the First Amendment: The Constitutionally Inform "Excessive Difference" Test*, Zoning and Planning Law Report, Vol12, No.1 (1989) at P. 90-91

growth of tract housing in 1950ôs. The ordinance is principally aimed at preventing the monotony of the same or similar home design in large subdivisions.

- *To preserve the architectural style and integrity of an historic district*. This form of architectural control is to prevent the destruction of historic buildings within a district and require that new construction therein conforms to the districtôs historic style.
- *To preserve architectural features of a particular building* designated as a landmark. The most prominent example of this form of review is the preservation of Grand Central Station in New York City[15].
- *To create an architectural style within a district*. This use of architectural review generally requires an agreement in the incipient stage of community development, and may be both a suburban residential and essential business district concept in application.
- *To create urban space, such as mini-parks and plazas* that attract (desirable) users. Recent studies have shown that with proper architectural deign, urban plazas and mini-parks can be made more inviting to city residents as lunching, meeting and recreation places. This ñpeople activityò, in turn, makes the urban area more interesting and safe.
- *To create entrance districts along transportation corridors*. This type of appearance review program recognizes the familiar visual experience we share in approaching cities and seeks to create a favorable impression.

[15] *Penn Central Transp. Co. v. New York City*, 438 US 104 (1978).

Architectural appearance review thus may regulate the visual appearance building for a variety of purposes, from neighborhood snobbery to crime prevention. The essence of this regulation is recognition that a visual image produced by architecture conveys a message, and control of that message can produce certain desired effect. [16]

In the case of *Reid v Architectural Board of Review of City of Cleveland Heights*[17], The Building Commissioner of the City of Cleveland Heights disapproved the plaintiffs (Donna S. Reid) project for a single-story building, making the following statement:

> This plan is for a single story building and is submitted for a site in a multi-story residential neighborhood. The Board disapproves this project for the reason that it does not maintain the high character of community development in that it does not conform to the character of the houses in the area. [18]

The Board was composed of three architects registered and authorized to practice architecture under Ohio laws with ten years of general practice as such. Section 137.05 of the Codified Ordinances of the City of Cleveland Heights, titled ñPurposeò reads as follows: [19]

> The purposes of Architecture Board of Review are to protect property on which buildings are constructed or altered, to protect real estate within, to

[16] Poole, Samuel C. and Kobert, Ilene Katz, ñ Architectural Appearance Review Regulations and the First Amendment: The Constitutionally Inform ñExcessive Differenceò Test, Zoning and Planning Law Report, Vol12, No.1 (1989) at P. 91

[17] *Reid v Architectural Board of Review of City of Cleveland Heights*, 192 N.E. 2d 74 (1963)

[18] Callies, David L., Freilich, Robert H. and Roberts, Thomas E., ñ*Cases and Materials on Land Use*ò (West Group Publishing, Third Edition, 1999), at pp 453 - 460

[19] Callies David L., Freilich Robert H. and Roberts, Thomas E., ñ*Cases and Materials on Land Use*ò (West Group Publishing, Third Edition, 1999), at pp 453 - 460

maintain the high character of community development, and to protect real estate within this City from impairment or destruction of value, by regulating according to proper architectural principles the design, use of material, finished grade lines and orientation of all new buildings, hereafter erected, and the moving, alteration, improvement, repair, adding to or razing in whole or in part of all existing buildings, and said Board shall exercise its power and perform its duties for the accomplishment of said purpose only.

This ordinance is intended to:

1. protect property,
2. maintain high character of community development,
3. Protect real estate from impairment or destruction of value, and the Boardôs powers are restricted ñfor the accomplishment of said purpose only.ò These objectives are sought to be accomplished by regulating:
    a. design,
    b. use of materials,
    c. finished grade lines,
    d. orientation (new buildings). [20]

Upon appeal to the Court of Common Pleas, the court rendered a judgment in favor of the Board, holding (1) that the Codified Ordinances were constitutional enactments under the police power of the City; (2) that the Board had the power and

[20] Callies David L., Freilich Robert H. and Roberts, Thomas E., ñ*Cases and Materials on Land Use*ò (West Group Publishing, Third Edition, 1999), at pp 453

authority to render the decision appealed from; (3) that the Board did not abuse its discretion; (4) that due process was accorded applicant. [21]

The Court ruled in favor of the Board of Commission, and supported the judgment of the trial court that held that the Architectural Review Ordinance are constitution exercise of police power by the City Council and is, therefore, valid.

III. Use of the Police Power to Promote Aesthetics in the United States

Initially, the courts were openly hostile to zoning that was based even partially on aesthetic considerations. The belief was that ñbeauty is in the eye of the beholderò, 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. [22]

A more positive reaction to aesthetics emerged after *Berman*[23]. Courts increasingly upheld regulations based only partially on nonaesthetic concerns, usually

[21] Ibid pp 453 - 460
[22] Rice, Shawn G., ñZoning Law: Architectural Appearance Ordinance and The First Amendmentsò, 1996, 76 Marq. L. Rev. 439 at P. 3
[23] *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98,99 L. Ed. 27 (1954)

including aesthetic considerations as dicta. Gradually, aesthetics as a sufficient justification grew in acceptance. Today, a majority of states allow land use regulation justified solely by aesthetic considerations. [24]

Without a doubt, court of lawôs acceptance of aesthetics interests as a legitimate scope of police power on land use and development went through three major phases: Early-Period Doctrine, Middle-Period Doctrines, and Modern-Period Doctrines. Each period is marked with several cases and doctrines that reflected how courts of law viewed aesthetics.

A- Early-Period Doctrines

While courts have long upheld visual beauty as a lawful basis for exercise of the power of eminent domain, early court decisions generally held that aesthetic interests were beyond the lawful scope of police power regulation. Courts objected to regulation for aesthetic purposes on the ground that such regulation involved an attempt to secure some benefit for society rather than prevention of harm to health, safety, morals or the general welfare. As stated by the New Jersey court in an early decision holding invalid a restriction on billboards:[25]

> ñNo case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his

[24] Rice, Shawn G., ñZoning Law: Architectural Appearance Ordinance and The First Amendmentsò , 1996,76 Marq. L. Rev. 439 at P. 3

[25] Rathkopf, Arden H. and Rathkopf, Daren A. , *The Law of Zoning and Planning: Building the land Use Case*, (2nd Edition, 1997) Section 16-12

neighbors. Aesthetic 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.ò [26]

The same statement was adapted when an ordinance prohibiting the erection of a one-story building within 80 feet of the building along a certain street was held invalid in *Romar Realty Co. v Board of Comrs*.[27], on the grounds that the prohibition was intended to beautify the appearance of the street, so that the reason for its passage was aesthetics.

Early court decisions also objected to aesthetics as a basis for regulation on the grounds that aesthetic values were a purely subjective matter of individual taste and, therefore, an arbitrary and capricious standard upon which to base regulation. [28] This view is reflected in an early decision of the Ohio Supreme Court when the city ordinance provision limiting a particular district to single or two-family dwellings held was invalid as based on purely aesthetic consideration.

ñIt is commendable and desirable, but not essential to the public needs, that our aesthetic desires be gratified. Moreover authorities in general agree as the essentials of a public health program, while the public view as to what is necessary for aesthetic program greatly varies. Certain legislatures might consider that it was more important to cultivate taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city

[26] *City of Passaic v Paterson Bill Posting, Advertising & Sign Painting Co*., 72 N.J.L. 285,287,268 (N.J. C. Err. & App. 1905
[27] *Romar Realty Co. v Board of Comrs*. 96 NJL 117, 114 A 248. 1921
[28] Rathkopf, Arden H. and Rathkopf, Daren A., *The Law of Zoning and Planning: Building the land Use Case*, (2nd Edition, 1997) at Section 16-13

councils might never agree as to what the public needs from an aesthetic never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard entirely impractical as a standard for use restriction upon property.ò [29]

Early-Period aesthetic doctrine was soon superseded in the states by middle-period aesthetic doctrine in which aesthetics came to be recognized as a legitimate purpose for regulation when linked with some other nonaesthetic purpose for regulation, and, still later, in an increasing number of states by modern aesthetic doctrine upholding regulation ñsolely for aestheticsò. However, the rationale of early doctrine is of more than historical interest. Concerns related to the inherent subjectivity of aesthetics and the degree which private rights may be impaired to secure some aesthetic benefit for society set out in early-period cases are still reflected in middle-period doctrineôs prohibition of regulation based on ñaesthetic aloneò and in the limitation place on regulation ñsolely for aestheticsò under modern doctrine. [30]

B- Middle-Period Doctrines

During the 1930s, state courts clearly moved towards acceptance of aesthetics as a basis for public power regulation, at least when such restrictions were supported by some other traditional nonaesthetic public purpose for regulation. This trend was heralded by a few early-period decisions, which upheld what were essentially aesthetic restrictions on

[29] *City of Youngstown v Kahn Bros. Bldg*. Co., 112 Ohio St. 654, 661, 3 Ohio L. Abs. 332, 148 N.E. 842, 844, 43 A.L.R. 662 (1925)
[30] Rathkopf, Arden H. and Rathkopf, Daren A., *The Law of Zoning and Planning: Building the land Use Case*, (2nd Edition, 1997) at sections 16-14

land use, by relating the restrictions to furtherance of health, safety, or morality. Such decisions relied on traditional public purpose to uphold the restrictions largely as a bootstrapping technique to circumvent the prohibition of early period aesthetic doctrine. A classic example is *St. Louis Gunning Advertising Co. v. St Louis*[31], a case said to mark the initial doctrinal shift toward middle-period aesthetic doctrine. In that case, the Missouri court upheld that regulation of billboards based on the finding that such structures afforded a shield for criminals and immoral practices. As state court became more receptive to the idea of aesthetics as a legitimate factor for legislative consideration, they followed the lead of these early decisions and moved toward upholding what were basically aesthetic restrictions on the bases of some linkage with tradition public purposes.[32]

A comprehensive city zoning ordinance provision forbidding the construction of business buildings in certain residential districts was held valid, although based partly on aesthetic consideration, in *War v Wichita*[33], affirming the denial of a writ of mandamus to compel the defendant city to issue a permit for the construction of such a building. After declaring that the enhancement of the artistic attractiveness of a city or town may be considered in exercising the police power only when the dominant aim in respect to the establishment of districts based on use and construction of buildings has primary regard to other factors lawfully within the scope of the police power, the court found that the suppression and prevention of disorder, the extinguishment of fires, and the enforcement

[31] *St. Louis Gunning Advertisement Co. v. City of St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911), dismissed , 231 U.S. 761, 34 S. Ct. 190, 61 L. Ed. 472 (1917)
[32] Rathkopf, Arden H. and Rathkopf, Daren A. , *The Law of Zoning and Planning: Building the land Use Case*, (2nd Edition, 1997) Sections 16.14 ï 16.21
[33] *Ware v. Wichita*, 113 Kan 153, 214 p99 (1923)

of regulations for street traffic and other matters designed rightly to promote the general welfare would be facilitated by the establishment of zones or districts for business as distinguished from residents. It is time, the court said, that courts recognize the aesthetic as a factor in life and the tendency of beauty and fitness to enhance values in public and private structures. [34]

While courts continued to refer to the inherent subjectivity of aesthetics as a basis for regulation and their unwillingness to act as art critics in ruling on the reasonableness of aesthetic restrictions, virtually all states came to embrace middle-period aesthetic doctrine. Under this doctrine, courts hold that land use regulation may not be based on aesthetic consideration alone, but that aesthetics may be a legitimate factor for consideration in enactment of a restriction so long as some other nonaesthetic public purpose is also furthered by regulation. [35]

Middle-Period doctrine may well continue as a validating basis for aesthetic regulation of land use and development even in states that have adopted the modern doctrine that ñaesthetic aloneò is a valid basis for regulation. However, the doctrine has long been criticized in court opinions and commentary as relying in many instances on fictitious linkages with nonaesthetic public purposes, particularly traffic safety and property values. The extent to which courts will continue to rely on the fiction of linkages with nonaesthetic public purposes for regulation may be affected by the adoption

[34] Ghent Jeffery F. *"Aesthetic objectives or consideration as affecting validity of zoning ordinance",* A.L.R. 3d 1222 (2006). at pp- 40

[35] Rathkopf, Arden H. and Rathkopf, Daren A., *The Law of Zoning and Planning: Building the land Use Case*, (2nd Edition, 1997) Sections 16-15 , 16-16

in many states of the ñaesthetics aloneò modern doctrine and by limitations imposed by these courts on the ñaesthetics aloneò rationale. Relying on functional linkage to uphold an aesthetic regulation may well subvert the purpose of imposing limitations on regulation solely for aesthetic under modern doctrine. [36]

C- Modern-Period Doctrines

In the 1960s state courts began moving towards full recognition of aesthetics as an independent public purpose for police power regulation of land use. As concern for environmental quality became a national goal, courts increasingly came to expressly accept the general welfare interest in maintaining and creating a visually pleasing environment as a legitimate basis for land use regulation. This acceptance was prompted in part by the decisions of the U.S. Supreme Court that clearly reflected the view that intangible aesthetic values are within the lawful scope of governmental concerns. The opinion of the Supreme Court in *Berman v. Parker*[37], although involving the power of eminent domain, has been frequently cited by state courts granting greater recognition to the legitimacy of aesthetics in land use regulation. Upholding the validity of an urban renewal project, Justice Douglasôs majority opinion stated:

> ñThe 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

[36] Rathkopf, Arden H. and Rathkopf, Daren A., *The Law of Zoning and Planning: Building the land Use Case*, (2nd Edition, 1997) Sections 16-20, 16-21
[37] *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98,99 L. Ed. 27 (1954)

beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolledò. [38]

In *People v. Stover*[39], one of the first state court decision to indicate that aesthetic interests related to community appearance were entitled to full recognition as an independent public purpose for land use regulation, the New York Court of Appeals upheld a prohibition on the hanging of clotheslines in front yards. Although the restriction was upheld on the basis of the linkage between aesthetics and property values, the court went on to state: [40]

> Once it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power. If zoning restrictions ñwhich implement a policy of neighborhood amenityò are to be stricken as invalid, it should be, one commentator has said, not because they seek to promote ñaesthetic objectivesò but solely because the restriction constitute ñunreasonable devices of implementing community policy.ò Consequently, whether such a statute or ordinance should be voided should depend upon whether the restriction was ñan arbitrary and irrational method of achieving an attractive, efficiently functioning, prosperous communityò ï and not upon whether the objective was primarily aesthetic. [41]

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[38] Rathkopf, Arden H. and Rathkopf, Daren A., *The Law of Zoning and Planning: Building the land Use Case*, (2nd Edition, 1997) Sections 16-21
[39] *People v. Stover*, 12 N.Y. 2d at 462, 240 N.Y.S. 2d 734, 191 N.E. 2d 272 (1963)
[40] Rathkopf, Arden H. and Rathkopf, Daren A., *The Law of Zoning and Planning: Building the land Use Case*, (2nd Edition, 1997) Sections 16-22
[41] *People v. Stover*, 12 N.Y. 2d at 462, 240 N.Y.S. 2d 734, 191 N.E. 2d 272 (1963)

Full recognition of aesthetics as a legitimate independent basis for regulation soon followed in later court decisions in New York and other states. The clear majority of states that have addressed the issue now embrace the modern doctrine upholding reasonable regulation of land use based primarily or exclusively on aesthetic consideration. This view is reflected in *Oregon City v. Hartke*[42], where the Oregon Supreme Court, in upholding the exclusion of a junkyard from a community stated: [43]

> There is a growing judicial recognition of the power of a city to impose zoning restriction which can be justified solely upon the ground that they will tend to prevent or minimize discordant the unsightly surroundings. This change in attitude is a reflection of the refinement of our taste and the growing appreciation of cultural value in a maturing society. The change may be ascribed more directly to the judicial expansion of the police power to include within the concept of ñgeneral welfareò the enhancement of the citizenôs cultural life. The broadening of the police power in this respect follows the expansion of the police power in other areas of regulation. We join the view that aesthetic consideration alone may warrant an exercise of the police power. [44]

In addition to those state courts expressly upholding regulation based on aesthetic consideration alone, a number of lower court opinions in other states have indicated approval of regulation for solely aesthetic regulation based on a linkage with a solely

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[42] *Oregon City v. Hartke*, 240 Or. 35, 400 P2d 255 (1965)
[43] Rathkopf, Arden H. and Rathkopf, Daren A., *The Law of Zoning and Planning: Building the land Use Case*, (2nd Edition, 1997) Sections 16-22, 16-25
[44] *Oregon City v. Hartke*, 240 Or. 35, 400 P2d 255 (1965)

derivative public purpose, such as the effect on property values, the economic interest in tourism or other intangible human values, embrace the modern doctrine by not requiring some link to a nonderivative public purpose for regulation. Such decisions, in effect, sanction aesthetic regulation so long as the regulation substantially furthers a general welfare interest other than visual-beauty alone. [45]

Georgia Manufactured Housing Association, Inc v. Spalding County[46] is another case that demonstrates zoning ordinance based solely or predominantly on aesthetic consideration maybe valid. In this case, zoning regulations requiring that manufactured housing be built with 4:12 roof pitch to qualify for placement in most residential districts did not violate equal protection or substantive due process under rational basis test; ñaesthetic compatibilityò between site-built homes and manufactured homes was legitimate government purpose, and rational basis existed for county to believe that requirement would advance government purpose.

In upholding a regulation based on aesthetics alone under modern doctrine, a court is in fact upholding it indirectly on the basis of either a derivative traditional public purpose which may be reasonably furthered by the regulation, such as property value, tourism, or the residential character of an area, or a derivative intangible human value which may be reasonably furthered bys regulation, including the happiness, comfort and general well-being of citizens resulting from an aesthetically pleasant environment. Thus, while the courts understand modern doctrine still recognizes the inherent subjectively of aesthetic values, courts today tend to find an ñobjective standard for

[45] Rathkopf, Arden H. and Rathkopf, Daren A. , *The Law of Zoning and Planning: Building the land Use Case*, (2nd Edition, 1997) Sections 16-25, 16-26

[46] *Georgia Manufactured Housing Association, Inc v. Spalding County*, 148 f.3D 1304 11th Cir. 1998

aesthetic regulation in either a derivative link to some traditional public purpose or derivative linked to widely shared human values related to the visual environment. In this respect, recognition of aesthetics as a legitimate basis for land use regulation under modern doctrine is unlikely to extend to every artistic conformity or nonconformity, but likely to be limited to conduct which bears substantially on the economic, social, and cultural patterns of a community or district. Cases upholding regulation based solely on aesthetic consideration without a linked to a traditional general welfare zoning purpos generally have involved such things as billboards and junkyards uses that are widely perceived as patently offensive.[47]

IV. Free Speech and Expression in Land Use Law

The First Amendment to the U.S. Constitution provides ò*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*ò.

Examination of the First Amendment rights in cases involving symbolic, non-verbal expression suggests that rather than conduct a thorough threshold analysis, courts favor a presumption of validity and a focus on the nature of the ñprotected expressionò when it is balanced against the government interest that created the conflict.[48] It is clear from the outset that architecture is not a traditional form of protected expression. At the same time, when one considers the multitude of nonverbal forms of expression accorded

[47] Rathkopf, Arden H. and Rathkopf, Daren A., *The Law of Zoning and Planning: Building the land Use Case*, (2nd Edition, 1997) Sections 16-26
[48] *Schud v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981)

First Amendment protection, it is difficult to argue that a house designed by Frank Lloyd Wright is not a form of artistic expression meriting protection. Professor Stephan P. Williams argues that ñLike artistic expression generally, architecture is often a conscious attempt to make a meaningful aesthetic statementò. Indeed architects and architectural writers frequently discuss a building in terms of an ñarchitectural statementò.[49]

Architecture could be classified under any of three speech categories:
Architecture as Artistic Expression, Architecture as Self-Expression and Architecture as Political Speech.

A- Architecture as Artistic Expression

Throughout history, architecture has been recognized as an important art form. 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 bricks and mortar. Architectureôs 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 ñserious literary, artistic, political or scientific valueò in it, the court certainly could accord architecture the same recognition. ñThe court has

[49] Poole, Samuel C. and Kobert, Ilene Katz, ñ Architectural Appearance Review Regulations and the First Amendment: The Constitutionally Inform ñExcessive Differenceò Test, Zoning and Planning Law Report, Vol12, No.1 (1989) at pp. 90

left vague what constitutes ñserious artistic value.ô ò[50]. However, one aspect of the analysis is clear: ñThe effect of the art on the viewing public is probably more important than the intent of the presenterò. Thus, regardless of a builderôs or architectôs subjective intent, architecture should be considered expression with serious artistic value that is protected by the First Amendment. [51]

B- Architecture as Self-Expression

When a landowner and an architect express preferences and project images through architectural design, the architecture is self-expression. For example, a house exterior appearance often expresses the residentsô personality. However, not all intentional expression of oneôs self is protected under the first amendment. [52]

C- Architecture as Symbolic and Political Speech

One of the cases that presents architecture as a symbolic political speech, was when, Samuel E. Poole III speculated that the neighbors of the landowner in *State ex rel. Stayanoff v. Berkeley*[53] interpreted a proposed pyramid-shaped home in their prestigious St. Louis suburbs as a political statement of rebellion against the communityôs traditional values. The architectural ñmessageò was a rejection of a western notion of a stately manor keeping vigil over an estate and the rejection of the neighborhood. This

[50] *Miller v. California* 413 U.S. 15, 34 (1973)
[51] Rice, Shawn G., ñZoning Law: Architectural Appearance Ordinance and The First Amendmentñ , 76 Marq. L. Rev. 439 at pp. 5
[52] Ibid at pp.6
[53] *State ex rel. Stayanoff v. Berkeley,* 458 S.W.2d 305 (Mo. 1970)

interpretation and the conclusion that construction of a pyramid-shaped design should be protected as political expression is difficult to accept. [54]

D- Standing

If a landowner, developer, or an architect is to be successful in a First Amendment challenge to an architectural appearance zoning law, the threshold requirement of standing must be met. ñProtecting architecture through a right of expression would arguably restrict the range of parties with standing to complain of a violationò. Builders and developers of tract housing probably lack a sufficient personal interest to claim a frustration of their expression. Whether an architect lacks standing depends upon the definition given to expression. A hired architect usually molds his work to the wishes of whoever commissioned the work. Nonetheless, ñan analogy may be made to the protection afforded a book: the First Amendment will protect the authorôs freedom of expression whether the book is written for the authorôs own benefit or commissioned for the benefit of another individual. 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 sanding requirement can be met by at least the landowner. Whether an architect could claim that his commercial freedom speech to advertise his work product was unjustifiably infringed upon architectural controls with only be considered when his claim coincides with the landownerôs cause speech, such as commercial or offensive speech. The distinction between an architectôs freedom of commercial expression suit and

[54] Rice, Shawn G., ñZoning Law: Architectural Appearance Ordinance and the First Amendmentñ, 76 Marq. L. Rev. 439 at pp. 6

a landownerôs offensive or political speech cause of action has been greatly diminished, if not eliminated. [55]

E- Reasonable Time, Place and Manner Restriction on Architectural Expression

Because architectural expression, like all expressions 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 content-neutral time, place and manner restriction test [56]

1- Justification Without Reference to Content: The Renton Test

The first requirement is to show the justification of the ordinance, the Supreme Court, in *City of Renton v. Playtime Theater Inc.*[57], established a test to determine whether an ordinanceôs deferential treatment of expression is justified without reference to the expressionôs 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. The typical architectural appearance ordinance passes the Renton

[55] Rice, Shawn G., ñZoning Law: Architectural Appearance Ordinance and The First Amendmentñ , 76 Marq. L. Rev. 439 at pp. 5
[56] Ibid at pp. 6
[57] *City of Renton v. Playtime Theater*, 475 U.S. (1985)

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. [58]

2- Narrowly Tailored to Serve Substantial Governmental Interests

The second part is whether the regulation is narrowly tailored to serve or further a significant governmental interest. This requirement involves two sub issues: an ordinanceôs degree of tailoring to the interest served and the substantiality of the state interest served by the ordinance. Architecture appearance ordinances are as narrowly tailored as possible. Additionally, they serve three significant and substantial governmental interests. Two are the same interests that justify architectural appearance ordinance without reference to its content: the protection of property value and protection and preservation of the quality of the neighborhood. The third substantial interest is not expressly stated by the ordinance but is reflected in the name given to these ordinances: the protection of the communityôs aesthetic appearance from the secondary effects of unaesthetic architecture. [59]

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 architecture expression

[58] Rice, Shawn G., ñZoning Law: Architectural Appearance Ordinance and the First Amendmentñ, 76 Marq. L. Rev. 439 at pp. 6
[59] Rice, Shawn G., ñZoning Law: Architectural Appearance Ordinance and the First Amendmentò, 76 Marq. L. Rev. 439 at pp. 6

questions, but also considers the opposing side of this issue. The third test is whether architecture appearance ordinances ñleave open ample alternative channels for communication of the informationò. The issue then is whether landowners who wish to express or speak through architecture have ample alternative channels of expression. For example, nearby communities that lack architectural appearance controls offer ample alternative opportunities for architectural expression. If alternative sites are available, the question remains as to the degree of availability the Court will require. [60]

V. Conclusion

Aesthetic regulation proscribes activities or land uses which a legislative body has determined are detrimental to community appearance or in some way unnecessarily offensive to the visual sensibilities of the average person. Within limits, aesthetic considerations may be used to justify state or municipal regulation of billboards, historic districts and junkyards, and to require architectural design review of proposed construction. Aesthetic considerations are also increasingly accepted as proper, and in many cases sufficient, justification for the exercise of police power over such matters as

[60] Ibid at pp. 6

sign posting, mobile home siting, accumulation of refuse, and even protest demonstrations. Aesthetic regulations typically aim to conserve property values, maintain community character and appearance, foster appropriate land utilization, or protect a tourist economy. These goals are generally considered to be within the concept of the general welfare, which was described by the United States Supreme Court in the 1954 cases of *Berman v. Parker* [61]

> ñThe 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 patrolledò [62]

Perhaps we realize the importance of aesthetics by imagining how our communities would look if there were not laws to protect our communitiesô aesthetics, and set aesthetic review ordinance as a legitimate exercise of police power.

An author concluded in 1970 with a message that is still pertinent today: ñWhat is done 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 ordinance, the eyesores of today will exist and multiply in the years to comeò. [63]

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[61] Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98,99 L. Ed. 27 (1954)
[62] Delaney. John J., Abrams. Stanly D. and Schundiman. Frank, *Land Use Practice & Forms: Building the land Use Case*, 2nd Edition, 1997. at section 16-23
[63] Rice, Shawn G., ñZoning Law: Architectural Appearance Ordinance and the First Amendmentñ, 76 Marq. L. Rev. 439 at pp. 10

Table of Cases

Bibliography

- Blaesser, Brian W., ñ*Discretionary Land Use Control: Avoiding Invitations to Abuse of Discretion*ò. (West Publishing Co. 1997).

- Bunting, Stephanie L., ñUnsightly Politics: Aesthetics, Sign Ordinances, and Homeowners Speech in City of Ladue V. Gilleo. ñ20 Harv. Envt. l. L. Rev (1996)

- Callies, David L., Freilich, Robert H. and Roberts, Thomas E., ñ*Cases and Materials on Land Use*ò (West Group Publishing, Third Edition, 1999)

- Delaney John J., Abrams Stanly D. and Schundiman Frank, ñ*Land Use Practice & Forms: Building the land Use Case".* (Thomson West, Second Edition, October 1996).

- Ghent, Jeffery F. ñ Validity and construction of zoning ordinance regulating architectural style or design of structureò, A.L.R. 3d 1397 (2006)

- Ghent, Jeffery F. ñAesthetic objectives or consideration as affecting validity of zoning ordinanceò, A.L.R. 3d 1222 (2006)

- Gill, Kevin G., ñ Freedom of Speech and the Language of Architectureò, 30 Hastings Const. L.Q. 395 (2003)

- Mandelker, Daniel R. and Rubin, Rebecca L., ñ*Protecting Free Speech and Expression: The First Amendment and Land Use Law*ò (American Bar Association, 2001)

- Mandelker, Daniel R., ñ*Land Use Law".* (Mathew Bender & Company, Inc. Fifth Edition, 2003)

- Poole, Samuel C. and Kobert, Ilene Katz, ñ Architectural Appearance Review Regulations and the First Amendment: The Constitutionally Inform ñExcessive Differenceò Test, Zoning and Planning Law Report, Vol12, No.1 (1989)

- Rathkopf Arden H. and Rathkopf Daren A., ñ*The Law of Zoning and Planning: Building the land Use Case".* (Blank Book, Second Edition, 1997)

- Rice, Shawn G., ñ*Zoning Law: Architectural Appearance Ordinance and the First Amendment*ñ, 76 Marquette Law Review, 76 Marq. L. Rev. 439 (1996)

- Weinberg, Paul J. and McGuire, Paula , ñ *Design Regulation and Architecture: Collision Course?*ò, Zoning and Planning Law Report, Vol122, No.10 (1999)

- William, Norman, *Scenic Protection as a Legitimate Goal of Public Regulation*, 38 Wash. U. J. Urb. & Contemp. L. 3, 3 (1990)