ZONING AND PLANNING LAW REPORT

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ZONING FOR AESTHETICS— WHO DECIDES WHAT YOUR HOUSE WILL LOOK LIKE?

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Introduction

We live in an era of limits. The proliferation of population; the desire of more people to live in particularly attractive areas; these priorities have foisted new limits on everyone wanting to design, build or modify a house. Basic, fundamental philosophical constructs such as the freedom to do with your land what you want, the freedom to express your aesthetic view of the world in the manner that you want, and the supposed sanctity of the American family home are now clearly subject to interference and regulation by municipal bodies and, often times, by neighbors nearly directly. When did this change occur and what are the long term consequences of it on the landscape of America's cities and towns?

Not surprisingly, given the fundamental nature of this conflict and the rights that underlie it, much has been written about it. In a 1996 law review article, John Nivala foresaw the evolution of the trend:

> To accept the exterior design of a single family house as a test entitled to first amendment protection runs smack into a wall . . . It was not always so. Until 1954, aesthetic criteria were, at most, accepted only as ancillary considerations in zoning decisions. The prevailing view was that government should not regulate aesthetics because it could neither adequately define aesthetic standards nor insure evenhanded application of them. Even when a municipality apparently did regulate for aesthetic reasons, the courts would perform analytical contortions to apply the seemingly less troublesome standards of health, safety, morals or general welfare.[1]

There has unquestionably been a shift in the way we design places to live. In some ways the West Coast of

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the United States has led this trend and change. The cities of Seattle, Washington, Portland, Oregon, San Francisco, California, and Irvine, California, in varying degrees, enacted municipal regulations devolving certain authority on design review boards to make aesthetic determinations. As an English writer, John Punter, indicated in his 1999 study of these five areas, the courts really do not know what to do when people complain about the arbitrariness and vagueness of the statutes and the way that they are enforced:

> A particular focus of debate has been the failure of the American courts to limit discretion, to insist upon appropriate review processes and properly prepared guidelines and to establish the precedence for appropriate policy development.[2]

Where are the courts going wrong and why can they not come to grips with this area of regulation? The answer lies in the vagueness of the regulations themselves; the unwillingness of a reviewing court to interfere in what it thinks to be an essentially local decision.

There is no dispute that the problem exists; it has even been discussed in a U.S. Supreme Court opinion:

> In his dissent from the majority and the *City of Los Angeles v. Tax Payers for Vincent* (466 U.S. 789, 1984), Supreme Court Justice William J. Brennan, Jr., cited the opening statement of a law review article by N.Y. Law Professor John J. Costonis: "Aesthetic policy, as currently formulated and implemented at the federal, state and local levels, often partakes more of high farce than of the rule of law. Its purposes are seldom accurately or candidly portrayed, let alone understood, by its most vehement champions. Its diversion to dubious or flatly deplorable social ends undermines the credit that it may merit when soundly conceived and executed. Its indiscriminate, often quixotic demands have overwhelmed legal institutions, which all too frequently have compromised the integrity of legislative, administrative, and judicial processes in the name of beauty."[3]

A review of relevant cases is in order, but before that takes place, it is important to note the benchmark for whether a ordinance is so vague that it is really incapable of being applied at all. That standard was laid down in the 1973 U.S. Supreme Court case of *Broadrick v. Oklahoma*:

> Local courts, when presented with a void-for-vagueness challenge to a regulation, most frequently echo the U.S. Supreme Court's language in *Broderick v. Oklahoma*, namely, that "an ordinance is unconstitutionally vague ***when men of common intelligence must necessarily guess at its meaning***." In other words, due process of law and legislation requires definiteness or certainty.[4]

Judicial Views on Aesthetic Regulations

Now we are ready to begin looking at cases to see why courts cannot seem to apply these standards. The first and best place to start is a State of Washington Court of Appeals case of 1993, known as *Anderson v. City of Issaquah*.[5] That case involved a property owner who was attempting to build a 6,000 square foot commercial building for several retail tenants. He obtained architectural plans and then submitted the project to various city departments for the necessary approvals. When he went to the Issaquah Development Commission, a commission created to administer and enforce these land use regulations, they applied building design criteria. The arbitrariness and subjectivity of the ordinance itself was apparent just from looking at it. As the Appellate Court indicated:

> Looking first at the face of the building design sections of IMC 16.16.060, we note that an ordinary citizen reading these sections would learn only that a given building project should bear a good relationship with the Issaquah Valley and surrounding mountains; its windows, doors, eaves and parapets should be of "appropriate proportions," its color should be "harmonious" and seldom "bright" or "brilliant"; its mechanical equipment should be screened from public view; its exterior lighting should be "harmonious" with the building design and "monotony should be avoided." The project should also be "interesting." IMC 16.16.060(D)(1)-(6). If the building is not "compatible" with adjacent buildings, it should be "made compatible" by the use of screens and site breaks "or other suitable methods and materials." "Harmony and texture, lines and mass [is] encouraged." The landscaping should provide an "attractive ... transition" to adjoining properties. IMC 16.16.060(B)(1)-(3).

The Washington Court could tell by looking at the ordinance how flawed it was, but it also had some help. The Seattle Chapter of the American Institute of Architects as well as the Washington Council of the American Institute of Architects and the Washington Chapter of the American Society of Landscape Architects weighed in with their two cents:

> As is stated in the brief of amicus curiae, we conclude that these code sections "do not give effective or meaningful guidance" to applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code. Although it is clear from the code sections here at issue that mechanical equipment must be screened from public view and that, probably, earth tones or pastels located within the cool and muted ranges of the color wheel are going to be preferred, there is nothing in the code from which an applicant can determine whether his or her project

is going to be seen by the development commission as "interesting" versus "monotonous" and as "harmonious" with the valley and the mountains. Neither is it clear from the code just what else, besides the valley and the mountains, a particular object is suppose to be harmonious with, although "harmony and texture, lines and masses" is certainly encouraged.

In attempting to interpret and apply this code, the commissioners charged with that task were left with only their own individual, subjective "feelings" about the "image of Issaquah" and as to whether this project was "compatible" or "interesting." The commissioners stated that the City was "making a statement" on its "signature street" and invited Anderson to take a drive up and down Gilman Boulevard and "look at good and bad examples of what has been done with flat facade." One commissioner drove up and down Gilman, taking notes, in a no doubt sincere effort to define that which is left undefined in the code.[6]

The Anderson case was upheld as recently as 2004 in the Supreme Court of Washington's *Pinecrest Homeowner's Association v. Glen A. Cloninger and Associates* case.[7] Referring to the *Anderson* case explicitly, the Pinecrest Court explained and reaffirmed the problems that the Anderson case highlighted:

At issue in *Anderson* was a section of the Issaquah Municipal Code setting forth the aesthetic standards governing building design. ***The criteria amounted to little more than the general requirement that buildings—in their colors, components, materials, and proportions—must be harmonious with the natural environment and neighboring structures.*** The *Anderson* decision chronicled the repeated efforts of one developer to intuit and satisfy the shifting personal demands of members of the development commission. (emphasis added)[8]

The face of this caustic review made clear just how subjective, arbitrary and intensely personal these judgments and decisions were. Interestingly, though, courts are apparently divided on this issue, as shown in the 2003 University of Colorado Law Review by Michael Lewyn, a professor at John Marshall Law School.[9]

In his article, Lewyn pointed out that the American Planning Association has now published a new guidebook that, among other topics, talks about design review. As Lewyn writes:

Section 9-301 of the guidebook authorizes local governments to designate "areas by ordinance as design review districts"—areas with structures "united aesthetically by development or that, in the determination of the local legislative body, [have] the potential to be united aesthetically by development." Within such areas, property owners must obtain a "Certificate of Appropriateness"—a written decision by a local design review board that their development conforms with the design review ordinance—for "all proposed development removing, destroying, adding, or altering exterior [and interior] architectural features of properties located in ... design review district."

***

Both the U.S. Supreme Court and the majority of state courts allow government to regulate land use to promote aesthetic values. Nevertheless, the guide book commentary itself concedes that design review ordinances may violate due process under case law invalidating such statutes as "an improper delegation of power or because they were unconstitutionally vague and thus was difficult for a board to make a decision based on the standards in the ordinance."[10]

To understand the problem more fully, though, we need to look at decisions that upheld design review ordinances and the hands-off rationale behind them. The most famous one is *State ex. rel. Stoyanoff v. Berkeley*.[11] Richard Yu Lai, of Arizona State University, summarizes the case well:

The case arose from the refusal of the architectural board of review of the City of Ladue, one of

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the more exclusive suburbs of metropolitan St. Louis, to issue a permit to Dimiter Stoyanoff, a registered architect, to build a house of his own design for his personal use. In response, the applicant's lawyers noted that, although the proposed residence was unusual in design, it nevertheless complied with all existing city building or zoning regulations and ordinances. The ordinances establishing the architectural board of review were challenged as being "unconstitutional in that they are vague and provide no standard nor uniform rule by which to guide the architectural board."[12] The court, however ruled in favor of the board and its enabling ordinances, thereby upholding the ban on Stoyanoff's proposed design.[13]

Even a brief review of the *Stoyanoff* case shows how superficial the analysis was:

> The ordinance here is similar to the ordinance in the *Guffy* case wherein it was held that the general standards of the ordinance were sufficient. Although it was said that neither of the above stated exceptions applied in the *Guffy* case, the impracticality of setting forth the completely comprehensive standard ensuring uniform discretionary action by the city council was discussed. It was held that the general standards were sufficient and that the procedure for determining whether the proposed filling station would or would not promote the "health, safety, morals or general welfare" was sufficient to provide against the exercise of arbitrary and uncontrolled discretion by the city council. Here, as in the *Guffy* case, the procedures are for public hearings with notice to the applicant, not only by the architectural board but also by the city council on appeal on the factual issues to be determined under the ordinance. An applicant's rights are safeguarded in this respect.[14]

The opinion does not break down the language in the ordinance. For example, the ordinance uses the language as follows:

> Ordinance 281 ... purports to set up an architectural board to approve plans and specifications for buildings and structures erected within the city and in a preamble to "conform to certain minimum architectural standards of appearance and conformity with surrounding structures, and that unsightly, grotesque and unsuitable structures, detrimental to the stability of value and the welfare of surrounding property, structures and residence, and to the general welfare and happiness of the community, be avoided, and that appropriate standards of beauty and conformity be fostered and encouraged."[15]

Stoyanoff is still good law in Missouri.[16] The opinion leaves out any analysis of the vagueness of the terms "appropriate standards of beauty and conformity."

Two other cases that seem to inhere great trust in municipalities also bear brief review. The first is the seminal California case of *Novi v. City of Pacifica*.[17] In that case Novi applied to the City for a permit to construct a 48-unit condominium project on approximately 2.3 acres near Pacific Coast Highway in central California. The project was to consist of eight four-story buildings. Novi was denied a use permit and a site development permit by the City of Pacifica's Planning Commission because of an "anti-monotony" provision in Pacifica's municipal code. Novi had submitted plans calling for two connected four-story buildings containing twenty-four units each, but the planning commission insisted that he reduce the project density to achieve random building placement, use of retaining walls and avoidance of linear monotony and massive bulky appearance and the achievement of a small scale village atmosphere characteristic of Pacifica.[18]

The decision by the appellate court to refuse to review the ordinance, and more importantly, how vague and unspecific their own reasoning was, is startling:

> The anti-"monotony" provision in Pacifica Municipal Code Section 9-4.320.4 subdivision (g), is also not unconstitutionally vague. Novi argues that the subdivision lacks objective criteria for reviewing the element of monotony, and that such criteria are required for aesthetic land use regulations ... But no where does the California Supreme Court's opinion in *Metromedia* state such a requirement. The opinion states only that aesthetic regulation is permissible if it is reasonably related to the public safety and welfare.
>
> In fact, a substantial amount of vagueness is permitted in California's zoning ordinances: "In California, the most general zoning standards are usually deemed sufficient. The standard is sufficient if the administrative body is required to make its decision in accord with the general health, safety and welfare standard." California courts permit vague standards because they are sensitive to the need of government in large urban areas to delegate broad discretionary power to administrative bodies if the communities zoning business is to be done without paralyzing the legislative process.[19]

Part of what was so startling about this passage is that the authority that the appellate court relied on was a practice book called "California Zoning Practice" issued fifteen years earlier by the University of California's Continuing Education of the Bar. To place such heavy reliance on a treatise rather than prior case law, together

with the fact that the quoted portions do not discuss the issue of vagueness thoroughly is perplexing.

The analysis the court ***did*** engage in, though, was even more startling:

> Here, subdivision (g) of Section 9-4.3204 requires "variety in the design of the structure and grounds to avoid monotony in the external appearance." The legislative intent is obvious: the Pacifica City Council wishes to avoid "ticky-tacky" development of the sort described by song writer Malvena Reynolds in the song, "Little Boxes." No further objective criteria are required, just as none are required under the general welfare ordinance. Subdivision (g) is sufficiently specific under the California rule permitting local legislative bodies to adopt ordinances delegating broad discretionary power to administrative bodies.[20]

Why are no further objective criteria required? The issue really is not the question of whether anti-monotony statutes are a good idea; the question is whether enough specific standards are articulated so that there is no abuse of discretion or abusive power. It seems here that, given the hands-off attitude of the *Novi* court, a very limit facial showing would be required to meet the standard.

Novi's rationale continues to be the law of California, though. The 1998 case of *Breneric Associates v. City of Del Mar*[21] makes this clear. The provisions of the City of Del Mar's design review code, in particular, authorized the design review board to deny the design review permit if:

> the design [is] not harmonious with . . . the surrounding neighborhood in one or more of the following respects: ... structural siting on the lot. Section 23.08.078 titled: "Regulatory Conclusions - Building Designs" authorizes the DRB to deny a design review permit if "the proposed development fails to coordinate the components of exterior building design on all elevations with regard to color, materials, architectural form and detailing to achieve design harmony and continuity."[22]

The *Breneric* court found that it was not obligated to define what "harmonious with the surrounding neighborhood" meant nor was it required to try to elicit what the phrase "design harmony and continuity" meant. As the *Breneric* court put it:

> The courts have repeatedly held that a determination of a project's aesthetic incompatibility with the neighborhood does not require expert testimony and ... the opinions and objections of neighbors can provide substantial evidence to support rejection of a proposed development. The opinions of administrative board members, when based on personal observations of the neighborhood and the proposed development, can also provide evidentiary support for a determination of aesthetic incompatibility of a project.[23]

This phrase in particular begs the question: What point is there in getting testimony from neighbors and board members if there is no specific standard in the applicable code to guide them?

More recent case law in both Pennsylvania and Illinois highlights the problems that vague language creates. The seminal 1974 case of *Soble Construction Company v. Zoning Hearing Board of the Borough of East Stroudsberg*[24] shows the true connection of why neighbors fight for these ordinances so vigorously:

> Neither aesthetic reasons ***nor the conservation of property values nor the stabilization of economic values in a township*** are, singly, or combined, sufficient to promote the health or the morals or the safety or the general welfare of the township or its inhabitants or property owners, within the meaning of the enabling act or under the Constitution of Pennsylvania...The Legislature, in providing for special exceptions in zoning ordinances, has determined that the impact of such a use of property does not, of itself, adversely affect the public interest to any material extent in normal circumstances, so that a special exception should not be denied unless it is proved that the impact upon the public interest is greater than that which might be expected in normal circumstances .... ***The protestants cannot sustain that burden by merely introducing evidence to the effect that property values in the neighborhood may decrease.***[25] (Emphasis added.)

Illinois is in accord and makes the same point about vagueness effectively preventing enforcement, in its appellate court's 1992 case, *Waterfront Estates Development, Inc. v. City of Palos Hills*[26]:

> Although "we can never expect mathematical certainty from our language," an ordinance which is so vague that persons of common intelligence must necessarily guess at its meaning is unconstitutional.[27]

From the Writers of the Ordinances

To see how this is playing out in jurisdictions across the country, it is necessary to find out what the writers of these ordinances are taking into account in drafting them and what they see as the critical problems facing communities that want to enact aesthetic standards.

Nore Winter, of Winter & Company, is the author of many of these ordinances; projects from his firm span more than 120 communities in over 40 states.

Winter sees process of writing design review guidelines as a hierarchy. In particular, when the neighborhood is already established, he indicates that several levels of detail need to be drafted:

> You are correct in that we provide design review services to many communities. Frequently, these take the form of design review guidelines, which are usually administered by a community board, as you know. With respect to infill and alteration of construction within established neighborhoods, we generally recommend this tool when the concerns are relatively "fine grained," and it is difficult to craft a proscriptive standard to address each individual design variable that is of concern.
>
> That said, it is important that the design guidelines have a sense of structure that facilitates informed decision-making, and they should be clearly linked to a description of the features of the area that are to be respected.
>
> ***We typically use a "hierarchical" structure, which incorporates intent and policy statements with specific guidelines, illustrations and explanatory language***. It is equally important to "maintain" the system, with periodic orientation and training sessions for the review body, such that they learn how to use the guidelines objectively and to work together to reach a decision that is based on the guidelines.
>
> We are also seeing increasing interest in finding ways to codify basic design-related variables in the underlying development code. This seems to work where there is consistency of context among properties within a single zoned district, and where basic considerations of mass, scale and site plan are at issue. Where this is the approach, we encourage communities to use visual modeling (usually computer-generated 3-D) to understand the traditional development patterns of a neighborhood, what current regulations and market trends are producing, and to evaluate the potential impacts of alternative regulations. (Emphasis added.)[28]

Winter goes on to indicate that, when he drafts an ordinance, he first does an in-depth diagnostic analysis of the characteristics of the neighborhood. He will conduct public workshops and focus groups with the neighbors as well as with the planning commissions.

He then prepares a pictographic and essay description of what he sees and to try to refine the elements of design that the neighbors, the planning commission and others interested are trying to foster. This, in his opinion, prevents an arbitrary decision.

Winter makes a point of trying to avoid discussions of aesthetics; he is more concerned with how structures sit on the site, their orientation to the street, their setbacks. He then prepares a series of policy statements; for example, if a neighborhood has a uniform alignment of porches, this "should" be maintained.

If, for example, a typical range of setbacks are 15-25 feet, rather than set an absolute standard, a range is proffered. Winter welcomes alternative designs if they maintain the sense of alignment with the other structures and other proscriptive goals set out in the design guidelines, rather than an aesthetic judgment, are what the board focuses on.

Winter believes that a board of peers can work if it is trained and given good guidelines. He believes that "system maintenance" is crucial; things change in the neighborhood and, as the board gains more experience, they often need someone to help them integrate that experience into the decisions that they are making. Winter also believes that communities can have professionals on the board; he believes that that enhances the quality of the board's decision making.

Winter believes that it is very difficult to regulate aesthetics; it is difficult to write guidelines that are based on taste. If the neighborhood had diversity, there can be no guidelines. However, if for example every building on a given street has wood-lapped siding then this is a neighborhood that should maintain its consistency. The board should avoid using words like "aesthetically pleasing." People fall back on dictating style when they have not thought through what features make a neighborhood compatible. Superficial details of architectural design should not be regulated.

In established residential neighborhoods, Winter believes that the mass and scale of new housing is the most important issue to come to grips with. His first question is whether the community needs to adjust its zoning code. If the code permits large-scale mass and bulk designs, then people will design and build to the limits of it, triggering a design review intervention. In this case, modifying the overall code solves the problem rather than adjusting the design guidelines.

Sometime, according to Winter, dealing with a time of change occurring is a problem for a neighborhood, particularly if it has been relatively stable for a long time. Helping people adjust to change as a social value; Winter believes that design guidelines cannot and should not stop growth, simply to manage it.[29]

Winter issues guidelines ahead of time trying to show what characteristics of neighborhoods that he wants to write regulations that will provide a basis for

regulation. In a sense, the questions he asks are rooted in self-examination:

1. Which features are most distinctive in contributing to the character of the district?
2. What are the typical building components seen today?
3. How are materials finished?
4. How are buildings sited?
5. How is the landscape treated?
6. What is the degree of visual continuity found in the district?
7. What is the degree of diversity found in the district?
8. To what degree do newer structures compliment the historic context?

He also asks that the board and planning officials forecast the future character of the area that they are trying to regulate. Much of this rationale applies better to historic districts or clearly defined "neighborhoods." A particular thorny problem occurs when a municipality attempts to enact city-wide design review ordinances and regulation without regard to a particular district.

This particular problem was echoed by Mark Brodeur[30] of Downtown Solutions. Brodeur also writes design review ordinances for areas as diverse as Pasadena, California, Delray Beach, Florida, and many jurisdictions in central and southern California.

Brodeur has seen changes in thinking about zoning during the course of his career from single-use type of zoning to having to cope with mixed-use problems and to writing design review regulations to take these new uses into account.

He echoes Winter's concerns about using aesthetics as a criterion for writing design review codes. In particular, Brodeur notes that cities have been loathe in the past to apply design review standards to single-family homes. This opinion echoes practice and the law; only recently are cases such as *Breneric* dealing with single-family home regulations, most are limited to larger developments or commercial projects.

Brodeur points out that, by way of contrast, the City of Coronado, California has a well-defined set of design standards whereas the City of Laguna Beach, California has the sort of vague language in its design review ordinance discussing the phrase "neighborhood compatibility" and "village atmosphere" without further definitions.[31]

With this lack of objective, clear guidelines, the process becomes more subjective and more personalized. As Brodeur points out, the enactment of philosophical-based guidelines allow decisions to change when the panel changes; the result then becomes very different depending on who the panel is. Brodeur also believes strongly that professionals that are objective can review the plans to advise a board and to remove some of the subjectivity as well. (A review of the City of Coronado's code makes clear that separate, single-family homes are exempt from its process; only multi-family, commercial and/or manufacturing structures are covered.[32]

Two of the jurisdictions that Brodeur has done work on, the town of Gulf Stream, Florida and the town of Delray Beach, Florida, reflect an existing character, one that can be objectively demonstrated by neighborhood review and survey, together with graphic aids and historical background. Brodeur argues that design review for single-family dwellings in diverse neighborhoods is a difficult and risky prospect; all of the subjectivity issues become aggravated with the lack of any continuity or uniformity in a given area. Like many design professionals, Brodeur is aware of the degree of antagonism that is generated in design review processes lacking strict and/or specific code requirements.

Final Thoughts

We have now seen two greatly different viewpoints towards the philosophical construct of whether a governmental agency can or should impose its own aesthetic guidelines on a developer of a single-family home. Vaguely worded ordinances may pass constitutional muster, but inevitably spawn litigation and lead to the undesirable result of pitting neighbors against neighbors in making these types of land use decisions.

The deeper philosophical question, though, is whether we as a nation, in furtherance of stabilizing property values, want to foster this type of uniformity. There is no question that in an uncertain economic world, people want to hold on to that one asset that they believe will maintain its value for them, their home. The proliferation of planned communities with private restrictions and their popularity makes that clear.

The matter of choice, however, must be maintained if the fundamental private property rights enshrined in the constitution are to be preserved. Architects will not have any incentive to exercise any creative judgment or freedom in coming up with new ideas for how to use space or how to provide a living environment for people who desire something different than, in the southern California vernacular, a faux Tuscan structure or a home painted in earth tones. Architects are being left out of this process because planning commissions, city councils and citizens fear that the exercise of this creative freedom will lead to destruction of a coherent neighborhood and devaluation of their property.

Perhaps a federal court articulated the problem best. In the 1999 case of *Western PCS BTA Corporation v. Town of Steilacoom*,[33] the United States District Court for Western Washington, relying on *Anderson*, perhaps quoted the most cogent portion of the *Anderson* opinion, in summing up the need for specificity in ordinances:

> Whenever a community adopts such [aesthetic] standards they can and must be drafted to give clear guidance to all parties concerned. Applicants must have an understandable statement of what is expected from new construction. Design professionals need to know in advance what standards will be acceptable in a given community. It is unreasonable to expect Applicants to pay for repetitive revisions of plans in an effort to comply with the unarticulated, unpublished "statements" a given community may wish to make on or off its "signature street." It is equally unreasonable, and a deprivation of due process, to expect or allow a design review board ... to create standards on an *ad hoc* basis, during the design review process .... A design review ordinance must contain workable guidelines. Too broad a discretion permits determinations based upon whim, caprice, or subjective considerations.

That need not happen with clarity in the zoning codes and design review ordinances and specificity in the regulation of planning type of objectives such as siting, foot print and respect for adjacent structures to minimize blockage of views and unnecessary mass and scale. All of these issues can be regulated objectively; it requires some work and some creativity to do it. To leach this creativity out of the process is for us to take a step backward as a society in growing and developing culturally, too.

Notes

1. John Nivala, *Constitutional Architecture: The First Amendment in a Single Family House*, 33 San Diego L. Rev. 291 (1996).
2. John Punter, *Design Guidelines in American Cities: Town Planning Review* Special Study No. 2, Liverpool University Press (1999 at 20, 22).
3. Richard Tsent-Yu Lai, *Can the Process of Architectural Design Review Withstand Constitutional Scrutiny?* in *Design Review—Challenging Urban Aesthetic Control,* Brenda Case Scheer and Wolfgang Preiser (1994), Chapman and Hall at page 31, citing *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984), and John J. Costonis: *Land and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 Mich. L. Rev. 356 (1982).
4. Brian Blaesser, *The Abuse of Discretionary Power*, in *Design Review—Challenging Urban Aesthetic Control*, Brenda Case Scheer and Wolfgang Preiser (1994), Chapman and Hall at page 44, citing *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).
5. *Anderson v. City of Issaquah*, 70 Wash. App. 64, 851 P.2d 744 (Div. 1 1993).
6. *Id*. at 76-77.
7. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates*, 151 Wash. 2d 279, 87 P.3d 1176 (2004).
8. *Id*. at 292.
9. Michael Lewyn, *Twenty-First Century Planning and the Constitution,* 74 U. Col. L. Rev. 651 (2003). *See also www.planning.org/features/2003/growsmart.htm*.
10. *Id.* at 682-83.
11. *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 41 A.L.R.3d 1386 (Mo. 1970).
12. *Id.* at 306-07.
13. Richard Tsang Yu-Lai, *Can the Process of Architectural Design Review Withstand Constitutional Scrutiny?*, in *Design Review—Challenging Urban Aesthetic Control*, Brenda Case Scheer and Wolfgang Preiser (1994), Chapman and Hall at page 32.
14. *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d at 311.
15. *Id.* at 306-07.
16. *Country Club Estates, L.L.C. v. Town of Loma Linda*, 281 F.3d 723 (8th Cir. 2002) ("Missouri cities have broad power to enact such zoning plans. Aesthetic requirements are among the policies that cities may pursue.")
17. *Novi v. City of Pacifica*, 169 Cal. App. 3d 678, 215 Cal. Rptr. 439 (1st Dist. 1985).
18. *Id*. at 680.
19. *Id.* at 682.
20. *Id.*
21. *Breneric Associates v. City of Del Mar*, 69 Cal. App. 4th 166, 81 Cal. Rptr. 2d 324 (4th Dist. 1998).
22. *Id.* at 172-73.
23. *Id*. at 176-77.
24. *Soble Const. Co. v. Zoning Hearing Bd. of Borough of East Stroudsburg*, 16 Pa. Commw. 599, 329 A.2d 912 (1974).
25. *Id.* at 917, recently upheld in *Shamah v. Hellam Tp. Zoning Hearing Bd.*, 167 Pa. Commw. 610, 648 A.2d 1299, 1304-05 (1994) ("However, objectors to a special exception cannot meet their burden of proving an adverse impact by merely introducing evidence to the effect that property values in the neighborhood may decrease.")
26. *Waterfront Estates Development, Inc. v. City of Palos Hills*, 232 Ill. App. 3d 367, 173 Ill. Dec. 667, 597 N.E.2d 641 (1st Dist. 1992).
27. *Waterfront Estates*, 597 N.E.2d at 649 (Citing *Broadrick v. Oklahoma,* 413 U.S. 601, 607 (1973)).
28. E-mail from N. Winter to P. Weinberg of 7/19/05.
29. Interview of 7/20/05 with Nore Winter of Winter & Co., Boulder, Colorado.
30. Interview of 7/22/05 with Mark Brodeur of Downtown Solutions, San Juan Capistrano, California.
31. *See, e.g.*, Laguna Beach Municipal Code §§ 25.05.040(H) and (H-9).
32. *See, e.g.*, City of Coronado Municipal Code § 70.12.030.
33. Western PCS BTA Corp. v. Town of Steilacoom, U.S. Dist. LEXIS 9068 (1999).