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# ARCHITECTURAL EXPRESSION: POLICE POWER AND THE FIRST AMENDMENT

ANNETTE B. KOLIS\*

Until recently, states could not legitimately utilize their police power to regulate uses of land or structures for aesthetic purposes.<sup>1</sup> In this century, however, increased industrialization and population have compelled courts to broaden the concept of “general welfare”<sup>2</sup>

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1. See, e.g., *Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 297, 62 A. 267, 268 (Ct. Err. & App. 1905) (“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.”); *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 661, 148 N.E. 842, 844 (1925) (public necessity justifies the exercise of police power and for this reason mere aesthetic considerations are insufficient to justify the exercise of police power).

2. Police power may be exercised only for public, rather than for private purposes. See *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (“subject only to constitutional restraint the private right must yield to the public need”); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (zoning regulations “must find their justification in some aspect of the police power, asserted for the public welfare”); *Chicago B. & O. Ry. v. Drainage Comm’rs*, 200 U.S. 561, 592 (1906) (the validity of a police power ordinance depends upon whether it is “really designed to accomplish a legitimate public purpose”); *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 661, 148 N.E. 842, 844 (1925) (police power is based on public necessity). See also Sayre, *Aesthetics and Property Values, Does Zoning Promote Public Welfare?*, 35 A.B.A.J. 471, 472 (1949) (zoning that increases the total wealth of the community is legitimate, but zoning that promotes the advantage of the individual owner is not). See generally Comment, *Aesthetic Zoning, The Right to Travel, and Growth Restrictive Ordinances*, 61 IOWA L. REV. 602, 609 (1975) (if the police power is used to regulate that which affects the “general welfare,” focus must shift to defining that term).

One view asserts, however, that zoning is no longer based on public welfare. Rather, it is “a contest between competing *private* interests in real estate: the developer versus the protesting property owners or neighbors,” which frequently results in “outrageous municipal practices that discourage or prevent development.” Babcock

for which the police power may be invoked.<sup>3</sup> States may now take a more intrusive role in the private use and development of land.<sup>4</sup>

Municipal regulation of billboards, historical districts, and architectural design is frequently justified by primarily aesthetic purposes.<sup>5</sup> To a society whose interests in historical and natural resource

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& Feurer, *Land as a Commodity "Affected with a Public Interest,"* 52 WASH. L. REV. 289, 291, 300 (1977).

3. See generally *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) ("[w]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities."); *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 310 (Mo. 1970) ("In this time of burgeoning urban areas . . . it is certainly within keeping with the ultimate ideal of general welfare that the Architectural Board . . . preserve and protect existing areas in which structures of general conformity of architecture have been erected."); *Wulfsohn v. Burden*, 241 N.Y. 288, 299, 150 N.E. 120, 123 (1925) (changing economic conditions may make necessary or beneficial the right of public regulation).

4. See generally *Babcock & Feurer, Land as a Commodity "Affected with a Public Interest,"* 52 WASH. L. REV. 289, 299 (1977) ("The host of land use and environmental controls implemented and administered by all levels of government do affect the use to which particular land may be put and how that use may be carried out."); Parker, *Comprehensive Design Zones: Using Zoning to Protect the Environment*, ENVIRONMENTAL COMMENT, January 1977, at 20 (Maryland county's enactment of a "comprehensive design zone" designed to "follow and monitor the development process from initial zoning to actual construction" in order to accommodate public and private rights).

5. See *Department of Hwys. v. National Adv. Co.*, 356 So.2d 551, 567 (La. App. 1978) ("The fact that aesthetic values are promoted in conjunction with the furtherance of safety of travel on the public ways does not indicate an abuse of the police power."); *Donnelly & Sons, Inc. v. Outdoor Advertising Bd.*, 339 N.E.2d 709, 717 (Mass. 1975) (billboard regulation under the police power upheld if solely for aesthetic reasons); *Piscitelli v. Township Comm.*, 103 N.J. Super. 589, 597-98, 248 A.2d 274, 278 (Sup. Ct. Law Div. 1968) (ordinance designed to conserve property values while accounting for aesthetic considerations upheld); *People v. Stover*, 12 N.Y.2d 462, 467, 191 N.E.2d 272, 275, 240 N.Y.S.2d 734, 738 (1963), *appeal dismissed subnom.* *Storer v. New York*, 375 U.S. 42 (1963) (legislation promoting aesthetics is a valid exercise of police power); *Oregon City v. Hartke*, 240 Or. 35, 49, 400 P.2d 255, 262 (1965) (aesthetic considerations alone may warrant exercise of police power); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 271, 69 N.W.2d 217, 222 (1955), *cert. denied*, 350 U.S. 841 (1955) (zoning power legitimate even for purely aesthetic reasons). See also Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1440 (1973) [hereinafter cited as MICHIGAN Note] (14 jurisdictions have validated ordinances based solely on aesthetic considerations; 23 require a supplemental non-aesthetic purpose; 14 have not determined the status of aesthetic regulation); Note, *Aesthetic Zoning*, 11 URBAN L. ANN. 295, 299 (1976) (the majority rule today is that legislation to promote aesthetic considerations must be buttressed by a non-aesthetic purpose in order to be held valid). See generally U.S. DEP'T OF COMMERCE, NAT'L BUREAU OF STANDARDS, RESEARCH AND INNOVATION

preservation have been awakened in recent years,<sup>6</sup> billboard regulation and historical district preservation appear legitimate. By contrast, architectural design regulations, authorizing the architectural review of new structures for conformity<sup>7</sup> or similarity<sup>8</sup> in designated neighborhoods, are not based on such traditional societal values.<sup>9</sup> Yet design review ordinances are increasingly used by municipalities

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IN THE BUILDING REGULATORY PROCESS 137, 146 (1977) (42.4% of responding municipalities with populations over 25,000 who engage in architectural design regulate "beauty for beauty's sake").

6. Federal legislation reflects the public interest in promoting and maintaining the natural environment. For example, in 1968, the Federal-Aid Highways Act, 23 U.S.C. § 138, and in 1966, the Department of Transportation Act, 49 U.S.C. § 1653(P), were passed, both with the purpose of maintaining natural scenery surrounding our highways.

*See generally* Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 339 N.E.2d 709, 721 (Mass. 1975) (public interest in billboard regulation); Babcock & Feurer, *Land as a Commodity "Affected with a Public Interest,"* 52 WASH. L. REV. 289, 289 (1977) (public interest in allocating land uses); Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075, 1075 (1970) (public awareness of environmental quality).

Courts generally uphold historic zoning legislation. *See, e.g.*, M & N Enterprises, Inc. v. City of Springfield, 111 Ill. App. 2d 444, 250 N.E.2d 289 (Ill. App. 1969) (denial of rezoning in area near historical district); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964) (validity of ordinance requiring conformity with local historical architecture).

7. *See, e.g.*, State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 306 (Mo. 1970) (ordinance required that a proposed structure "conform to minimum architectural standards of appearance and conformity with surrounding structures"); Hankins v. Borough of Rockleigh, 55 N.J. Super. 132, 134, 150 A.2d 63, 64 (Super. Ct. App. Div. 1959) (ordinance required new dwellings to "be of early American, or of other architectural style conforming with the existing residential structure and with the rural surroundings in the Borough"); Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 68, 192 N.E.2d 74, 75 (Ct. App. 1963) (ordinance required that proposed structure "conform to the character of the homes in the area"); Board of Supervisors v. Rowe, 216 Va. 128, 145, 216 S.E.2d 199, 213 (1975) (ordinance insured that new structures were of "good taste, proper proportion, in general and reasonable harmony with the existing buildings in the surrounding area").

8. *See, e.g.*, Pacesetter Homes, Inc. v. Village of Olympia Fields, 104 Ill. App. 2d 218, 219, 244 N.E.2d 369, 370 (App. Ct. 1968) (ordinance prohibited "excessive similarity, dissimilarity or inappropriateness in exterior design"); D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 920 (2nd ed. 1971) (quoting the Lake Forest, Illinois, Architectural Control Ordinance which "governs both similarity and dissimilarity in design").

9. *See* U.S. DEP'T. OF COMMERCE, NAT'L BUREAU OF STANDARDS, RESEARCH AND INNOVATION IN THE BUILDING REGULATORY PROCESS 146 (1977). This study concludes that polled municipalities deem historical design review to be more effective than architectural design review of new structures. The article notes that one reason for this conclusion may be a perception on the part of municipal officials that

as supplemental "urban land-use guidance tool[s]."<sup>10</sup> These ordinances typically preclude the construction of residential or commercial buildings where an architectural review board determines that the proposed structure represents an unauthorized departure from either neighboring architectural style or local design standards. For example, under such an ordinance, a review board might prohibit construction of contemporary architecture in an Edwardian-style subdivision, or promote architectural conformity in buildings located in a city's business area.

Municipalities generally justify ordinances restricting architectural design by showing that the ordinances preserve market values<sup>11</sup> or maintain community character.<sup>12</sup> Such programs fail, however, to

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"historic-cultural goals . . . [are] on a sounder legal footing . . . [and also have greater] political support . . ." than "beauty" or "esthetic" goals. *Id.*

10. *Id.* at 138. Proponents of architectural design review ordinances claim that such regulations "enhance creative design and optimize the possibility of achieving public as well as private sector goals." *Id.*

11. *See, e.g., State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 306-07 (Mo. 1970) (proposed dwelling validly excluded by architectural board where home would adversely affect market values of surrounding property); *Piscitelli v. Township Comm.*, 103 N.J. Super. 589, 597-98, 248 A.2d 274, 278 (Sup. Ct. Law Div. 1968) (ordinance designed primarily to conserve property values may also encompass aesthetic considerations); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 68-69, 192 N.E.2d 74, 76 (Ct. App. 1963) (ordinance protecting property values by regulating architectural design upheld). *But see Pacesetter Homes, Inc. v. Village of Olympia Fields*, 104 Ill. App. 2d 218, 220, 244 N.E.2d 369, 370 (1968) (ordinance prohibiting structures which would adversely affect the value of surrounding property held unconstitutional for lack of adequate standards); *Board of Supervisors v. Rowe*, 216 Va. 128, 145-46, 216 S.E.2d 199, 212-213 (1975) (county regulation of architectural design to protect property values held not authorized by enabling statutes). *See generally Anderson, Architectural Controls*, 12 SYRACUSE L. REV. 26, 44 (1960) [hereinafter cited as Anderson] (an ordinance with the stated purpose of protecting property values through architectural control will provide "a hedge against judicial disapproval"); *Johnson, Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199 (1955) ("Governmental regulation of economic activity and programs for economic and social betterment" are likely to withstand Constitutional challenge); *Michelman, Toward a Practical Standard for Aesthetic Regulation*, 15 PRAC. LAW. 36, 42 (1969) [hereinafter cited as Michelman] (author suggests that controls based on the close association of aesthetics and economics are more open to objective judicial examination than are controls based on purely aesthetic grounds); *Steinbach, Aesthetic Zoning: Property Values and the Judicial Decisional Process*, 35 MO. L. REV. 176, 183 (1970) (judicial trend upholding zoning ordinances which closely associate aesthetics and property value); *Comment, Zoning Ordinance—Enhancement of Aesthetic Values Alone Not Sufficient Basis for Exercise of Police Power in Florida*, 4 FLA. ST. U. L. REV. 163, 168 (1976). *See also note 9 supra.*

12. *See note 7 supra.*

recognize that architecture is art,<sup>13</sup> a form of self or symbolic expression.<sup>14</sup> Artistic expression does not easily lend itself to police power restrictions.<sup>15</sup>

This Note will consider the constitutional validity of legislative regulation of architectural design when challenged by an as yet judicially unexplored First Amendment right to freedom of architectural expression.<sup>16</sup> Aesthetic regulation will be examined in light of recent

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13. See generally Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 557 (1940) ("When an artist creates, be he an author, a painter, a sculptor, an architect, or musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use.").

14. See Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN. L. REV. 179, 181 (1975) [hereinafter cited as STANFORD Note] (architecture is "art, self-expression, and symbolic expression").

15. See generally *People v. Stever*, 12 N.Y.2d 462, 471-72, 240 N.Y.S.2d 734, 741-42, 191 N.E.2d 272, 277-78, *appeal dismissed*, 375 U.S. 42 (1963) (Van Voorhis, J., dissenting) (zoning "is too rapidly becoming a legalized device to prevent property owners from doing whatever their neighbors dislike"); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 76-77, 192 N.E.2d 74, 81 (1963) (Corrigan, J., dissenting) (choice of architectural design should not be forced to succumb to "the official municipal juggernaut of conformity . . . because of the apparent belief in [the] community of the group as a source of creativity"); Mandelker, *Stoyanoff: Back to the Barricades!*, 22 ZONING DIGEST 288a, 288b (1971) (In discussing the court's opinion in *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970), the author asserts: "The court seems to accept an allegation in the case that the Stoyanoff residence was 'grotesque,' but some would argue that it was the surrounding area that was grotesque, and not the Stoyanoff's proposed home." The author further notes that the excluded home's design appeared in the May, 1968 issue of *Progressive Architecture*. *Id.* at 288b-288c n.4); Williams, *Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 5 (1977) [hereinafter cited as Williams] (the author argues that architecture is "expressive conduct" protected by the First Amendment; consequently governmental and individual interests should be reassessed in regulations which seek to control architectural design); Note, *Aesthetic Zoning*, 11 URBAN L. ANN. 295, 295-97 (1976) (opponents of aesthetic zoning assert that since standards of beauty defy formulation, aesthetic regulations involve discriminatory use; proponents argue that without such regulation property values and scenic areas will be adversely affected); Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1442-48 (1973) (the author attempts to refute the arguments that aesthetics cannot or should not be reduced to objectively controllable standards); Babcock, *Billboards, Glass Houses, and the Law*, HARPER'S MAGAZINE, Apr. 1966, at 20, 24, 33 [hereinafter cited as Babcock] (the author deems the growth of architectural control inappropriate and undesirable, and draws a distinction between architectural control ordinances and legitimate ordinances which protect the natural environment).

16. For two excellent articles exploring this possible limitation on architectural control ordinances, see Williams, *supra* note 15, at 1 (the author considers and rejects

Supreme Court directives concerning free speech. This Note will suggest that while states may legitimately regulate architecture in the interests of safety and health, state interests in architectural conformity may be insufficient to justify abridgment of this artistic expression.

## I. ARCHITECTURAL EXPRESSION

The first question to be considered is whether architectural expression is protected by the First Amendment. While the First Amendment expressly protects "speech" from abridgment,<sup>17</sup> it has been interpreted to encompass certain conduct accompanying protected speech.<sup>18</sup> Artistic self-expressions which involve more than words have therefore been extended constitutional protection:

The actor on the stage or screen, the artist whose creation is in oil or clay or marble, the poet whose reading public may be practically nonexistent, the musician and his musical scores . . . these too are beneficiaries of freedom of expression.<sup>19</sup>

No cases have yet, however, considered the applicability of First

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privacy and autonomy claims as protection for architectural "expressive conduct" in favor of the potentially more forceful First Amendment claim); STANFORD Note *supra* note 14, at 179 (the author asserts that architectural controls stifle three types of constitutionally protected expression—self-expression, art and symbolic expression—and concludes that zoning ordinances which control aesthetic design of private residences are often constitutionally deficient).

17. U.S. CONST. amend. I: "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."

18. See generally *Procunier v. Martinez*, 416 U.S. 396, 410-11 (1973) ("In *United States v. O'Brien*, 391 U.S. 367 (1968) . . . [a]lthough O'Brien's activity involved "conduct" rather than pure "speech," the Court did not define away the First Amendment concern, and neither did it rule that the presence of communicative intent necessarily rendered O'Brien's actions immune to governmental regulation."); Note, *Symbolic Speech*, 9 IND. L. REV. 1009, 1011, 1014 (1976) (courts have expanded the scope of the First Amendment in the area of symbolic speech, but in most post-O'Brien cases have required only a showing of a "rational basis for state action which infringes on symbolic speech"). Because architecture involves three areas of protected speech, see note 14 *supra*, it should not be scrutinized under an intermediate level of review. See STANFORD Note, *supra* note 18, at 186 n.34, 187 (in order "[t]o avoid the arbitrariness that results from labeling an activity as speech or conduct, which thereby determines the degree of state justification required to uphold the regulation, all symbolic speech deserves the same degree of protection as that accorded to so-called pure speech . . . [which is] the strictest level of scrutiny the Court applies whenever the State would infringe upon a fundamental right").

19. *Poe v. Ullman*, 367 U.S. 497, 514 (1961) (Douglas, J., dissenting).

Amendment protections to architecture,<sup>20</sup> although architecture has throughout history been recognized as an important art form:

An architect—or the builder of a house working through an architect—uses brick as a painter uses canvas or a writer uses words to express his notions of beauty and comfort, as well as many of his social values. . . . [A]t least the aesthetic features of residential architecture warrants constitutional protection like that accorded other forms of self-expression.<sup>21</sup>

The fact that architecture is also functional<sup>22</sup> and that it is generally an economic venture between architect and client should be irrelevant to the threshold constitutional inquiry.<sup>23</sup> By analogy, books,

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20. Two reasons may explain this void. First, American society generally places artists and their creations on a low echelon in the scale of important interests. See Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 554 (1940) ("In this country, scant recognition has been given overtly, aside from the copyright law, to the legal problems raised by artistic creativeness. Constant reference must be made to continental jurisprudence where the protection of the artist has been developed to a fine degree."); Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines*, 60 GEO. L.J. 1539, 1544-45 (1972) ("American courts, with their commercial orientation, have failed to develop a sensitivity for the needs of artists"). Second is the possibility that architects and their clients, in order to avoid potentially expensive litigation, simply conform to an area's architectural restrictions or build elsewhere. This fact may serve to invalidate ordinances which have an impermissible "chilling" effect on First Amendment freedoms. Cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (a state statute will be invalidated if it is "not readily subject to a narrowing construction by the state courts, . . . and its deterrent effect on legitimate expression is both real and substantial"). See also Williams, *supra* note 15, at 32.

21. STANFORD Note, *supra* note 14, at 185.

22. *Id.* at 182 n.11 ("the state interests arising from the functional elements of architecture are not relevant to the threshold inquiry, but to the balancing of the individual against the state interests"). See also Williams, *supra* note 15, at 24 n.81. ("Conflicting values play a role in the process of first amendment analysis but not in the threshold issue of identifying the expressive character of the conduct regulated.")

23. See *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) ("[S]peech does not lose its First Amendment protection because money is spent to project it . . . even [if] it is carried in a form that is 'sold' for profit").

The recent Supreme Court extension of First Amendment protection to commercial speech "rest[s] on an analysis which balance[s] the listeners' and society's interests in commercial speech against the state's justifications for regulation." *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 199-200 (1977). The application of the commercial speech doctrine to architectural design control was considered in STANFORD



often written for the sole purpose of commercial profitability, are nevertheless accorded a high degree of constitutional protection.<sup>24</sup> A theater owner does not lose his First Amendment protection even though his primary motive for displaying a film may be economic, rather than creative.<sup>25</sup>

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Note, *supra* note 14, at 179, although the article was written before the Supreme Court explicitly extended constitutional protection to some commercial speech in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Thus, the article's depiction of the "arguably inferior status" of commercial speech, STANFORD Note, *supra* note 14, at 181 n.10, may take on new dimensions. Presumably, the *Virginia State Bd.* test will apply to determine whether commercial architecture deserves constitutional protection. The public's interest in commercial architecture will thus be a relevant factor, and although "not all commercial messages contain the same or even a very great public interest element[,] [t]here are few to which such an element . . . could not be added." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976).

In addition, the requirements announced in *Linmark Associates, Inc. v. Township of Willingboro*, 97 S. Ct. 1614 (1977), may apply to the inquiry concerning constitutional protection for commercial speech. Also, limits on the protection to be afforded to commercial architecture possibly exist under the principles announced in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). In *Young*, the Court stated: "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Id.* at 62. A distinction can, however, be drawn between the "material" regulated in *Young* and regulation of architectural design. The ordinances involved in *Young* sought to restrict the *location* of "theaters which exhibit sexually explicit 'adult' movies." *Id.* at 52. Architectural design is arguably a "commercial exploitation of material" in which the state may not have such a strong interest in restricting for the purpose of preserving "the quality of urban life." *Id.* at 71.

24. See generally STANFORD Note, *supra* note 14, at 182-83. The author discusses Supreme Court consideration of written works and application of the obscenity doctrine and concludes that protection of artistic expression in the form of architecture may depend on the design's "seriousness" or its ability to convey ideas. *Id.* at 183 n.17. Because architectural expression does not encompass obscenity normally excluded from First Amendment protection, it is not clear whether these tests should have any force in justifying restrictions on architectural expression.

25. See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (owners of adult movie theaters challenged a zoning ordinance requiring dispersal of such theaters); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (owners of drive-in movie theaters challenged an ordinance prohibiting movies containing nudity where movie screens were visible from public places). See generally STANFORD Note, *supra* note 14, at 181 n.10. The author argues that protecting the right of expression may restrict the range of parties with standing and concludes that developers of tract housing and commercial builders will be excluded. The author further notes that architects may also be excluded unless the design is for their own structure. It is, however, arguable that all architects should be protected under the First Amendment even where their work reflects the clients' desires. An analogy may be made to the protection afforded a book: the First Amendment will protect the author's freedom of ex-

Similarly, a future homeowner who hires an architect should not be prohibited from challenging governmental infringement of free expression. It is the artistic expression itself which is protected.<sup>26</sup> The functional utility, the commercial nature of the transaction, or the combined commercial interests of two or more people in that expression should not impair the conclusion that architecture, as artistic expression, deserves protection under the First Amendment.

## II. BALANCING THE INTERESTS IN ARCHITECTURAL DESIGN

Under the police power, states enact zoning enabling acts for the "public welfare"<sup>27</sup> which in turn authorize municipalities to pass architectural design review ordinances.<sup>28</sup> The typical design review ordinance establishes a review board which is authorized to review the design of new structures. Standards in design review ordinances may be specific<sup>29</sup> or may simply limit the extent to which a proposed structure can depart from existing design in the proposed neighborhood.<sup>30</sup> If the structure does not conform to the review board's inter-

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pression whether the book is written for the author's own benefit or commissioned for the benefit of another individual.

26. *Cf.* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists . . . the protection afforded is to the communication, to its source, and to its recipients"). *See generally* Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring) ("freedom of speech means the right to communicate, whatever the physical means for doing so").

27. *See generally* Berman v. Parker, 348 U.S. 26, 33 (1954) (The public welfare values that which is "spiritual as well as physical, aesthetic as well as monetary."); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (all zoning regulations "must find their justification in some aspect of the police power, asserted for the public welfare"); Chicago B. & O. Ry. Co. v. State *ex rel.* Drainage Comm'rs, 200 U.S. 561, 592 (1906) ("the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety"); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 267, 69 N.W.2d 217, 220 (1954), *cert. denied*, 350 U.S. 841 (1955) (regulations which seek to promote public convenience or general prosperity are within the police power of the state).

28. STANFORD Note, *supra* note 14, at 180.

29. Specific design requirements are especially prevalent in the historical zoning context. *See, e.g.*, City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964). *See also*, D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 920 (2nd ed. 1971) (quoting the Lake Forest, Illinois, Architectural Control Ordinance which "governs both similarity and dissimilarity in design").

30. *See* notes 7 & 8 *supra*. *Cf.* South of Second Assoc. v. Georgetown, 580 P.2d 807, 810-11 (Colo. 1978) (unclear delineation of historic preservation areas held void for vagueness because "a property owner cannot reasonably ascertain which architec-

pretation of the ordinance and the developer refuses to modify the design, the structure cannot be built on the proposed site. Design review will often, therefore, impose substantial limitations on architectural expression.

It must be conceded that the right to freedom of expression is not absolute.<sup>31</sup> A municipality may be justified in restricting architectural expression depending on the public interest to be furthered by the regulation,<sup>32</sup> and the degree of protection architectural expression may eventually be accorded by the courts.<sup>33</sup>

### A. *Governmental Interests in Regulating Design*

Although early decisions restricted the employment of police power to "necessary" regulation,<sup>34</sup> the scope of this power has been expanded to include regulations for the "general welfare" or "general

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tural designs would entitle him to a certificate of appropriateness"); *Morristown Rd. Assocs. v. Mayor of Bernardville*, 163 N.J. Super. 58, 394 A.2d 157 (1978) (design review ordinance held void as vague and indefinite).

31. See *Elrod v. Burns*, 427 U.S. 347, 360 (1976) ("[t]he prohibition on encroachment of First Amendment protections is not an absolute"); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973) ("Where communication of ideas, protected by the First Amendment, is not involved, or the particular privacy of the home . . . or any of the other 'areas or zones' of constitutionally protected privacy, the mere fact that, as a consequence, some human 'utterances' or 'thoughts' may be incidentally affected does not bar the state from acting to protect legitimate state interests."); *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949) ("even the fundamental rights of the Bill of Rights are not absolute").

32. See generally *Williams*, *supra* note 15, at 24-28; STANFORD Note, *supra* note 14, at 190, 196.

33. See generally *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) ("The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems"); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974) ("the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question."); *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (every medium of communication "is a law unto itself"); Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 25, 40 (1951) (invalidation of a statute must rest on the fact that other interests have been valued too much in comparison to the right of free expression); Note, *Freedom of Expression in the Land Use Planning Context: Preserving the Barrier of Presumptive Validity*, 28 U. FLA. L. REV. 954, 956 (1976) [hereinafter cited as FLORIDA Note]; Comment, *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81, 107 (1964).

34. See note 1 *supra*.

prosperity.”<sup>35</sup> Clearly within the scope of the general welfare are design review ordinances which regulate the safety of the design or materials of a new structure.<sup>36</sup> At the opposite end of the spectrum of police power regulations are ordinances based primarily or solely on aesthetic interests.<sup>37</sup> The intermediate, more moderate, ordinance purports to justify design restrictions for the purpose of protecting and preserving property values within a community or neighborhood.<sup>38</sup>

To date, the local interest in regulating architectural design has been challenged only by claims of due process. Against such claims courts have upheld the validity of design review ordinances<sup>39</sup> using a

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35. See note 28 *supra*.

36. Building safety and health codes are based on these state interests and are generally upheld, presumably because the state interest is great in protecting its citizens. There are relatively objective standards available to delineate what is necessary to protect health and safety. D. MANDELKER, *MANAGING IN OUR URBAN ENVIRONMENT* 741-43 (2d ed. 1971); 13 AM. JUR. 2D Buildings 52 (1964). See also note 28 *supra*.

37. Courts which uphold such regulation often cite *Berman v. Parker*, 348 U.S. 26 (1954), where the Supreme Court stated that the concept of “public welfare” includes “aesthetic as well as monetary” considerations. *Id.* at 33. See, e.g. *Donnelly & Sons, Inc. v. Outdoor Advertising Bd.*, 339 N.E.2d 709, 717 (Mass. 1975) (relies on *Berman’s* expansion of “public welfare” to conclude that “aesthetics alone may justify the exercise of police power”); *People v. Stover*, 12 N.Y.2d 462, 467, 240 N.Y.S.2d 734, 738, 191 N.E.2d 272, 275 (1963) (relies on *Berman* to sustain an ordinance and posits aesthetics as a valid subject of legislative concern); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 271, 69 N.W.2d 217, 222, cert. denied, 350 U.S. 841 (1955) (after *Berman*, the zoning power may probably be exercised for purely aesthetic reasons). See generally Anderson, *Architectural Controls*, 12 SYRACUSE L. REV. 26, 29 (1960); Note, *Aesthetic Zoning*, 11 URBAN L. ANN. 295, 302 (1976).

Because *Berman* primarily dealt with an eminent domain proceeding rather than with the validity of a zoning ordinance, 348 U.S. at 27, not all courts are willing to use *Berman* to uphold an exercise of the police power for purely aesthetic considerations. See Comment, *On the Threshold of a Taking: Limits on Municipal Exclusion of Billboards*, 48 U. COLO. L. REV. 123, 128 (1976) (“Despite the pronouncement of *Berman*, police power restrictions for the sake of aesthetics alone have usually been rejected by the courts.”). But see Williams, *supra* note 15, at 2, 4 (Courts use the *Berman* rationale to uphold most aesthetic regulation).

38. See, e.g., *Marrs v. City of Oxford*, 24 F.2d 541, 548 (D. Kan. 1928) (The stabilization of property values “is probably the most cogent reason back of zoning ordinances.”); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 267, 69 N.W.2d 217, 220 (1954), cert. denied, 350 U.S. 841 (1955) (police power justifies protecting property values).

39. See, e.g., *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970); *Piscitelli v. Township Comm.*, 103 N.J. Super. 589, 598-99, 248 A.2d 274, 279 (Sup. Ct. Law Div. 1968); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963); *Oregon City v. Hartke*, 240 Or. 35, 46-48, 400 P.2d 255, 261-62 (1965); *State*

presumption of constitutional validity and a policy of judicial deference to local legislative judgments.<sup>40</sup> An individual is usually accorded neither a right to build nor a right to build in a particular architectural style.<sup>41</sup>

*ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955).

40. For some cases decided under a presumption of constitutional validity against claims of due process deprivation, see generally *Nebbia v. New York*, 291 U.S. 502, 525 (1933) ("the guarantee of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 395 (1926) (if zoning legislation purposes are "fairly debatable" and not "clearly arbitrary and unreasonable," then "the legislative judgment must be allowed to control"); *Donnelly & Sons, Inc. v. Outdoor Advertising Bd.*, 339 N.E.2d 709, 716 (Mass. 1975) ("The by-law is presumed to be valid and, if reasonableness is fairly debatable, the judgment of the local legislative body must be sustained."); *Oregon City v. Hartke*, 240 Or. 35, 47, 400 P.2d 255, 261 (1961) (the policy of exercising greater judicial restraint in passing upon the validity of legislation which controls economic interests extended to legislation regulating aesthetics). *Contra*, *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 502 (1977) (housing ordinance which affects the "family" violates the due process clause); *Pacesetter Homes, Inc. v. Village of Olympia Fields*, 104 Ill. App. 2d 218, 220, 244 N.E.2d 369, 372-73 (1968) (ordinance delegating a committee power to deny a permit if the committee "believes" that the proposed construction "may" cause "harmful effects" held invalid). See also FLORIDA Note, *supra* note 32, at 955, 984 ("[t]he presumptive validity accorded zoning legislation has consistently prevailed over challenges based on property rights").

Traditional judicial deference to zoning regulations has been eroded in New Jersey by a court's requirement in *Southern Burlington County NAACP v. Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, 423 U.S. 808 (1975), that communities provide for their "fair share" of low-income regional housing needs. See, e.g., *Home Builders League of South Jersey, Inc., v. City of Berlin*, 157 N.J. Super. 586, 385 A.2d 295, 303 (1978). If other courts are willing to follow New Jersey's progressive stance, closer judicial scrutiny of municipal regulations can be expected, especially when the regulations exclude low- and moderate-income families from the regulating municipality. Design ordinances which have a similar effect may be invalidated under such a judicial analysis.

41. See Note, *Regulation of Land Use: From Magna Carta to a Just Formulation*, 23 UCLA L. REV. 904, 905, 918 (1976) (recent case law trend suggesting that land ownership no longer includes a right to develop). Cf. Michelman, *supra* note 11, at 41; *Toward a Practical Standard for Aesthetic Regulation*, 15 PRAC. LAW. 36, 41 (Feb. 1969) ("[A]ssume that what A does is to build a deck house in B's neighborhood, which so far is populated only by Tudor-style, Georgian-style, and New England Colonial-style homes. Can it really be said that by buying into such a neighborhood, B somehow staked out a claim not to be exposed to contemporary architecture?").

Procedural due process claims are similarly unsuccessful because adequate procedures in the review of architectural design are generally provided by municipalities. Ordinances usually establish an architectural review board to review applications and provide the future homeowner an opportunity to be heard. See, e.g., *Board of Super-*

Courts will generally not invalidate an architectural design review ordinance when the express purpose of the ordinance is the preservation and protection of property values.<sup>42</sup> When “aesthetics and economics can be assumed to coalesce,”<sup>43</sup> the regulation is often deemed a valid promotion of legitimate state interests.<sup>44</sup> Local legislatures need not conclusively prove the validity of their assumptions concerning the relationship between economics and aesthetics.<sup>45</sup> Whether a proposed structure will adversely affect property values<sup>46</sup> is generally irrelevant to the validity of a design review ordinance, if such an assumption is “reasonable” or “debatable.”<sup>47</sup> Consequently,

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visors v. Rowe, 216 S.E.2d 199 (Va. 1975). Where municipalities do not provide proper procedural safeguards, a claim of infringement of architectural expression may invalidate the ordinance as an impermissible prior restraint under the principles announced in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). The *Conrad* case, involving a community’s refusal to permit a theater to operate on the basis of the content of performances shown, might be distinguished from an architectural review case: architectural expression may be considered more intrusive due to its permanence than the performance of a play in a theater. Yet where architectural review boards work with vague standards, their “unbridled discretion” may be considered a “danger of censorship and of abridgment of our precious First Amendment freedoms . . . too great” to be justified. *Id.* at 553. See *Procunier v. Martinez*, 416 U.S. 396, 415 (1974) (impermissible prior restraint where “regulations fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship”). See also, *City of West Palm Beach v. State ex rel. Duffey*, 158 Fla. 863, 864, 30 So.2d 491, 492 (1947) (ordinance controlling architecture impermissibly vague); *Pacesetter Homes, Inc. v. Village of Olympia Fields*, 104 Ill. App. 2d 218, 226, 244 N.E.2d 369, 372 (1968) (improper delegation where standards in ordinance are too vague). See generally *Barnett, Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 543 (1977).

42. See note 11 *supra*.

43. *United Adv. Corp. v. Metuchen*, 43 N.J. 1, 5, 198 A.2d 447, 449 (1964) (“There are some areas in which aesthetics and economics coalesce. . . . [These] concepts of congruity [are] held so widely that they are inseparable from the enjoyment and hence the value of property”).

44. See note 11 *supra*.

45. See, e.g., *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74, 76, 78 (1968) (despite testimony by an architect that denial of a building permit was not based on the structure’s adverse effect on neighboring property values, the court upheld the refusal to issue a permit). See generally *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62 (1973) (*dicta* that “[t]he fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not sufficient reason to find that statute unconstitutional”).

46. See generally *Williams*, *supra* note 15, at 20 n.63; FLORIDA Note, *supra* note 14, at 191 n.64.

47. See note 40 *supra*. See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (“It is not our function to appraise the wisdom of [the city’s] deci-

whether these ordinances actually preserve property values and thereby promote the public welfare is a question generally not considered by the courts.<sup>48</sup>

Courts willing to uphold design ordinances based solely on aesthetic considerations<sup>49</sup> rely upon municipal justifications which often stretch the police power to an extreme. These courts implicitly assume that the standards are not impermissibly vague or incapable of objectivity.<sup>50</sup> Such decisions assume that aesthetically conforming

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sion. . . . [T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."); *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."); *Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1917) (the Court will interfere with local legislative authority which is "primarily the judge of public welfare" only when it is clear that legislation has "no real or substantial relation" to "the public health, safety, morals, or to the general welfare").

Judicial deference in the zoning context may be compared with the obscenity case of *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60-61 (1973), where the Court noted:

Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist.

*See generally* Note, *Aesthetic Zoning*, 11 URBAN L. ANN. 305-06 (1976) (judicial deference provides no basis for determining whether aesthetic regulations are reasonable or unreasonable).

48. STANFORD Note, *supra* note 14, at 191 n.64 ("courts have rarely explored the consequences of accepting the property value argument to justify architectural controls;" judicial refusal to scrutinize these justifications may result in unreasonable exclusions of classes of people or structures). *See* FLORIDA Note, *supra* note 32, at 967-68 (the presumption of constitutional validity accorded to zoning regulation allows courts "to clothe their decisions with generalities and to avoid complex issues" and courts "may be reluctant to cast aside presumptive validity to apply the close scrutiny required when a fundamental right is at issue" because of the difficulty of the task of inquiring into the policies and motives behind legislation).

Assumptions concerning property value may be legitimate in the zoning context because of the difficulty of proving detriment to property value. The uncertainty of economic impact was discussed in dicta in *Belle Terre v. Boraas*, 416 U.S. 1, 10 (1973): "in most zoning cases, the precise impact on value may, at the threshold of litigation over validity, not yet be known."

*See also* Williams, *supra* note 15, at 19-20.

49. *See* note 37 *supra*.

50. *See* Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218, 225-27 [hereinafter cited as Dukeminier] (1955) (although "beauty" cannot be precisely defined, courts are accustomed to dealing with elusive terms such as "wealth, property, malice"). *See generally* MICHIGAN Note, *supra* note 5, at 1442-47. *But see* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70 (1973) (Douglas, J., dissenting) ("Art and literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions."); *City of Youngstown v. Kahn Bros.*

architecture should be promoted for the general welfare of the community<sup>51</sup> or that dissimilar structures will constitute a type of "visual nuisance."<sup>52</sup> Many authorities urge, however, that architectural beauty cannot be defined and consequently should not be regulated by municipalities.<sup>53</sup> Although aesthetic interests in cultural and environmental preservation might justify historical zoning and billboard regulation,<sup>54</sup> an aesthetic justification for regulating architecture to preserve community character or architectural conformity arguably does not deserve the same deference.<sup>55</sup>

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Bldg. Co., 112 Ohio St. 654, 661, 148 N.E. 842, 844 (1925) ("city councils might 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 on property."); Norton, *Police Power, Planning and Aesthetics*, 7 SANTA CLARA LAW 171, 183 (1967) ("good taste and aesthetic sensitivity cannot be guaranteed either for city officials or for judges"); Comment, *Zoning Ordinance—Enhancement of Aesthetic Values Alone Not Sufficient Basis for Exercise of Police Power in Florida*, 4 FLA. ST. U. L. REV. 163, 168 n.29 (1976) (the major problem for boards of architectural review is the lack of definite and objective standards).

51. See note 37 *supra*.

52. See, e.g., *People v. Stover*, 12 N.Y.2d 462, 468, 240 N.Y.S.2d 734, 739, 191 N.E.2d 272, 276 (1963), *appeal dismissed*, 375 U.S. 42 (1963) (the court analogized nuisance theory, citing the test of "visual nuisance:" "conduct which is unnecessarily offensive to the usual sensibilities of the average person"). Cf. Babcock, *supra* note 15, at 23 (author calls the *Stover* test "a dreadful criterion for public regulation in a democratic society"). See generally Comment, *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81, 85, 91 (1964) (the author discusses judicial extension of protection traditionally afforded to aural and olfactory nuisances to offensive objects and concludes that the "range and complexity of aesthetic objectives" would make this extension particularly vulnerable to subjective determinations); Cromwell v. Ferrier, 19 N.Y.2d 263, 272, 279 N.Y.S.2d 22, 30, 225 N.E.2d 749, 755 (1967) ("[In zoning matters], [t]he eye is entitled to as much recognition as the other senses, but, of course, the offense to the eye must be substantial and be deemed to have material effect on the community or district pattern").

53. See notes 15 & 50 *supra*.

54. See generally Babcock, *supra* note 15, at 30 (the government should protect landmarks and "natural amenities"); MICHIGAN Note, *supra* note 11, at 1463 (the reduction of aesthetic natural resources calls for effective legal protection).

55. See generally Anderson, *supra* note 11, at 29 (the purpose of architectural controls is "to improve community appearance by preventing extremes of dissimilarity or monotony"); Babcock, *supra* note 15, at 24, 33 (growing architectural control is inappropriate and may be distinguished from desirable ordinances which protect the natural environment); Michelman, *supra* note 11, at 36, 37 ("The effect on market value . . . is derivative or symptomatic [of aesthetic considerations]"). See also note 9 *supra*; Steinbach, *Aesthetic Zoning: Property Values and the Judicial Decisional Process*, 35 MO. L. REV. 176 (1976) (the principal purpose of aesthetic zoning is "to enhance or preserve the appearance of the community by eliminating or reducing



### B. *The Constitutional Weight of Architectural Expression*

Although aesthetics and property value preservation may be deemed legitimate state interests properly furthered through police power regulation, no municipal ordinance can oppressively infringe on fundamental rights protected by the Constitution.<sup>56</sup> Legitimate state interests must still be weighed against fundamental individual interests.<sup>57</sup> Yet even if architectural expression is extended First Amendment protection by the courts, states still may restrict some architectural design, since protected speech may be constitutionally regulated under certain circumstances.<sup>58</sup> However, the state's burden

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dissimilarity, monotony, and incongruity in the physical appearance of structures in the neighborhood").

56. *See Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (city ordinance affecting the family); *Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974) (ordinance restricting occupation of dwellings violated no fundamental right guaranteed by the Constitution); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (judicial deference to zoning legislation will cease if the legislation infringes on constitutionally protected rights). *Cf. Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (state action may not invade "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control"); *Procunier v. Martinez*, 416 U.S. 396, 405 (1974) ("a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims"). *See also Moore v. City of East Cleveland*, 431 U.S. 494, 513-14 (1977) (Stevens, J., concurring) ("The holding in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, that a city could use its police power, not just to abate a specific use of property which proved offensive, but also to create and implement a comprehensive plan for the use of land in the community, vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad zoning power must be exercised within constitutional limits").

57. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (First Amendment interests must be weighed against the importance of countervailing state interests); *Elrod v. Burns*, 427 U.S. 347, 362-63 n.16 (1976) (First Amendment interests balanced against the governmental interest in regulation); *Donnelly & Sons, Inc. v. Outdoor Adv. Bd.*, 339 N.E.2d 709, 722 (Mass. 1975) (governmental interests outweighed First Amendment interests).

*See generally The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 205 (1977) (in noncommercial speech cases the Court requires "a compelling state interest . . . substantially furthered . . . by the least intrusive means possible;" in commercial speech cases the Court applies a balancing approach but places "a heavy burden on the state"). *See also Richardson, Freedom of Expression and the Function of the Courts*, 65 HARV. L. REV. 1, 47 (1951) ("It has not always been conceded . . . that the protection of property rights is any less fundamental to the preservation of liberty than freedom of speech and of the press").

58. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) ("time, place, or manner" restrictions on protected speech are presumptively more valid than restrictions based on content); *Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (infringement of First Amendment interests may be justified by a counter-

of proof would be reversed in a First Amendment challenge since there would no longer be a presumption of constitutional validity.<sup>59</sup> Consequently, the weight which may be accorded architectural expression will be relevant to the balance between state and individual interests.

Each medium of expression is governed by its own rules.<sup>60</sup> Architectural expression cannot be accorded the same protection afforded "pure speech"<sup>61</sup> since it necessarily involves some action apart from

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vailing state interest which is "sufficiently compelling"); *Elrod v. Burns*, 427 U.S. 347, 360 (1976) (although there is "a presumptive prohibition on infringement" on First Amendment interests, "[r]estraints are permitted for appropriate reasons"); *Buckley v. Valeo*, 424 U.S. 1, 18, 26 (1976) (if a regulation is not a "reasonable time, place, and manner" regulation, it may nevertheless be justified by a "constitutionally sufficient justification"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) ("A state or Municipality may protect individual privacy by enacting reasonable time, place and manner regulations applicable to all speech irrespective of content. . . . But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power"). *See also* Williams, *supra* note 15, at 33-34 (competing interests must be balanced, but in the architectural regulation context, the state's interest is the "risk" of "an unusually rich property owner, indifferent to the dissipation of his wealth, who happens to have what the community regards as monstrous taste . . . [and who builds] on such a scale that normal planting will not block the structure out," which the author deems a trivial risk).

59. *See generally* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUNDATION RESEARCH J. 521, 545 (1977) ("[E]ven if speech activities cannot pervasively be distinguished from many other claims of liberty on the ground of respect for the essence of the individual self, the fact remains that those aspects of liberty that involve speech receive the most explicit endorsement in the test of the Constitution and for that reason alone may properly be singled out for special judicial protection."); FLORIDA Note, *supra* note 32, at 983 ("Since strict scrutiny applies in the context of freedom of expression, the courts should be obliged to pierce the barrier of presumptive validity to examine and balance competing policies."); Comment, *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81, 106 (1964) ("[T]he presumption of constitutionality normally accorded legislative enactments is 'frankly reversed' when a statute is challenged as an abridgement of free speech").

60. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."); *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (every medium of communication "is a law unto itself"). There is disagreement as to the weight which must be accorded expression. *See, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) ("the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation").

61. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976); Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 225 (1976).

the expression. Because architectural expression combines artistic expression with functional utility,<sup>62</sup> it may not be perfectly analogous to other art forms<sup>63</sup> or to “symbolic speech.”<sup>64</sup> Yet it should not be sub-

62. *See generally* STANFORD Note, *supra* note 14, at 182 n.11, 183 n.17. The author suggests that whether a structure’s design will warrant First Amendment protection may depend on the design’s primary purpose. Thus a determination as to whether a design is primarily functional or aesthetic will aid a court in balancing architectural expression against the State’s interest in health, safety, and preservation of property values. Whether this distinction is necessary in a First Amendment analysis is questionable. As noted earlier in the text, books and other art forms may also be functional yet are not denied First Amendment protection.

63. The permanence of a large structure such as a house or office building may serve to distinguish architecture from other art forms, which are not permanently intrusive, such as books, paintings and sculpture. *See, e.g.*, *Running Fence Corp. v. Superior Court*, 51 Cal. App. 3d 400, 412, 124 Cal. Rptr. 339, 347 (1975) (the artist was permitted for a period of 14 days to display his “Running Fence,” “an 18-foot high heavy white nylon fabric fence hung from a steel cable strung between steel poles, generally 62 feet apart, for a distance of 24 miles”). *See also* Williams, *supra* note 15, at 24 (Although architecture “will normally raise a captive audience issue that rarely arises in connection with other forms of artistic expression,” this fact should not affect First Amendment protection.).

64. The Court considered governmental regulations in the context of symbolic speech in *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968). The Court stated “that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech elements can justify incidental limitations on First Amendment freedoms.” *Id.* at 376. The Court put forth a test to determine when governmental regulation is justified:

- 1) if it is within the constitutional power of the Government;
- 2) if it furthers an important or substantial governmental interest;
- 3) if the governmental interest is unrelated to the suppression of free expression; and
- 4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377.

The type of conduct sought to be regulated is relevant to the sufficiency of governmental interest in regulation. In *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976), the Court considered the government’s justification for restriction on political contributions and concluded: “We cannot share the view that the present Act’s contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O’Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card.” The Court struck the provision, holding it “beyond dispute that the interest in regulating the alleged ‘conduct’ . . . ‘arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful,’” and because the provision was not “a reasonable time, place and manner regulation.” *Id.* at 17-18.

The type of conduct embraced within the term “symbolic speech” thus appears to be conduct of a more transient nature than the erection of a building. *See, e.g.*, STAN-

ject to the stricter regulations imposed upon commercial speech<sup>65</sup> for it is expression more ideological than commercial.<sup>66</sup> An architect's interest in his design may be primarily economic; yet he still merits First Amendment protection.<sup>67</sup> However, the degree of First Amendment protection afforded to architectural expression may still depend upon "the nature of the forum and the conflicting interests involved"<sup>68</sup> and also the content of the communication.<sup>69</sup>

Consequently no concrete yardstick exists to measure the legal im-

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FORD Note, *supra* note 14, at 185 n.30 (symbolic expression principles applied in the school context in litigation over hair styles and length).

*See generally* *People v. Stover*, 12 N.Y.2d 462, 466, 191 N.E.2d 272, 276, 240 N.Y.S.2d 734, 739 (1963) (ordinance which prohibits clotheslines without permit imposes no "arbitrary or capricious standard of beauty or conformity," but merely proscribes certain offensive conduct); Note, *Symbolic Speech*, 9 IND. L. REV. 1009, 1011, 1014 (1976) (While courts have extended First Amendment protection to musical expression after *O'Brien*, most cases "have only required a showing of a rational basis for state action which infringes on symbolic speech.").

65. The content of commercial speech may determine whether or not the expression is protected under the First Amendment. *See* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-73 n.24 (1976).

66. *See* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 779-80 (1976) (Stewart, J., concurring) ("Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought. . . . Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of goods or services.").

If commercial expression is defined as that which "promot[es] . . . goods and services," *id.*, arguably architecture which has such a commercial effect might be subjected to the stricter regulations associated with commercial speech. However, even a building constructed with the intent of "promot[ing] . . . goods and services," such as a standard-designed fast-food restaurant, should not be considered so "commercial" as to preclude any First Amendment protection. *See also* note 23 *supra*.

67. *Cf.* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (an advertiser's commercial speech interest, although "purely economic," does not preclude First Amendment protection); *Buckley v. Valeo*, 424 U.S. 1, 16 (1976), ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment.")

68. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974).

69. *See* *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) ("Even within the area of protected speech, a difference in content may require a different governmental response."). *Cf.* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) ("If there is a kind of commercial speech that lacks all First Amendment protection . . . , it must be distinguished by its content."). *See also* *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) ("[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.").

portance of architectural expression.<sup>70</sup> Yet if architectural expression is extended First Amendment protection, traditional judicial deference to legislative judgments against due process attacks on design ordinances must give way.<sup>71</sup> A First Amendment claim will cast a locality's proffered justifications "in a different light"<sup>72</sup> than when attacked by due process claims.<sup>73</sup>

### III. THE CONSTITUTIONAL VALIDITY OF RESTRICTIONS ON PROTECTED SPEECH

#### A. *The First Amendment Standards of Review*

The Supreme Court employs a strict scrutiny approach in noncommercial speech cases. This test requires a state interest "sufficiently compelling,"<sup>74</sup> furthered by the least intrusive means possible,<sup>75</sup> where the means bear a "substantial relation"<sup>76</sup> to the compelling governmental interest.<sup>77</sup> Governmental restriction of noncommercial speech must be nondiscriminatory and justified by a state interest "unrelated to the suppression of expression."<sup>78</sup> In commercial speech

70. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 778 (1976) (Stewart, J., concurring) ("The scope of constitutional protection of communicative expression is not universally inelastic.").

71. See notes 47 & 59 *supra*.

72. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976).

73. See generally *Smith v. Goguen*, 415 U.S. 566, 594-95 (1974) (Rehnquist, J., dissenting) ("[S]tate and local governing bodies . . . often . . . prohibit erection of buildings . . . which might itself in an aesthetic sense involve substantial elements of 'expressive conduct'. . . . So long as the zoning laws do not, under the guise of neutrality, actually prohibit the expression of ideas because of their content, they have not been thought open to challenge under the First Amendment."); STANFORD Note, *supra* note 14, at 190 ("Whether the police power justifies control of architecture involving rights of expression deserves consideration unclouded by existing assumptions about governmental regulation of property.").

74. *Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

75. *Buckley v. Valeo*, 424 U.S. 1, 68 (1976); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976).

76. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

77. See *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 467 (1977) ("a compelling public need that cannot be met in a less restrictive way will override [First Amendment] interests."). See generally *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 205 (1977).

78. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

cases, the Court applies a balancing approach,<sup>79</sup> but by placing a heavy burden on the government to justify infringement, leans toward requiring a “sufficiently compelling” state interest.<sup>80</sup> In “symbolic speech” cases, the Court requires a “sufficiently important governmental interest in regulating the nonspeech elements” to justify “incidental limitations on First Amendment freedoms.”<sup>81</sup>

Under any of these tests, the validity of ordinances controlling architectural similarity, compatibility, or neighborhood character is questionable. Due to the heavy burden placed on government in the commercial speech balancing approach, the commercial-noncommercial distinction will not likely have a significant impact on First Amendment challenges to design control ordinances. A “sufficiently compelling” governmental interest should be required in either case. Even if courts deem the less strict “symbolic speech” test applicable, a “sufficiently important governmental interest” will be required to justify the regulation. In any interpretation of the weight to be accorded architectural expression, closer judicial scrutiny of the governmental justifications of design review ordinances will be necessary than heretofore required.

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79. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 789 (1976) (Rehnquist, J., dissenting). See also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (commercial speech warrants a “limited measure of protection, commensurate with its subordinate position in the scale of First Amendment value”).

80. See generally *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 205-06 (1977) (while the court “seem[s] to state merely a balancing test . . . in applying the test the Court places a heavy burden on the state”). See also *Suffolk Outdoor Adv. Co. v. Hulse*, 393 N.Y.S.2d 416, 422-23 (1977), upholding a ban of nonconforming billboards against a First Amendment claim. The court in *Suffolk* distinguished *Virginia State Bd.* because it involved a total ban of a content of speech and was not concerned with “aesthetics or other appropriate governmental concerns, such as public interest and safety.” *Id.* at 423. The court remanded the case to determine whether there was a reasonable relation between the regulation and governmental purpose. *Id.* at 425. But see *Baldwin v. Redwood City*, 540 F.2d 1360, 1367 (9th Cir. 1976), cert. denied, 431 U.S. 913 (1977), in which the court invalidated as unnecessarily restrictive an ordinance controlling the temporary display of political campaign signs. Unlike the court in *Suffolk*, the *Redwood City* court noted that signs “do not invade the home” and “can be avoided simply by not looking.” *Id.* at 1367. The city could “impose design restrictions that would bar the more unsightly posters, without impairing political expression.” *Id.* at 1370.

81. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). See note 64 *supra*.

### B. *Police Power and the First Amendment*

The Supreme Court has recently considered the constitutional validity of municipal regulations which infringe on First Amendment freedoms. In *Erznoznik v. City of Jacksonville*,<sup>82</sup> theater owners challenged the facial validity of an ordinance prohibiting films containing nudity from drive-in theater screens visible in public places.<sup>83</sup> In concluding that the burden falls upon the unwilling viewer to avert his eyes from the object which offends his sensibilities,<sup>84</sup> the Court held that the plaintiffs' First Amendment interests outweighed the government's justifications for regulation.<sup>85</sup> The Court found that the ordinance under consideration was, rather than a permissible "time, place and manner" restriction, an attempt to regulate "content"<sup>86</sup> and that

Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home . . . , or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.<sup>87</sup>

The Court found that the huge outdoor screen in question was not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it" and therefore censorship of content was not justified by the "limited privacy interest of persons on the public streets."<sup>88</sup>

Under *Erznoznik*, the case against architectural design controls would be relatively clear were it not for two qualifying footnotes in

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82. 422 U.S. 205 (1975).

83. *Id.* at 206.

84. *Id.* at 210-11. The Court stated:

Much that we encounter offends our esthetic, if not our political and moral sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. . . . [T]he burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'

85. *Id.* at 212.

86. *Id.* at 209. *See* *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."). *But see* *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 223 (1975) (Burger, J., dissenting) ("[I]t would be absurd to suggest that [the regulation of nudity on outdoor screens] operates to suppress expression of *ideas*." (Emphasis in original)). *See also* note 78 *supra*.

87. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975).

88. *Id.* at 212.

the opinion. The Court distinguished the rights of unwilling viewers which were not at issue from the rights of the theater owners which were under consideration,<sup>89</sup> further noting

We are not concerned in this case with a properly drawn zoning ordinance restricting the location of drive-in theaters or with a nondiscriminatory nuisance ordinance designed to protect the privacy of persons in their homes from the visual and audible intrusions of such theaters.<sup>90</sup>

Consequently as long as an ordinance does not restrict expression solely "because of its message, its ideas, its subject matter, or its content,"<sup>91</sup> a narrowly tailored ordinance protecting homeowners against offensive "visual intrusions"<sup>92</sup> will be valid after *Erznoznik*.

89. *Id.* at 211 n.7.

90. *Id.* at 212 n.9.

91. *Id.* at 215, quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Procunier v. Martinez*, 416 U.S. 396, 413 (1974); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975). See also Williams, *supra* note 15. The author states: "Even if the purpose underlying an aesthetic regulation can be established unequivocally—for example, protection of property values—it may not always be easy to determine whether that purpose should be classified as related or unrelated to expression." *Id.* at 25. Williams suggests that this determination will require the balancing of variables, among which are the following:

- 1) the extent to which a regulation seeks to protect those who may suffer actual harm independent of their own aesthetic preferences;
- 2) the extent to which a regulation is directed at specific messages rather than general modes and manners of expression; and
- 3) the extent to which a regulation, while restricting some expression, may actually enhance the value of other expression.

*Id.* at 25-27.

92. Whether the "captive audience" justification for state regulation of architectural expression will be viable is unclear. The principles announced in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), appear to have been somewhat eroded by the stricter requirements announced in *Erznoznik*. See generally Donnelly & Sons, Inc. v. Outdoor Adv. Bd., 339 N.E.2d 709, 721-22 (Mass. 1975) ("due to the intrusive quality of billboards, passers-by, whether willing or not, are compelled to see the advertisement"); *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN. L. REV. 179, 198 (1975) (the author suggests that the "captive audience" argument will not likely be made for architecture under recent Supreme Court decisions). But see EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 37 (1963) ("industrialization has fundamentally altered the former relationships between property holding and the achievement of individual rights. . . . Geographical escape has been cut off."). See also Williams, *supra* note 15, at 28-29 (in a First Amendment balancing process between "the scope of the burdens placed by the design on any 'captive audience' and by the regulation on the would-be builder," architectural review which excludes structures merely for nonconformity to the surrounding neighborhood "presents perhaps the weakest case for regulation.").



In *Young v. American Mini Theatres, Inc.*<sup>93</sup>, the Court denied a theater owner's First Amendment challenge against a zoning ordinance requiring locational dispersal of adult theaters.<sup>94</sup> Because there was no limit in the ordinance on the number of theaters which could be erected, the municipality could control the location of these theaters just as it could regulate the location of other commercial establishments.<sup>95</sup> *Erznoznik* is distinguishable to the extent it involved a total ban on a specified content of expression.<sup>96</sup>

The Court considered a total ban on a specified content of expression in a residential area in *Linmark Associates, Inc. v. Township of Willingboro*.<sup>97</sup> The Court held for real estate agents<sup>98</sup> challenging a municipal ban on "For Sale" and "Sold" signs.<sup>99</sup> The township asserted that it proposed the ban to stem "the white flight of homeowners from a racially integrated community."<sup>100</sup> Viewing plaintiffs' claim as based on a right to commercial speech,<sup>101</sup> the Court rejected the township's defense that the ordinance restricted only the "method of communication."<sup>102</sup> The Court noted that the "alternative channels for communication" which the ordinance left open were "far from satisfactory." Further, the Court held that the purpose of the ordinance was not to restrict the "time, place, or manner" of expression.<sup>103</sup> Rather, the ban was founded on an unsubstantiated fear of

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93. 427 U.S. 50 (1976).

94. *Id.*

95. *Id.* at 62-63. See generally Note, *Equal Protection and the First Amendment: Zoning Away Skid Row*, 31 U. MIAMI L. REV. 713 (1977); Comment, *Content-Based Classifications of Protected Speech: A Less Vital Interest?* 1976 UTAH L. REV. 616 (1976).

96. 422 U.S. at 206.

97. 431 U.S. 85 (1977).

98. *Id.* at 98.

99. *Id.* at 86.

100. *Id.*

101. *Id.* at 91-92.

102. *Id.* at 93. For a case upholding a ban on most outdoor advertising near state highways, see *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741, 762 (N. Dak. 1978) (the statute restricts "the place and manner of outdoor advertising signs" and these "restrictions (1) are justified without reference to the content of the regulated speech, (2) serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the same information.").

103. 96 S. Ct. at 93-94. Cf. *Commonwealth v. Sterlace*, Pa., 391 A.2d 1066 (1978) (Advertising ordinance upheld as permissible "time, place and manner" regulation).

the impact of the expression's content, and the purpose of the ban was therefore to restrict the content of an expression of vital interest to the community.<sup>104</sup> Moreover, the township failed to establish that the ordinance was necessary to achieve or effective in achieving its stated purpose.<sup>105</sup>

In delineating the narrow circumstances in which a municipality may regulate content, the *Linmark* Court reiterated the criteria formulated in *Erznoznik* and *Young*. The Court held that regulation is appropriate when it restricts a "mode of communication that 'intrudes on the privacy of the home'" or when "the place or manner of speech produces a detrimental 'secondary effect' on society."<sup>106</sup> In addition, the Court quoted *United States v. O'Brien*<sup>107</sup> to conclude:

The township has not prohibited all lawn signs—or all lawn signs of a particular size or shape—in order to promote aesthetic

104. *Id.* at 95-96. See *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 205 n.48 (1977) (in *Linmark*, "the Court struck down the ordinance on the ground that its purpose—to stem the flight of homeowners from a racially integrated community—related directly to the message communicated."). See generally *Department of Hwys. v. National Adv. Co.* 356 So.2d 557, 566-67 (La. Ct. of App. 1978) (the court upheld a statute which distinguished between on- and off-premise signs along highways against a First Amendment attack because the statute left "open . . . 'alternative channels for communication of the information'" and "the statute [was] genuinely concerned with the geographical location of 'speech' in order to promote legitimate governmental interests which [were] unrelated to the suppression of free expression").

105. 97 S. Ct. at 95. Whether an ordinance's effectiveness in achieving its stated important governmental interest will be relevant against a First Amendment challenge is unclear. In a case similar to *Linmark*, an ordinance prohibited real estate signs for the stated purpose of stemming white flight. The court in *Daugherty v. City of East Point*, 447 F. Supp. 290, 295-96 (N.D. Ga. 1978) held:

The fact that this ordinance was enacted and perhaps achieved an important governmental objective does not exempt East Point from the restraints of the First Amendment. The Court realizes the importance of the national policy of promoting racial integration. This does not allow the Court to disregard the rights guaranteed under the First Amendment, rights more compelling than any national policy.

The holding in *Daugherty* may be relevant to architectural design ordinances based on preserving property values. By analogy, even if the design ordinance succeeds in preserving property values, it should not withstand a First Amendment challenge. The distinction between *Daugherty* and design review ordinances purporting to protect property values may lie, however, in the fact that the *Daugherty* ordinance furthered an important "national policy" whereas design review ordinances may purport to protect constitutional due process rights of property owners in the community. In design ordinances the conflict will arise between two competing constitutional guarantees and the balance may not be as clear as that reached in *Daugherty*.

106. 97 S. Ct. at 94.

107. 391 U.S. 367, 377 (1968).

values or any other value 'unrelated to the suppression of free expression.'<sup>108</sup>

At first glance, this may appear to legitimize architectural design control based primarily or solely on aesthetic considerations. When challenged by claims of infringement of free expression, however, the aesthetic values sought to be promoted by architectural control ordinances should no longer be "unrelated to the suppression of free expression," for it is "content," or architectural design itself, which the ordinances regulate and restrict. At least the Court's *O'Brien* standards of "an important or substantial governmental interest" furthered by restrictions "no greater than [are] essential to the furtherance of that interest"<sup>109</sup> should be required to justify governmental regulation of architectural design.

### C. *Architectural Design Control and the First Amendment*

It can be asserted that the principles enunciated in *Erznoznik* are inapplicable to architectural design ordinances because these ordinances do not involve total bans of certain types of architecture<sup>110</sup> "on the ground that they are more offensive than others."<sup>111</sup> The effect of ordinances specifying permissible styles of architecture or requiring "similarity" or "compatibility" to existing neighborhood character is, however, a total ban of certain architectural styles from a neighborhood or from a community. Regulation of the content of architectural expression will be justified under *Erznoznik* if it can be shown that the proposed structure "intrudes on the privacy of the home" and that it is "impractical for the unwilling viewer . . . to avoid exposure."<sup>112</sup> It is difficult, however, to envision an architectural style so intrusive as to justify governmental restriction.<sup>113</sup>

108. 97 S. Ct. at 93-94.

109. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968). See Williams, *supra* note 15, at 34.

110. See generally *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949) (because even fundamental rights are not absolute, a constitutional violation contemplates a "real abridgment of the rights of free speech"); *People v. Stover*, 12 N.Y.2d 462, 468, 240 N.Y.S.2d 734, 739, 191 N.E.2d 272, 275 (1963) (a distinction is drawn between regulatory and prohibitory legislation, the former raising a higher presumption of validity); T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 94 (1963) (the author discusses the uncertainty of when expression is impermissibly "abridged" since the term is difficult to delineate).

111. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975).

112. *Id.*

113. Although the rights of unwilling viewers were not at issue in *Erznoznik*, 422 U.S. at 211 n.7, the fact that the Court was able to conclude that a huge outdoor

Municipalities may assert that architectural design ordinances are permissible location restrictions based on legitimate content classifications and are thus valid exercises of police power as enunciated in *Young*. In *Young*, the city's interest in restricting location of adult theaters to preserve the "quality of urban life"<sup>114</sup> appears more compelling than interests usually asserted for restricting architectural styles. A distinction may be drawn between the "erotic" expression involved in *Young* and architectural expression to establish that the latter should be accorded a greater degree of constitutional protection.<sup>115</sup> The fact that an architect may be able to build elsewhere<sup>116</sup> should therefore be insufficient to validate architectural design control, since "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place!"<sup>117</sup>

The validity of architectural design ordinances will depend on the weight accorded state interests asserted for or purposes of the regulation. Courts will probably uphold those architectural control ordinances reflecting a "sufficiently important governmental interest in regulating the nonspeech element" that [is] 'unrelated to the suppres-

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screen was not impermissibly "obtrusive," 422 U.S. at 212, lends support to the argument that an architectural design will rarely be impermissibly obtrusive. See note 92 *supra*.

114. 427 U.S. 50, 72 (1976).

115. See notes 61 and 95 *supra*.

116. See generally *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 71, 192 N.E.2d 74, 77 (1963) (although the court noted that the "structure would be a very interesting home placed in a different environment," it concluded that the structure would adversely affect the proposed neighborhood); MICHIGAN Note, *supra* note 5, at 1461 ("So long as unregulated areas exist where architects may build as they please, it is arguable that architectural nonconformity is not unduly restricted by controls.").

117. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975), quoting *Schneider v. State*, 308 U.S. 147, 163 (1939). Architectural controls operate within residential and commercial land use districts. When an architect and client seek to build in any area, use restrictions are not at issue. It is therefore arguable that they seek to express their architectural sensibilities in "appropriate places." An analogy may also be made to the requirement announced in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977), that an ordinance must leave "open ample alternative channels for communication." If, therefore, there are other areas in a municipality in which the proposed structure may be built, it is possible that the ordinance will be upheld. See note 116 *supra*. *Linmark*, however, involved commercial speech, and as noted earlier in the text, architectural expression should not be subjected to the stricter regulation permissible under the commercial speech doctrine. See notes 65 and 66 *supra*.

sion of free expression' ”<sup>118</sup> accomplished by the least intrusive means possible.<sup>119</sup>

State interests in requiring “similar” or “compatible” architecture for aesthetic reasons are not, however, interests “unrelated to the suppression of free expression.”<sup>120</sup> Such regulation may be invalid because it “arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.”<sup>121</sup> Moreover, requiring similarity to existing structures will likely stifle architectural experimentation,<sup>122</sup> adversely affecting the state’s interest<sup>123</sup> in a “beautiful community.”<sup>124</sup>

118. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

119. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

In order to determine whether the restriction is “unrelated to the suppression of free expression,” the Court in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977), inquired into the regulation’s primary purposes and concluded that the purpose was not properly to restrict the time, place or manner of expression, but rather to prohibit the effect of the content of expression. Architectural control ordinances also regulate the content of architectural expression (*i.e.*, the design) and prohibit the effect of that expression (dissimilarity, monotony, property value decline).

In *United States v. O’Brien*, 391 U.S. 366, 382 (1968), the Court found that the purpose of the regulation to further the “interest in the preservation of draft cards was wholly unrelated to their use as a means of communication.” *Buckley v. Valeo*, 424 U.S. 1, 17 (1976). Under a similar analysis, architectural controls, promulgated to maintain safety, health and property values, might be upheld as “unrelated to the suppression of free expression.” *See Williams, supra* note 15, at 41 (“[I]f the governmental interest sought to be advanced is safety, it appears to be quite unrelated to the suppression of free expression.”).

120. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976); *United States v. O’Brien*, 391 U.S. 366, 376 (1968).

121. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976); *United States v. O’Brien*, 391 U.S. 366, 382 (1968).

122. *See, e.g., Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 68, 75, 192 N.E.2d 74, 75, 80 (1963) (ordinance upheld requiring conformity with structures in neighborhood). *See generally* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 11 (1963) (“Suppression promotes inflexibility and stylification, preventing society from adjusting to changing circumstances or developing new ideas”); Anderson, *Architectural Controls*, 12 SYRACUSE L. REV. 26 (1960); Note, *Aesthetic Zoning: Property Values and the Judicial Decisional Process*, 35 MO. L. REV. 176 (1970).

123. *Cf. Moore v. City of East Cleveland*, 431 U.S. 494, 508 (1977) (Brennan, J., concurring) (“The Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us of white suburbia’s preference in patterns of family living.”). *But see Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71-72 (1976). (“It is not our function to appraise the wisdom of [the city’s] decision.”)

124. *See generally Dukeminier, supra* note 50, at 228 (although the author advo-

If architectural design ordinances are justified by the goal of property value preservation, the validity of governmental regulation is strengthened under the traditional rule that "it is the duty of the owner of property to so use it that it will not injure another."<sup>125</sup> Regulation of the content, or the architectural design, of the expression may be permissible because the expression "reaches a group the township has a right to protect"<sup>126</sup>—neighboring property owners. Consequently the government may have a "sufficiently important governmental interest in regulating the nonspeech element,"<sup>127</sup> or structure, of the building. A First Amendment claim will, however, require more substantiated evidence of adverse impacts on property value than has previously been accepted by courts faced with due process challenges.<sup>128</sup> Moreover, an ordinance promulgated to preserve

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cates architectural aesthetic control, he admits that the determination of what is "beautiful" depends upon conditioning and habit, and that new design is therefore resisted); Norton, *Police Power, Planning and Aesthetics*, 7 SANTA CLARA LAW 171, 172 (1967) (the practical application of architectural control "may represent but a rudimentary striving for the ideal of the beautiful"); Babcock, *supra* note 15, at 30 ("if we insist on a democratic decision-making process [in architectural design control], then we are bound to substitute taste for beauty").

125. *Marrs v. City of Oxford*, 24 F.2d 541, 547 (D. Kan. 1928). *But see* note 48 *supra*.

126. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977).

127. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976). *See* note 36 *supra*. Additionally, with the growing interest in solar energy utilization, municipalities might enact regulations to guarantee buildings' solar access. *See generally* Comment, *Obstruction of Sunlight as a Private Nuisance*, 65 CAL. L. REV. 94, 95, 106-07 (1977).

128. *See* notes 59 and 105 *supra*. The degree of substantiation necessary to justify governmental assumptions concerning the adverse impact of a proposed structure is unclear. In the obscenity context the Court does not require "conclusive proof of a connection between antisocial behavior and obscene material" if the governmental assumption is reasonable. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60-61 (1973). Obscenity, however, lies outside the scope of First Amendment protection, whereas architectural expression should lie within its scope. Yet the Court has also stated in dicta, discussing highway beautification regulation: "The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not sufficient reason to find that statute unconstitutional," *id.* at 49, 62 (1973). It is therefore possible that even in the face of a First Amendment challenge, courts will uphold "reasonable" assumptions concerning detriment to property value. Environmental protection regulation considered in dicta in *Slaton* may, however, be distinguished from architectural regulation. Something more than the mere "shifting of economic arrangements," *Kovacs v. Cooper*, 336 U.S. 77, 95 (1948) (Marshall, J., concurring), is involved in environmental protection. Architectural control ordinances are not exercised for such a broadly beneficial goal. Although it must be conceded that property values affect taxes and public services in a community, and thereby may affect the public welfare, *Dukeminier, supra* note 50,

property value must be narrowly drawn,<sup>129</sup> with the restriction “no greater than [is] essential to the furtherance of that interest.”<sup>130</sup> This requirement may invalidate ordinances prohibiting certain classes of architectural styles from invading specified neighborhoods.

In addition, First Amendment challenges may question the administration of ordinances purporting to preserve property value. Ordinances which accord local officials broad discretion to determine whether a particular structure will adversely affect property values may be improper prior restraints of expression.<sup>131</sup> It is no answer that many architectural review boards are composed of one or more architects.<sup>132</sup> Ordinances delegating broad discretion are subject to

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at 231-32, it is not always certain that the erection of a particular structure will, in fact, have such a substantial effect on property values, see STANFORD Note, *supra* note 14, at 191 n.64 (“aesthetic appeal and land values are not always positively correlated”). See also text accompanying note 48 *supra*; MICHIGAN Note, *supra* note 5, at 1455-56 (architectural control legislation does not employ precise standards and determinations that property values will be adversely affected are usually made by a Board of Architects rather than a Board of Assessors); Comment, *Zoning Ordinance—Enhancement of Aesthetic Values Alone Not Sufficient Basis for Exercise of Police Power in Florida*, 4 FLA. ST. U. L. REV. 163, 168 n.29 (1976) (the major problem for Boards of Architectural Review is the lack of definite, objective standards).

129. See *Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (“Even were we to credit the State’s reasons and ‘even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be narrowly achieved. The breadth of legislative abridgment must be viewed in light of less drastic means for achieving the same basic purpose.’”); *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (“‘[A] State may not choose means that unnecessarily restrict constitutionally protected liberty.’”).

130. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976); *United States v. O’Brien*, 391 U.S. 366, 377 (1968).

131. See note 41 *supra*. See also, *Williams*, *supra* note 15, at 7, 30.

132. See generally *South of Second Associates v. Georgetown*, 580 P.2d 807, 808 n.1 (Colo. 1978) (the fact that the ordinance was amended so as not to require an architect to sit on the architectural review board “may weigh heavily in a[n] action concerned with an alleged arbitrary enforcement of an otherwise valid ordinance”); *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 309-12 (Mo. 1970) (ordinance delegating power to three architects to deny applications upheld); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 69, 192 N.E.2d 74, 75 (1963) (ordinance delegating power to board composed of three architects to deny permits upheld); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 265, 69 N.W.2d 217, 219 (1954), *cert. denied*, 350 U.S. 841 (1955) (ordinance delegating authority to board consisting of three residents of village, two of whom are architects, upheld). See also *City of West Palm Beach v. State ex rel. Duffey*, 158 Fla. 863, 864, 30 So.2d 491, 492 (1947) (ordinance impermissibly vague, leaving discretion to the “whim and caprice of the administrative agency”); *Pacesetter Homes, Inc. v. Village of Olympia Fields*, 104 Ill. App. 2d 218, 226, 244 N.E.2d 369, 373 (1968) (improper delegation where standards in ordinance are too vague); *Board of Supervisors v. Rowe*, 216 S.E.2d 199, 213 (Va.

potential abuse and, given judicial deference to local legislative judgments,<sup>133</sup> are likely to remain undiscovered. To insure valid administrative action under these statutes, a minimum level of proof of adverse impact must be required. Architectural review boards should not be allowed to censor expression "on the ground that [some expressions] are more offensive than others"<sup>134</sup> unless the offensiveness results in a demonstrable adverse impact on the community.

### SUMMARY

Judicial deference to unproved legislative assumptions that certain incompatible or "offensive" architecture will depress property values may deter architectural innovation.<sup>135</sup> One writer suggests that misplaced governmental controls have stifled American architectural development: "Greece had its Acropolis and medieval Europe its great cathedrals. For what will our imperial cities be remembered in history?"<sup>136</sup> Another writer suggests that by allowing the community to collectively determine what is beautiful architecture, we are substituting "taste" for "beauty" with no demonstrable benefit to the majority.<sup>137</sup>

The subordination of individual artistic expression to a community's standards<sup>138</sup> is an invasion of individual rights<sup>139</sup> inconsistent

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1975) (Board without power under enabling acts to impose architectural design restrictions).

133. See notes 40 and 47 *supra*.

134. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). See also *Bayou Landing, Ltd. v. Watts*, 563 F.2d 1172 (5th Cir. 1977).

135. See note 122 *supra*. But see *Dukeminier*, *supra* note 50, at 227 ("A great age of architecture has not existed without the popular acceptance of a basic norm of design.").

136. Hershman, *Beauty as the Subject of Legislative Control*, 15 PRAC. LAW. 20, 35 (Feb. 1969).

137. *Babcock*, *supra* note 15, at 28.

138. See *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 76, 192 N.E.2d 74, 81 (1963) (Corrigan, J., dissenting) ("[Appellant's] aesthetic sensibilities in connection with her selection of design for her proposed home [should not] be stifled because of the apparent belief in this community of the group as a source of creativity.").

139. See generally EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 32, 37, 115 (1963) (the theory of freedom of expression requires that each individual's right be protected, but because the political structure of legislatures does not provide such protection to "vulnerable" unorganized sectors, "a deliberate, affirmative, and even aggressive effort" must be made to protect freedom of expression); Norton, *Police Power, Planning and Aesthetics*, 7 SANTA CLARA LAW 171, 182-83 (1962) (devotees of "modern" architecture are probably a "permanent minority");



with the American goal of tolerance.<sup>140</sup> The Constitution requires protection of fundamental individual rights, especially when their exercise results in no demonstrable detriment to others.<sup>141</sup> The general public welfare will be better promoted by recognizing the First Amendment rights of architects and their clients so that they may achieve great architecture.<sup>142</sup> Ordinances regulating architectural design should therefore be reexamined by states and municipalities. Such regulation should be narrowly tailored to accomplish "sufficiently compelling" or at least "important" state interests in order to accommodate the fundamental constitutional rights of the individual in our society.

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FLORIDA Note, *supra* note 32, at 962-63 ("The increased intervention of government into private affairs to safeguard individual rights creates a real and substantial threat of governmental interference with those rights.").

140. *See generally* *People v. Stover*, 12 N.Y.2d 462, 472, 240 N.Y.S.2d 734, 742, 191 N.E.2d 272, 278 (1963) (Van Voorhis, J., dissenting) ("In our age of conformity it is still not possible for all to be exactly alike, nor is it the instinct of our law to compel uniformity wherever diversity may offend the sensibilities of those who cast the largest number of votes in municipal elections. . . . Even where the use of property is bizarre, unsuitable or obstreperous, it is not to be curtailed in the absence of overriding reasons of public policy."); *Babcock*, *supra* note 15, at 26 ("I trust some future social historian will explain why the suburban mind, so bitterly opposed to collective decisionmaking in matters of economics and social welfare, was the first to insist upon collectivism in taste."); *See also* Hershman, *Beauty as the Subject of Legislative Control*, 15 PRAC. LAW. 20 (Feb. 1969) (the author suggests that the influence of the Puritan ethic created a utilitarian sense of beauty allowing architectural restrictions); Michelman, *supra* note 11, at 40 (the public remains apathetic to the government establishing itself as an arbiter of taste).

141. *See generally* *Dukeminier*, *supra* note 50, at 236 (community officials should interfere with the private use of property "only when the individual use seriously hampers the achievement of community goals"); Michelman, *supra* note 11, at 39 (society has a special interest in the self-expression of its members).

142. *See generally* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 94 (1973) (Brennan, J., dissenting) (a restriction of expression which is too broad may result in "the suppression of a vast range of literary, scientific, and artistic masterpieces" in derogation of the First Amendment).