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AESTHETICS AND THE LAW OF HISTORIC PRESERVATION

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AESTHETICS AND THE LAW OF HISTORIC PRESERVATION

The use of legal means to promote and regulate historic preservation is often justified by appeal to aesthetic values, along with more obvious historic, cultural, and economic values. This application of aesthetic values derives from earlier legal developments in zoning for aesthetic purposes, especially the exclusion or restriction of commercial establishments and signs in residential areas and of billboards along highways and scenic areas. Although courts in the early twentieth-century completely rejected aesthetic values in justifying such exercises of the state's police power, courts have recently begun to accept aesthetic values as adding some justification, although they are still rarely considered sufficient.

This legal application of aesthetic values, rarely analyzed by legislatures, courts, legal scholars, or philosophers, presents several philosophical problems: (1) the legal meaning of "aesthetics," (2) the justification for legal reliance on aesthetic values, (3) the rationale for the relative importance accorded to aesthetic values, and (4) the defense of particular aesthetic standards.

Legal analysis by scholars and courts is strikingly similar to philosophical analysis, especially in the centrality of objectivity, logic, and reasonableness. Fundamental terms and concepts are often carefully scrutinized by legal thinkers, especially when undefined or ill-defined in statutes and previous court decisions, and when new situations arise demanding further analysis of fundamental concepts. Because courts must reach a holding in every case, they usually analyze issues only to the extent needed to reach a decision on the controversy at hand, and particular issues can often be avoided. Still, it is not unreasonable to expect that legal thinkers and philosophical aestheticians might independently develop analyses of mutual interest. Legal analysis warrants philosophical attention as an example of linguistic usage, along with ordinary language and the language of critics and artworlds. Moral philosophers and philosophers of law have found legal analysis fertile grounds for philosophical inquiry, but aestheticians have not yet studied aesthetic concepts in the law. Legal scholars have given increasingly serious attention to aesthetic issues, but without reciprocal analysis by aestheticians, and usually without significant understanding of contemporary work in philosophical aesthetics.[1] Philosophical analysis can provide the detailed conceptual analysis sometimes short-changed in the law.

THE DEFINITION OF "AESTHETICS"

Most historic preservation statutes and legal opinions do not define "aesthetics" at all, while some legal scholars scoff that it may be indefinable[2] and others think it presents no difficulty.[3] Some courts use "aesthetic" in a colloquial sense, to characterize surface (usually, visual) impressions, in contrast with things considered more substantial, material, and, by implication, more valuable. In Civello v. New Orleans[4] (a 1924 zoning case upholding prohibition of business in a residential district), "aesthetic considerations" were characterized as a "regard merely for outward appearances."[5]

Other courts use "aesthetic" to characterize, often in disparaging tones, standards for those sensual impressions (mainly, beautiful and ugly). The dissent in Merritt v. Peters[6] (a 1953 Florida decision upholding an ordinance limiting the size of commercial signs) complained that aesthetics is "the science of sensuous knowledge, the goal of which is beauty, in contrast with logic, whose goal is truth."[7] Other courts have hinted that aesthetic standards are superficial or trivial by equating beauty with "mere" good taste.[8]

More positively, the U.S. Supreme Court said, in Berman v. Parker[9] (a widely-quoted 1954 decision upholding the exercise of eminent domain in urban Model

Cities programs): "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary."[10] Although the decision does not contain a definition per se of "aesthetic," this passage suggests that the court understands it to characterize non-commercial or non-utilitarian values.

Some courts have recognized, quite appropriately, that aesthetic standards, especially "beauty," apply to both man-made and natural objects. For example, the court in Maher v. City of New Orleans (a 1975 decision upholding the historic preservation ordinance for the Vieux Carré) spoke approvingly of a city's desire "to maintain 'the value of scenic surrounding' and 'the preservation of our environment.'"[11]

Improved conceptions of "aesthetics" would clarify the role, if any, that such values should play in legal action. First, the law should recognize that aesthetic concerns involve all surface textures and phenomena, including sound and touch, not solely visual phenomena. It is at least arguable, for example, that aesthetic regulation should extend to the quality of sounds in a certain location, not merely their decibel level. Second, comprehensive assessment of the legal issues requires a descriptive identification of the subject matter of aesthetics, not perjorative assumptions about its superficiality. Third, the recognition that both artifacts and natural objects may have aesthetic value is essential for consistent analysis of both man-made buildings and natural environments. A proposed working definition of "aesthetics" for historic preservation law which meets these concerns is "the study, description, and evaluation of perceptual, non-utilitarian characteristics of artifacts and the natural environment."

LEGAL THEORIES JUSTIFYING RELIANCE ON AESTHETIC VALUES

The legal theory most often used to justify reliance on aesthetic values in the law uses an expanded sense of "public welfare," the traditional justification for exercise of the police power of the state.[12]

In Berman v. Parker, the U.S. Supreme Court urged, "The concept of the public welfare is broad and inclusive."[13] In Bohannan v. City of San Diego,[14] upholding an historic preservation ordinance, the court reasoned that "the police power extends to measures designed to promote the public convenience and the general prosperity," and that the ordinance served purposes well within the concept of general welfare, although aesthetics alone would have been insufficient to justify the ordinance.[15] The court in Civello v. New Orleans said that "general welfare" includes "aesthetic considerations," as "The beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents, and it sustains in a general way the value of property in the neighborhood."[16] In Barrett v. State,[17] a New York court in 1917 upheld regulations protecting the eagle, reasoning that "The police power is not to be limited to guarding merely the physical or material interests of the citizen. His moral, intellectual, and spiritual needs may also be considered. The eagle is preserved, not for its use, but for its beauty."[18] The Supreme Court of New Hampshire has also held, in upholding an historic preservation ordinance, that aesthetic considerations are included in the general welfare: "The beauty of a residential neighborhood is for the comfort and happiness of the residents and it tends to sustain the value of property in the neighborhood."[19] Similarly, in New Orleans v. Levy, the regulation of signs in the historic district was considered to be "for the public welfare."[20] This expanded sense of "public welfare" has been challenged, however, as in Dowsey v.Kensington,[21] a 1931 New York decision: "'Public welfare' is a concept which in recent years has been widened to include

many matters which in other times were regarded as outside the limits of governmental concern. As yet, at least, no judicial definition has been formulated which is wide enough to include purely aesthetic considerations."[22]

Despite legal statements that aesthetic values are non-utilitarian, justification of the exercise of the police power in the interest of the public welfare clearly is utilitarian, as aesthetic value generally, as well as particular aesthetic standards, are held to be functions of some resulting benefit to a community, such as improved property values or improved emotional health.[23] This sense of utility as material usefulness is still quite different from the philosophical utilitarian theory that aesthetic value is a function of the aesthetic experience which an object can produce. Courts have not explored, let alone accepted, the possibility that aesthetic considerations could be of value in themselves, independently of any material benefit to the public. Nor have they recognized that aesthetic value understood in the sense of benefit to the public welfare is a utilitarian rationale, even though still difficult to measure in dollars and cents. Increased acceptance by the courts of aesthetic values may depend on recognition of these utilitarian values.

A legal theory less frequently used to justify reliance on aesthetic factors is extension of the traditional common law tort of nuisance to include visual nuisances. In Civello v. New Orleans, the court said: "Why should not the police power avail, as well to suppress or prevent a nuisance committed by offending the sense of sight, as to suppress or prevent a nuisance committed by offending the sense of hearing, or the olfactory nerves?"[24] Similarly, in Perlmutter v. Greene,[25] a New York court held that the state was justified in regulating large display signs on highways "to shield the travelers on the highway from obnoxious sights of public nuisances or quasi nuisances. . . ."[26] In People v. Stover,[27] a recent New York decision upholding a prohibition of clotheslines in the front yards of residential neighborhoods, the court reasoned that "conduct which is similarly offensive to the senses of hearing and smell may be a valid subject of regulation under the police power, and we perceive no basis for a different result merely because the sense of sight is involved."[28] In Hav-A-Tampa Cigar Co. v. Johnson,[29] upholding regulation of billboards, a Florida court agreed: "Relief of the eye from irritating color, movement and motif should be as justified before the law as removing disagreeable odors from the nose or disagreeable noises from the ear."[30] Nuisance theory is available only for extreme cases of ugliness, such as billboards. It is thus of limited value in historic preservation, where the purpose of regulation is not removal of the ugly, but preservation of the beautiful, although nuisance theory would seem appropriate for prohibitions on the construction of eyesores in historic districts.

People have a common law right not to have ugliness intrude on their environment, but the law has not recognized any affirmative right to beauty in that environment. Requirements for positive aesthetic value (as in the preservation of historic buildings) do not derive from any common law or constitutional right, but only from statutes reflecting legislative decisions to require such value in certain situations. This dichotomy between negative and positive value is questionable if aesthetic values comprise a continuum from positive to negative. If people have a right to an increase in aesthetic value from negative to less negative, then there should also be a right to an increase from negative to positive or from less positive to more positive. It might be that the law assumes that, although there is general agreement on what constitutes extremely negative value, there is no such agreement on positive value, thus justifying rights only with respect to the former. This assumption is questionable, at best.

The legal reliance on aesthetic values might be less tentative if the law recognized that aesthetic values as understood by the law are in fact utilitarian,

or if it were recognized that the common law right not to be subjected to nuisances could logically extend to a right to positive aesthetic values in one's environment. The law would benefit from a more comprehensive sense of "aesthetic value" than mere ugliness and beauty. Clarification of the range of aesthetic values and their relationships would facilitate more systematic, consistent, and appropriate legal action.

THE RELATIVE IMPORTANCE OF AESTHETIC VALUES

Aesthetic values are rarely considered sufficient or necessary to justify the exercise of the police power for any purpose, but they are now generally considered to provide supplementary justification to the legal regulation of historic preservation, billboards, and zoning.

More conservative court decisions hold that, if such factors as public health and safety are sufficient to justify an exercise of the police power, then aesthetic factors add additional weight. In City of Shreveport v. Brook,[31] the Supreme Court of Louisiana upheld an ordinance requiring the fencing of auto junk yards on safety grounds, emphasizing that aesthetic considerations were secondary and incidental,[32] although not completely irrelevant. In the Opinion of the Justices to the Senate,[33] the Massachusetts Supreme Court in 1955 noted approvingly that many court decisions in that state had held "that aesthetic considerations alone are not enough, but that they may be taken into account, if the primary objects of the regulation are sufficient to justify it."[34] The court also noted that apparently "more weight might now be given to aesthetic considerations than was given to them a half century ago."[35]

A more liberal view, expressed in several decisions, is that aesthetic considerations are among several types of factors which jointly can justify zoning and other regulation. In City of New Orleans v. Levy,[36] the court said that aesthetics was one of several factors, including commercial value, in its decision upholding an ordinance limiting signs in the historic district.[37] In upholding historic preservation ordinances in Deering, the New Hampshire Supreme Court said that aesthetic factors were among several valuable considerations justifying the ordinances.[38] In Simpson v. Los Angeles,[39] a city ordinance closing a picturesque Mexican street was held beyond the scope of the police power, but the court strongly hinted that if public health and safety factors were shown in addition to (but not instead of) aesthetic considerations, the ordinance would have been upheld.[40]

Only one reported decision has held that aesthetic factors alone are sufficient to justify an exercise of the police power. In Merritt v. Peters, the court considered the general attractiveness of the area sufficient reason to uphold a zoning ordinance, even though "the factors of health, safety and morals are not involved."[41] Some scholars think this view may become more prevalent.[42]

The central philosophical issue raised by these decisions is the extent to which governmental interference in private property rights is justified or required to protect aesthetic interests -- not at all, or only when public health and safety are involved, or only when the aesthetic interest is substantial enough to reasonably outweigh the undesireability of government interference? In turn, this issue depends on the extent to which aesthetic value is recognized as one factor in the public welfare.

AESTHETIC STANDARDS

In most historic zoning schemes, a local board of architects, city planners, and residents sets aesthetic standards, consistent with very general guidance from state and local governments.[43] Standards seem to be set by majority rule,[44] but legal writers do not seem to have considered whether the appropriate majority is of interested persons in the community who make their views known, "cultured" elements of the community, art experts, and so forth. Apparently, no legislature has believed that aesthetic standards should be established by experts in the way that engineering standards are set. No legislation or court decision even acknowledges the possibility of objective aesthetic standards, independently of majority opinion, and some legal scholars seem to assume that objectivity is not possible.[45] Virtually none of the existing local commissions provides for membership by a local architectural or art critic, art historian, or philosopher of art, although such persons might help immeasureably in reducing the uneasiness over what some consider as inherently "subjective" matters.

If an exercise of the police power of the state requires majority decision,[46] must aesthetic considerations be treated as "mere taste"? Governmental agencies in related areas, most notably state and Federal agencies in the arts and humanities, make decisions according to objective standards of artistic and scholarly excellence, as determined by panels of experts in each field. These decisions primarily involve the awarding of discretionary grant funds to private citizens, while historic preservation laws involve overt restrictions on the use of private property, thus reaching constitutional rights. Even so, historic preservation law could benefit from the experience of related governmental cultural agencies in the use of panels of experts to identify and apply objective standards, and the justifiability of the use of such objective standards (as opposed to majority rule) by a governmental body. Even if the majority must decide whether a government should regulate aesthetic standards, the specific standards need not be determined by majority rule. The law seems yet to be shown or convinced that an objective basis for aesthetic standards is even possible.

A special issue unexamined in historic preservation law is the relationship of aesthetic and historic standards. The assumption that "old is good" seems implicit in most decisions, making persons who merely lived at a certain period of time the standard setters. Are all old buildings prima facie beautiful? Are beautiful buildings worth preserving before they get old? Is an historic building with little aesthetic value more valuable than a beautiful building with little historic worth? Are aesthetic considerations included in historic preservation statutes merely to provide additional rationale for preserving buildings of questionable historical value? Does the inclusion of aesthetic factors confirm the suspicion that the real governmental interest in historic preservation is not history but property values? Historic and aesthetic values seem to have been lumped together in the law as vaguely "cultural" assets.

CONCLUSION

"Aesthetics" has become a fashionable buzzword in historic preservation statutes and ordinances, with little exploration of the concept and its applications, and little awareness by aestheticians of the work to be done.

NOTES

[1]For an early, thoughtful analysis by a legal scholar, see Chandler, The Attitude of the Law Toward Beauty, 8 ABA J. 470 (1922).

Richard Wolfson, over 30 years ago, identified four areas of mutual interest in aesthetics and the law: "1--Artistic and Literary creations which employ illustrations from the Law; 2--Literary Creation within the law; 3--Decisions involving aesthetic judgments on the part of triers; 4--The general nature of the legal system." Aesthetics and the Law, 33 KY. L. REV. 33, 36 (1944). Only the third (found in legal areas of obscenity, copyright, and zoning legislation, id. at 39) seems directly and uniquely of interest to contemporary analytic aestheticians.

Karl Llewellyn wrote eloquently about "The Beautiful in Law," but his concept of aesthetics extended only to form and style of legal writing. On the Good, the True, the Beautiful in the Law, 9 U.CHI.L.REV. 224, 224-50 (1942).

[2]"the word /aesthetics/ opens a Pandora's box of ill-defined, if not essentially undefinable concepts. . . ." Goldstone, Aesthetics in Historic Districts, 36 LAW & CONTEMPORARY PROBLEMS 379, 379 (Summer, 1971).

[3]Rodda, The Accomplishments of Aesthetic Purposes under the Police Power, 27 SO.CAL.L.REV. 149, 151 (1954).

[4]154 La. 271, 97 So. 440 (1924). As discussions of "aesthetics" in historic preservation decisions rely heavily on earlier zoning and billboard cases, those authorities are included here for discussion.

[5]Id. at 444.

[6]65 So.2d 861 (Fla. 1953).

[7]Id. at 864.

[8]People v. Wolf, 127 Misc. 382, 216 N.Y.S. 741, 744 (1926) (rule against advertising signs reversed); Civello v. New Orleans, 154 La. 271, 97 So. at 444.

[9]348 U.S. 26 (1954).

[10]Id. at 33.

[11]516 F.2d 1051, 1062 (5th Cir., 1975). reh. den. Cf. Santa Fe v. Gamble-Skagmo, 73 N.M. 410, 389 P.2d 13, 18 (1964); Modjeska Sign Studios v. Berle, 9 ERC 1765, 1767 (N.Y. App. Div. 1977) (prohibition of advertising signs in Catskills and Adirondacks); Hav-A-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 167, 5 So. 2d 433, 440 (1942) (regulation of billboards upheld).

[12]See Wolf, The Landmark Problem in New York, 22 INTRAMURAL LAW REVIEW OF NYU 99, 100-01 (1966-67); Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 LAW & CONTEMPORARY PROBLEMS 218, 218-19 (1955).

[13] 348 U.S. at 33.

[14] 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973).

[15] Id. at 336-37.

[16] 97 So. at 444.

[17] 220 N.Y. 423, 116 N.E. 99 (1917).

[18] Id. at 101.

[19] Town of Deering ex rel. Bittenbender v. Tibbetts, 105 N.H. 481, 202 A.2d 232, 234-35 (1964).

[20] 64 So.2d at 803.

[21] 257 N.Y. 221, 177 N.E. 427 (1931) (zoning ordinance overturned).

[22] Id. at 431.

[23] See, e.g., Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 LAW & CONTEMPORARY PROBLEMS 218, 230-31 (1955).

[24] 97 So. at 444.

[25] 259 N.Y. 327, 182 N.E.2d 5 (1932).

[26] Id. at 6.

[27] 12 N.Y. 2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272 (1963).

[28] 12 N.Y.2d at 276.

[29] 149 Fla. 148, 5 So.2d 433 (1942).

[30] 5 So.2d at 439-40.

[31] 230 La. 651, 89 So.2d 156 (1956).

[32] Id. at 158; accord, Cromwell v. Ferrier, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1967) (billboard regulation upheld, as aesthetic considerations related to economic and cultural setting); Dowsey v. Kensington, 257 N.Y. 221,

177 N.E. 427 (1931) (zoning prohibited as insufficient health, safety justification, although aesthetic factors present).

33 128 N.E.2d 557 (1955) (ruling that act regulating historic preservation in Nantucket would be constitutional).

34 Id. at 561.

35 Id.

36 223 La. 14, 64 So. 2d 798 (1953).

37 Id. at 802-03.

38 Town of Deering ex rel. Bittenbender v. Tibbetts, supra.

39 38 P.2d 174 (Cal. App. 1934).

40 Id. at 178-79.

41 65 So. 2d at 862.

42 See, e.g., Rodda, The Accomplishment of Aesthetic Purposes Under the Police Power, 27 SO.CAL.L.REV. 149, 179 (1954).

43 See, Goldstone, Aesthetics in Historic Districts, 36 LAW & CONTEMPORARY PROBLEMS 379, 384 (Summer, 1971).

44 "the ultimate objective of the community is to secure a use of land which promotes the most values for the most people. . . ." Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 LAW & CONTEMPORARY PROBLEMS 218, 224 (1955).

45 Decisions on individual cases are especially difficult because "they hinge primarily on so subjective a criterion as an aesthetic judgment." Goldstone, Aesthetics in Historic Districts, 36 LAW & CONTEMPORARY PROBLEMS 379, 380 (Summer, 1971).

"this definitional problem arises because beauty is a subjective element." Brock, Zoning for Aesthetics--A Problem of Definition, 32 U.CIN.L.REV. 367, 368; see also, 380 (1963).

J. J. Dukeminier does acknowledge that rationality is possible in making aesthetic evaluations, although absolute standards are not, but his argument is marred by a pervasive confusion of the psychology and the philosophy of art.

Zoning for Aesthetic Objectives: A Reappraisal, 20 LAW & CONTEMPORARY PROBLEMS 218, 228-29 (1955).

46

H. R. Chandler long ago assumed this: "public opinion when sufficiently crystallized and permanent, makes the law. It always has done so and it always will." The Attitude of the Law Toward Beauty, 8 ABA J. 470, 474 (1922).

A distinction should be made, however, between public opinion that aesthetics is a proper object of government regulation and public opinion concerning particular aesthetic standards.

American Society for Aesthetics News

"THEORY AND THE ARTS: TOWARDS A CREATIVE PARTNERSHIP"

38th Annual Meeting

Milwaukee, Wisconsin, 22-25 October 1980

Wednesday, October 22

8:00 p.m. Reception at Pabst Brewery Rathskeller

Thursday, October 23: Milwaukee Art Center
Conservation, Restoration, Reconstruction

9:00-10:30 a.m. Visual Arts

PETER VOGEL, Canadian Conversation Institute, "Techniques and Concepts of Inpainting"

ARETE B. SWARTZ, Royal Oak Foundation, "Historic Preservation: A Step Toward the Future"

10:45 a.m.-12:15 p.m. Performance Arts

PHILIP GOSSETT, University of Chicago, "What Does it Mean to 'Perform' the Critical Edition of an Opera?"

ROCHELLE ZIDE-BOOTH, Adelphi University, "Reconstructing Dance Through Notation and Making it Live"

1:45-3:30 p.m. Values, Yesterday, and Today

DAVID CARRIER, Carnegie-Mellon University, "On Restoring Artworks"

LUCIAN KRUKOWSKI, Washington University, "One Case Where the Artwork Ends Although the Object Endures"

JULIE VAN CAMP, National Endowment for the Humanities, "Aesthetics and the Law of Historic Preservation"

3:45-5:15 p.m. The Musical Work

PHILIP ALPERSON, University of Calgary, "The Temporality of Music"

RANDALL R. DIPERT, State University College of New York, Fredonia, "The Proper Place of Composers' Intentions in Performances of Music Works"

8:00 p.m. The Art of Time in New Music—Concert and Discussion

YEHUDA YANNAY, University of Wisconsin, Milwaukee, and Music from Almost Yesterday Ensemble

Additional Thursday events: Current exhibitions at the Milwaukee Art Center

Friday, October 24: Marquette University

9:00-10:30 a.m. Philosophy and Literature

MARK JOHNSON, Southern Illinois University, Carbondale, "Metaphor and the Creation of Similarity"

ROGER A. SHINER, University of Alberta, "Showing, Saying and Jumping: The Philosophy of Tom Stoppard"

10:45 a.m.-12:15 p.m. Joseph Margolis's Art and Philosophy: A Symposium

WILLIAM KENNICK, Amherst College; MARX WARTOFSKY, Boston University; JOSEPH MARGOLIS, Temple University

1:45-3:15 p.m. Conceptual Art

TIMOTHY BINKLEY, School of Visual Arts, "Conceptual Art: Appearance and Reality"

DON CELENDER, Macalester College, "Aspects of Conceptual Art"

4:00 p.m. Presidential Address: RUDOLF ARNHEIM. "Thoughts on Style"

5:00-7:00 p.m. Reception

Additional Friday Offering: Continuous program of audio/visual materials relating to the topics of the sessions

Saturday, October 25. Marquette University

9:00-9:30 a.m. Business Meeting

9:30-11:30 a.m. Popular Culture

PAUL BOUISSAC, University of Toronto. "The Semiotics of Circus"

DAVID BORDWELL and KRISTIN THOMPSON, University of Wisconsin, Madison. "Defining the Popular Cinema"

1:00-4:00 p.m. Architectural Tour of Milwaukee