

Beauty and the Police Power

— Everett P. Priestley

One facet of zoning law is particularly irritating to me because of its lack of vision. More and more citizens are beginning to insist upon improvement of the quality of their environment, including demands that their communities be made more pleasing to the eye. Many people are concerned about the growing number of unplanned "shopping center rows," and monotonously designed residential developments. Yet, despite this desire for attractive surroundings, until recently there has been no statutory or decisional law bases for considering aesthetics in the development of our communities. The standards remain inadequately defined.

Assuming, therefore, that most citizens would welcome imaginative, attractive, and well-planned structures and other improvements, aesthetic sanctions are needed to effect this goal. Aesthetic zoning is not the complete answer. In fact, since it has never really been tried on a large scale without reliance on other aspects of the police power, it may not be the answer at all. Aesthetic control, and especially site plan reviews by a board of architects and other qualified persons, is a fine alternative and one worth experimentation. It will not make all shopping centers works of art or all subdivisions architectural marvels, but it might go a long way toward eliminating the real eyesores.

THE EVOLUTION OF AESTHETIC CONTROLS

Zoning has its roots in the common law action of nuisance. Our professor Anderson has given the short hand definition of nuisance as "a pig in a parlor instead of the barnyard." The development of this area of the law allowed the later conclusion that the rights of property owners were not absolute and could be limited if found to be in contravention of the public health, safety or welfare. Out of this concept grew the proposal that the police power of the community could be utilized to affect orderly development. The proponents of this concept brought their efforts to a head in 1926 with the carefully chosen test case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365. The success of this effort is attested to by the naming of that system

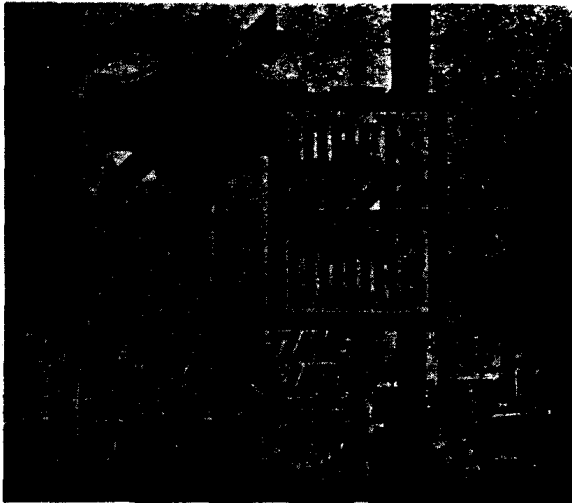
of comprehensive planning Euclidian zoning. The concept soon achieved widespread use. By the end of 1930 zoning ordinances were effective in 67% of the urban population. Today just about every city or county has some type of comprehensive zoning plan.

Zoning has had reasonable success in accomplishing its original goals, despite some chequered areas such as zoning boards on the take and the over-generous allowance of variances and exceptions. The drastic effects which are possible where the zoning board is irresponsible are demonstrated by Fairfax County where the board was found guilty of accepting bribes.

The other branch of the development of aesthetic control originated in the billboard battle which started in the 1890's. The first judicial reaction to the efforts to curb or control billboards was a firm rebuff. In *City of Passaic v. Patterson* the court reasoned that "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." This type of decision was reversed as early as 1911 when a Missouri court held a billboard regulation valid. The grounds given were not aesthetics, which was the true reason, but rather a string of arguments grounded in the police power. The signs were found to "endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreantsthey are constantly used as privies and for the lowest forms of prostitution." Gratuitously and with a certain caution, the court also mentioned that billboards are inartistic and unsightly.

BEAUTIFUL AS WELL AS HEALTHY

There have been many later decisions which have credited aesthetic values, but never as the sole basis for regulation. An economic basis invariably was found. Important examples of the beauty which could be preserved and developed even with this requirement are the carefully regulated areas in Williamsburg, Santa Fe, New Orleans and Nantucket. But the next big impetus in the progress toward pure aesthetic regulation came in an eminent



domain case, *Berman v. Parker*, 348 U.S. 26 (1954). This case involved the constitutionality of a District of Columbia renewal program. The statement may have been dictum, but it has been cited so widely that it has had considerably more weight than mere dictum. The Supreme Court, speaking through Mr. Justice Douglas, stated that "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." This language has been quoted, almost without exception, in all succeeding efforts to use state or municipal police power to effectuate control of the beauty of a community.

Since *Berman* a few isolated cases have validated ordinances based almost exclusively on aesthetics, but there has been no stampede. In *State ex rel. Saveland Park Holding Corp. v. Wieland*, 69 N.W.2d 217 (1955), the Wisconsin Supreme Court upheld an ordinance requiring approval by a Building Board before any structure could be built. The exterior architectural appeal could not be at great variance with other structures in the area. Once again aesthetic values were coupled with property values. The important and familiar case of *People v. Stover*, 191 N. E. 2d 272 came in 1963. Here protesting taxpayers had hung rags, old uniforms and underwear in their front yard. The City of Rye, New York passed an ordinance prohibiting the erection of clotheslines which blocked driver vision—a conventional police power function. The court went beyond this standard on its own initiative and approved the statute on an aesthetic basis. However, it still threw in the protection of real estate values to support its holding. In 1965 *Oregon City v. Hartke*, 400 P.2d 255 cited *Stover* in sustaining a total ban on wrecking yards from the city. In so holding they stated that "We join the view that

aesthetic considerations alone may warrant an exercise of the police power." With these and other cases the trend has come very close to an allowance of police power based on the sense of sight.

Virginia law is not in this vanguard. *Kenyon Peck Inc. v. Kennedy*, 168 S.E.2d 117 (1969), reiterated that a municipality or county cannot limit or restrict the use which a person may make of his property under the guise of its police power where ... justified solely on aesthetic considerations. There was, however, an unreported case in Fairfax County where prohibition of high rise apartments was allowed because a scenic view would have been blocked from already existing houses.

DEFINING AESTHETIC CONTROLS

- THE ARGUMENTS PRO AND CON

In his hornbook on Urban Planning in § 48, Hagman states that aesthetic control is one which attempts to preserve or improve the beauty of an area as perceived by the sense of sight. To this he immediately adds the caveat that no one has to look, but odors and sounds are difficult not to notice. In that phrase is capsulized the history of aesthetic zoning. Because it has always been rationalized that one can avoid looking at ugliness, it has invariably been left out of the potent forces of police power.

The other major stumbling block which has traditionally been laid in front of controls for beauty sake is that of vagueness. Public health, safety and morals submit to reasonable definition, it is said, but aesthetic considerations vary greatly with the wide variations of taste and culture. Since no precise definition can be given, all such ordinances are doomed to be vague and incapable of enforcement without arbitrariness. However, when you examine the other branches of the police power, which have been legitimized, you find imprecision which is far greater than that in aesthetic controls. For example, what is obscene? What can a government ban as offensive to public sensibilities? A movie like *Deep Throat* may be temporarily cut from the screens of New York and Williamsburg, but how long will the courts allow such a ban to continue? How long will *Roth* remain the obscenity standard? There are a great number of imprecise areas in the law. When the courts agree that conditions have changed, and that aesthetics should assume their rightful place in the police power, we will probably be able to live with the imprecision involved.

After the initially hostile reaction to aesthetic controls, the court system softened its position to the point where beauty could be a consideration, as long as controls were mainly based on other areas of the police power. Except in the few recent cases,

this remains the basic policy of the law today. The policy was summed up by Roscoe Pound: "Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency."

Are we not in a position finally to give beauty a rightful place? Aren't we wealthy enough that every dollar doesn't have to pay its own way. Can't the desire to maximize profits be tempered by the need to have structures approved before they are built. This is not to say that the tastes of a few should be imposed on the rest. But with model legislation, and legislative guidelines, a board of knowledgeable people reviewing site plans could constitute just enough coercion to make builders build with the public in mind. Edmund Burke once wrote: "To make us love our country, our country ought to be made lovely." Perhaps he didn't refer to aesthetic zoning, but he does give the gist of the need for such standards. Our surroundings have a profound effect on our daily productivity and the fulfillment of our potentials. Perhaps court resistance to aesthetic control is a factor in urban blight, high crime rates and the ugliness in much of the present development. To have a respect and love for his community, a person must be able to appreciate the beauty of his surroundings as well as its profit potential. If there is no pride in the community, then the scruples about harming it are lessened. In the classic article *Zoning For Aesthetic Objectives: A Reappraisal*, 20 Law and Contemporary Problems 218 (1955), J.J. Dukeminier, Jr. put it this way, "Our communities need to achieve an environment that is emotionally satisfactory, that effects a reduction in purposeless

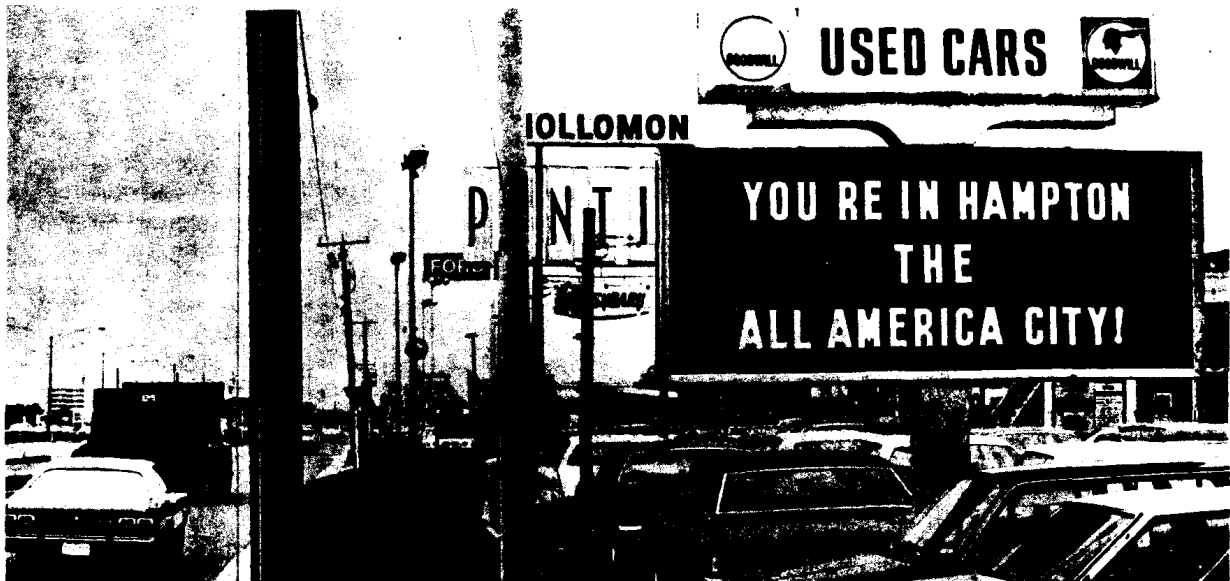
nervous and physical tensions of the inhabitants. When the inner life of an individual is out of balance, anxiety occurs, expressing itself in a number of socially destructive ways."

RECENT DEVELOPMENTS, TECHNIQUES, AND THE OUTLOOK

Zoning is under attack. The newest front of the civil rights movement is fighting the effects of exclusionary. Euclidian zoning, with its separate areas for more desirable residences, has had the effect of stratifying communities along economic lines. Urban sprawl can be traced at least in part to the present concepts of zoning. In California zoning is being used to exclude commune from suburbia. Areas are reserved for single family dwellings and the term family is being redefined to exclude the communal family. In another article in this issue, the use and constitutionality of cluster zoning is examined. This concept rejects the traditional method of blocking off entire developments in lots without provision for common areas. With cluster zoning houses and apartments are being placed closer together, with large areas of undeveloped land reserved as commons for recreation and natural maintenance. The idea of allowing families to isolate themselves on the biggest lot they can afford is losing favor. Instead of sideyards that are good only for mowing, high priced land is now being preserved for the type of mental expansion that is impossible in the typical subdivision.

Historical areas are being preserved under various systems. Williamsburg represents the most

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extensive and probably the most successful effort. The National Trust and other societies are working to catalogue important structures so they won't be demolished. New York City has an innovative program which lists landmarks and prohibits their destruction or changes without prior approval. This has been suggested to be an unjustified interference with property rights. An alternative could be the purchase of negative easements against the destruction of historic areas. Robert L. Montague III in an article at 51 Va. L. Rev. 1214 (1965) suggests a system of tax incentives to be used in Virginia for the preservation of its many antiquities. Even with these efforts to catalogue and preserve, the loss of important landmarks continues. Under a program inaugurated in the 1930's the Historic American Buildings Survey listed more than 10,000 buildings worthy of preservation. It was estimated in 1963 that 50% of these buildings, significant in America's history and culture had already been destroyed.

Another unfortunate development is demonstrated by *Seagram & Sons v. Tax Commission*, 200 N.E.2d 447 (1964). The Seagram building in New York City had been built with unusual care and the result was a beautiful structure that promoted the economic interests of the owner and enhanced the beauty of the city. The Tax Commission chose to adopt a different appraisal system which increased the owners tax bill. This was an obviously self-defeating and short-sighted action, but it was affirmed.

CONCLUSION

The most attractive method for enhancing the appearance of our communities is the adoption of architectural boards of review. These have been rejected in several cases, but the time is ripe for their acceptance. Whatever the method adopted, aesthetic control is a vital field and one worth the efforts of the legal profession. The wealth and know-how are available. The question remains whether the courts and the legislatures will provide the legal framework for protecting the beauty of our communities. The alternative is for our generation to be remembered only as the innovators of "shopping center row."

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