

Chapter 11. Aesthetic Regulation and Historic Preservation

- Statutes and ordinances grounded *solely* in aesthetic purposes have been difficult to justify until recently
- All zoning, to certain extent, based on desire for beauty
- *Berman v. Parker* (Supreme Court 1954) noted that public health, safety, morality, peace and quiet, law and order constitute the traditional scope of police power but do not limit it....that concept of public welfare includes the aesthetic as well as monetary
- NEPA (1969) made consideration of aesthetic objections a fundamental part of national policy
- Despite recent court support for aesthetic control, courts are repeatedly forced to determine whether a particular aesthetic regulation is proper use of police power
- Sign control ordinances are susceptible to First Amendment attacks
- Aesthetic regulation may also lead to property "takings" claims
- Courts' shift over time to favor aesthetic-based regulation recognizes that pleasing surroundings are protectable as part of public welfare

Trend Toward Sign Control

- Courts in early part of 20th century not receptive to billboard and sign regulation
- Recently courts have recognized aesthetic concerns as valid justification for use of police power
- Majority of states now hold that a regulation based solely upon aesthetic considerations is legitimate
- Regulation of signs can include:
 - Total exclusion
 - Limits on location, size, height, and setback from the street
- Distinctions can be made between on-and off-premise signs, urban or residential areas, commercial and non-commercial signs
- Power to regulate outdoor advertising found in state and local laws, and even in some state constitutions

Sign Regulation

- Regulations prohibiting signs near major highways and public places are traditionally considered valid
- Issue of whether compensation is owed under the takings clause for existing billboards is unsettled
- Some states have found that the existence of a right of removal is a proper basis for denial of compensation to the lessee for the value of a sign
- Highway Beautification Act (1965)
 - Prohibited signs within 660 feet of the right-of-way along interstate and primary highway systems unless area zoned for commercial or industrial uses
 - Compensation must be paid for removal of signs predating the law
 - Proscription (prohibition) of signs within 660 feet stimulated proliferation of large billboards in rural areas just beyond the line
- Justification for regulating signs have shifted from one emphasis to another
 - To protect travelers
 - Aesthetics
 - Preservation of scenic or historic property
 - Preservation of property values
 - Protect tourism
- Aesthetics standing alone now recognized as valid exercise of police power in many jurisdictions
- Supreme Court has upheld ordinance that banned signs on public property
- Billboards have been treated separately and distinguished from other signs
- Many ordinances that prohibit new signs treat existing signs as nonconforming uses; courts allow amortization schedules for removal

Sign Control and First Amendment Conflicts

- Sign controls raise First Amendment issues because messages on signs are (more or less) protected speech
- Commercial speech is given only limited protection
- Noncommercial speech may not be regulated strictly on the basis of content, but reasonable time, place, and manner restrictions may be imposed
- Commercial billboard regulation has generally been upheld because of state's interest in protecting the health, safety, and general welfare of the community
- U.S. Supreme Court (*Metromedia v. San Diego*) found part of city's ordinance unconstitutional—found it went too far in regulating noncommercial speech—afforded greater protection to commercial speech than noncommercial speech and City did not explain disparate treatment
- *Members of Los Angeles City Council v. Taxpayers for Vincent* state court upheld ordinance regulating sign usage on public property
- Recent litigation has involved constitutionality of ordinances that ban newsracks on city sidewalks (*Cincinnati*—ordinance struck down, *Boston*—upheld)

Architectural Control

- Ordinances that provide for architectural design review are increasingly being enacted
- A majority of state allow architectural design review regulations based solely aesthetic considerations
- Early case upholding design review State ex rel. Saveland Park Holding Corp. v. Weiland (Wisconsin) held that building permit could not be issued if building were so at variance with existing structures that would cause depreciation in property values
- More recent decent Reid v. Architectural Bd. Of Review (Ohio) disapproved a permit for a single-story, ten-foot high house built of glass and concrete in a rough U-shape in a grove of trees surrounded by ten-foot fence to be built in area of stately, older, 2 ½ story houses
 - Court held maintenance of high character of community character was within scope of the general welfare
- Courts will determine whether standards are adequate to guide administrative decisions (can't be too vague)
- Another case State ex rel. Stoyanoff v. Berkeley (Missouri) court upheld a denial of building permit by architectural review board on grounds the proposed building would not fit architectural character of neighborhood (proposed structure was pyramid-like structure with a flat top, and triangular windows and doors at the corners)

Architectural Control (cont'd)

- Decisions based solely on aesthetics has increased
 - 1984 Supreme Court affirmed aesthetics as proper basis for the exercise of state police power for general welfare (Members of City Council of City of Los Angeles v. Taxpayers for Vincent)
- Ordinances establishing procedures for architectural design review must set standards that are not unduly vague
 - Must also be narrowly drawn and must further a sufficiently substantial government purpose to avoid First Amendment considerations
 - Standards may be found in the consistency or patterns of community preference
 - Presence of expressly articulated standards is exceedingly important and will often warrant granting legislative presumption of validity to an architectural control
- Aesthetic regulation based on offensiveness of the expression or design can amount to censorship and raise freedom of expression concerns (although Supreme Court has not directly addressed this question)
- Restrictive covenants are alternatives to the public regulation of aesthetics
 - Land use controls in private agreement to restrict the use of land
 - Absence of state action reduces, but does not eliminate First Amendment considerations
 - Courts have been less stringent in scrutinizing aesthetic standards in covenants

Historic Preservation

- What is historic? What reasons for preserving historic resources?
 - Physically link us to our past
 - Has become part of us
 - Live in era of increasing homogeneity
 - Link us to past events, eras, movements, and persons
 - Intrinsic value as art
 - Right of cities and countryside to be beautiful
 - Preservation can serve important human and social purpose in our society
- Congress used eminent domain to purchase Civil War battlefield sites
 - But unsettled question is whether government regulatory powers can be used to limit uses or structures not inherently noxious, particularly without payment of compensation to the owner
- In 1931, Charleston enacted first law that was effective to protect historic area, New Orleans followed in 1936, San Antonio in 1939
- Federal Historic Preservation
 - 1906 Antiquities Act—allowed President to designate national monuments
 - 1966 National Historic Preservation Act (NHPA)
 - National Register of Historic Places (listing qualifies for grants)
 - Established standards for evaluating historic significance
 - Matching grants-in-aid program at state and local levels
 - Established Advisory Council on Historic Preservation
 - Section 106 Review process for protection of federal resources (like NEPA)
 - National Historic Preservation Fund provides matching grants to states to carry out purposes of NHPA

Historic Preservation (cont'd)

- Section 106 of NHPA mandates evaluation and analysis process be followed prior to approval of federal projects affecting historic properties (but recommendations are not binding)
- Department of Transportation Act
 - Section 4(f) contains strongest language of all federal acts relevant to historic preservation because it prohibits federal approval or funding of transportation projects that require use of historic sites unless there is no prudent for feasible alternative and the project includes all possible planning to minimize harm to the site
- Tax Reform Act of 1976 and Economic Recovery Tax Act of 1981 created federal tax incentives for rehabilitation of a certified historic structure
- All states and territories have enacted historic preservation laws
 - 1980 amendments to NHPA greatly increased states' roles in historic preservation
 - States can delegate regulatory authority by providing localities with power to enact historic district zoning and landmark designation
 - Most states authorize local preservation bodies to acquire historic properties
 - Most states have adopted their own version of section 106 of the NHPA
 - Most important preservation work occurs at local level and this is where major conflicts are encountered and resolved

Local Historic Preservation

- Local regulatory schemes are simple—another type of zoning control
 - Often establish a preservation overlay zone, setting forth criteria for inclusion in the district, and creates some sort of preservation review board
 - Amount of authority vested in a review board varies
 - Legal challenges, including “takings” claims, are litigated based on board decisions
 - Localities often include NHPA review standards because there is established body of interpretative case law
- A good preservation control program has 3 elements
 - Survey to establish the basis of designation and regulation
 - Means of providing technical and economic assistance to aid historic property owners
 - Synchronization with the jurisdiction’s comprehensive plan and zoning ordinances
- Because most preservation ordinances are implemented through overlay zoning, important that Comprehensive Plan be consistent with applicable zoning
- Takings Claims
 - Potentially greater with designation of isolated landmark
 - Application to noncommercial landowners more problematic
- Religious Land Use and Institutional Persons Act (2000)—intended to make it difficult to regulate religious buildings through historic preservation