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Taking Design Review Beyond the Beauty Part: Aesthetics in Perspective

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ARTICLES

TAKING DESIGN REVIEW BEYOND THE BEAUTY PART: AESTHETICS IN PERSPECTIVE

BY
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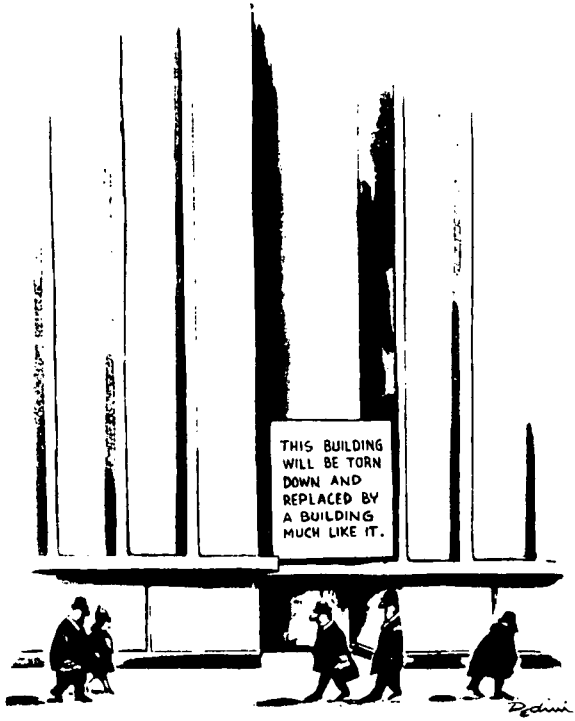
Creating and recreating the physical environment may not be the most important thing a society does for enriching . . . its members, but as long as it's being done, an integrity appropriate to it should be sought.

Constance Perin[1]



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1. C. PERIN, WITH MAN IN MIND: AN INTERDISCIPLINARY PERSPECTIVE FOR ENVIRONMENTAL DESIGN 25 (1970).

A considerable body of literature has accumulated on the aspects of design review with aesthetic objectives.[2] A reader of that literature is apt to suffer from chronic *deja vu*. "Most literature on aesthetics tends to isolate it from . . . experience, to discuss the aesthetic process as though it were an abstract problem in logic."[3] Jesse Dukeminier's classic article remedying that misapprehension was one of great utility.[4] However, subsequent articles dealing with the same issue have had lesser utility.[5]

The history of design review has been marked by a significant increase in its use[6] and an unremitting banality of the structures approved by its often arbitrary procedures.[7] Flawed design prod-

2. Kyne, *Bibliography to Legal Periodicals Dealing with Historic Preservation and Aesthetic Regulation*, 12 WAKE FOREST L. REV. 275 (1976).

In the literature, "aesthetics" does not seem limited to problems of "beauty"; rather, it functions as a shorthand description of observer reactions based on intuitions not described by standards. For example, an established architecture such as Indian pueblo design in the American Southwest manifests time-tested wisdom about design as it relates to climate and topography. A glass tower erected atop the cliff under which Mesa Verde is tucked would intuitively be considered inappropriate by an observer. An analysis of the hot days, cold nights and high winds striking the glass box also might produce elaborate standards to explain the glass tower's inappropriateness. J. FITCH, AMERICAN BUILDING 262 (2d ed. 1972).

For this Article the following definition will be used:

design review: evaluation by public agents of the design of a building and its site in relation to each other and to its surroundings—in effect, a combination of building and site plan review.

building design review: evaluation by public agents of the design of structures, without particular regard to the surroundings that are part of the same development.

architectural review: building design review, using the criteria of practicing architects.

site plan review: evaluation of the arrangement of structures, natural features and man-made features of the surface of land in a development.

3. Fitch, *The Aesthetics of Function*, in PEOPLE AND BUILDINGS 4 (R. Gutman ed. 1971).

4. Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955). The characterization "classic" was awarded by D. HAGMAN, URBAN PLANNING LAW 93 (1972); Hagman awards that label sparingly, *see* D. HAGMAN, PUBLIC PLANNING & CONTROL OF URBAN & LAND DEVELOPMENT 104-05 (Supp. 1976).

5. "Yesterday's clarion call may often produce its share of sour notes if sounded too long." Mandelker, *Stoyanoff: Back to the Barricades*, 22 ZONING DIG. 228a (1970).

6. In 1937, 30 cities had design review; in 1969, 550 cities had design review. SINGER, CAN WE LEGISLATE BEAUTY? (1970). "Some ideologies become law with little argument because the cultural climate allows it." C. PERIN, *supra* note 1, at 144.

7. A. HUXTABLE, KICKED A BUILDING LATELY? 80-83, 171-74, 179-82 (1977).

ucts have become sufficiently commonplace to support a full-time occupation for specialists solving the "architectural pathologies" of their fellow professionals.[8]

The actual practice of design review and the design professions now requires examination to steer it closer to the achievement of sound ends through fair means. The dominant manifestation of design review — the evaluation of one architect's work by the officially sanctioned judgment of one or more other architects — must be scrutinized for utility and fairness. Recent research in natural and behavioral sciences addressing the relationship of environments to occupants, as well as the change in the consensus of architectural modernism as to the primacy of aesthetics, make it necessary to rethink the traditional legal treatment of design review. Scholarly legal literature over the past twenty-five years merely has responded to Dukeminier's phrasing of the issue as a problem of aesthetic objectives; that approach, however, has been inadequate in describing procedures to review the qualitative problems of design.

This Article will first examine and develop the concept of "beauty" to provide a reasonable perspective for its intelligible use in design review. By placing aesthetics within the context of other values, standards will be formulated by which the adequacy of current design review procedures can be evaluated. The Article will conclude by suggesting how current design review procedures may be improved.

I. Solving an Abstract Problem in the Logic of Beauty

In 1955, when Jesse Dukeminier wrote his classic article on zoning for aesthetic objectives, judicial analyses of aesthetic goals as an element of land use control teetered between forthright rejection and disingenuous evasion. For example, bans on billboards were upheld for such dubious professed reasons as the prevention of immoral behavior behind them or fire hazards piled around them and not because they were ugly.[9] Dukeminier recognized the

8. Goldberger, *Architectural Malpractice Suits Reported Increasing 20% a Year*, N.Y. Times, Feb. 12, 1978, 1, 54 col. 1.

9. Dukeminier, *supra* note 4, at 219-22. As an example of evasion, Dukeminier discusses St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed*, 231 U.S. 761 (1913) (upholding billboard restrictions because such signs can screen lurking criminals, working prostitutes, collected trash and garbage). *See also In Re* Columbus Outdoor Advertising, 51 Ohio App. 2d 187,

orientation of most judges who demanded "precise criteria by which 'beauty' can be measured,"[10] and he diagnosed the source of this preoccupation as a "misunderstanding of the meaning of words."[11] Judges had been trapped by a "name" theory of meaning (*i.e.*, the notion that the word "beauty" is the proper name of an object against which each case can be held up for measurement).[12] Under this theory, each case involving aesthetic objectives begins by asking "what is beauty," which can be answered only by producing evidence of an object called "beauty" found to be "fact" at trial.[13] One can imagine the difficulties that would arise if judges were to begin each case by asking "what is justice" and then withhold decision until an object called "justice" were introduced into evidence as a standard for resolving the dispute.[14]

Having diagnosed the judges' malady, Dukeminier prescribed a nostrum.[15] Just as the American legal system has avoided a "what is justice" impasse by using an operational process — a "due process" — to define justice, the "what is beauty" impasse can be remedied by an operational definition.[16] The meaning of a

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367 N.E.2d 920 (1977) (accepting a traffic safety rationale for billboard regulations); Gosman v. Prince George's County, ___ Md. App. ___, ___, 397 A.2d 630, 634 (1979).

For the forthright objection to aesthetic objectives as the sole basis of police power, *see* Board of Supervisors v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975); *compare* Mayor of Baltimore v. Mano Swartz, 268 Md. 79, 299 A.2d 828 (1973), *with* Donnelly Outdoor Advertising Corp. v. Baltimore, 279 Md. 660, 370 A.2d 1127 (1977) (city ordinance requiring removal of all but identification signs in Baltimore's old town was upheld as a valid exercise of police power; the court stated the ordinance was not based wholly on aesthetic considerations, but rather the preservation of architecturally or historically significant areas).

10. *Dukeminier, supra* note 4, at 225. Preoccupation with "criteria" has remained a judicial characteristic. *See* Pacesetter Homes, Inc. v. Village of Olympia Fields, 104 Ill. App. 2d 218, 244 N.E.2d 360 (1968); Morristown Road Assoc. v. Borough of Bernardsville, 163 N.J. Super. 58, 394 A.2d 157 (1978); South of Second Ass'n v. Georgetown, ___ Colo. ___, 580 P.2d 807 (1978); Donnelly Outdoor Advertising Corp. v. Baltimore, 279 Md. 660, 370 A.2d 1127 (1977); Mayor of Baltimore v. Mano Swartz, 268 Md. 79, 299 A.2d 828.

11. Dukeminier, *supra* note 4, at 225.

12. Ryle, *The Theory of Meaning* in C. CANTON, PHILOSOPHY AND ORDINARY LANGUAGE 128, 131-32 (1963).

13. *See* Dukeminier, *supra* note 4, at 222.

14. *Id.* at 226.

15. The philosopher's treatment of a question is like the treatment of an illness; the philosopher tries to cure "mental cramps." O. BOUWSMA, THE BLUE BOOK IN PHILOSOPHICAL ESSAYS 183-87 (1965).

16. Wittgenstein's example of "treating a question" presents the same trans-

word is a function of its use in a particular context,[17] and it cannot properly be found in the abstract, isolated from its use. "The question 'What is a word really?' is analogous to 'What is a piece in chess?'"[18] A description of the physical properties of a pawn, for example, does not lead to an understanding of its meaning in chess. Only by an understanding of the whole game and the role of the piece in the game can any one chess piece be really understood.[19] Dukeminier accordingly reframed the judges' problem of "what is beauty" as "to know how to use it [the meaning of the word 'beauty'] in an intelligible way to describe phenomena within a given context."[20] The task of the judicial analyst of this new problem is the investigation of each game ("context") in which "beauty" is a piece (is "used") so that the whole game is understood — the rules defining it and the role of the piece "beauty" in the game. While different games which incorporate the piece "beauty" may be informative, the judicial analyst needs a game where the piece "beauty" and all other pieces are limited to moves permissible under American law.

It may be possible to find an existing game in which "beauty" is a piece capable of enough moves to satisfy the needs of land use regulation while coincidentally being restricted to legally permissible moves. In that instance the analyst is comparable to the referee of existing games who must examine in detail the whole game to rule on the moves of the players.[21] It is also possible that a new game must be created. Such a game, however, would not be totally unprecedented since it must satisfy the requirements of the Ameri-

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formation from a substantive question ("What is length?") to a procedural question ("How do we measure?"). L. WITTGENSTEIN, THE BLUE BOOK 1 (1958).

17. *Id.* at 67.

18. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 108 (1953).

19. K.T. FANN, WITTGENSTEIN'S CONCEPTION OF PHILOSOPHY 72 (1969). The word "game" is not intended as a comment on the seriousness or frivolity of the aims of the activity. Rather, the word game suggests man-made rules, interactive pieces, a limited field of play and pieces with a hierarchy of assigned moves reflecting the relative importance of the piece. *See, e.g.*, the use of the game analogy in Melden, *Action in Essays* in PHILOSOPHICAL PSYCHOLOGY 58, 64 (D. Gustafson ed. 1964). The "game" concept has implications analogous to the concepts calling the law a "language system," Eisele, *The Legal Imagination and Language: A Philosophical Criticism*, 47 COLO. L. REV. 363, 367 (1976), or "practice," Rawls, *Two Concepts of Rules*, 6 PHIL. REV. 3 (1955).

20. *See*, Dukeminier, *supra* note 4, at 226.

21. *See*, Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1078-82 (1975), for a detailed use of the game referee model of legal analysis.

can legal system and ought to be compatible with the existing design system. The task in that event is like that of a game-maker for Parker Brothers whose assignment is to devise a game in which a particular piece ("beauty"), in combination with other particular pieces ("health," "safety," "comfort," "reasonable," etc.), can be used on a board according to fair rules (played on constitutionally limited substance with fair procedures).

When Dukeminier was writing, only a few legal games had been played with the piece "beauty."[22] The law had dealt favorably with aesthetic objectives for public controls only in the context of either a distinctive architectural tradition[23] or of sign control.[24] Since 1955, these two games, or contexts, have been recognized as sui generis within the range of regulations for aesthetic objectives.[25] A distinctive architectural tradition defines its own standards for design through its distinctiveness; the tradition has met the test of public acceptance over time to dispel any suspicion of subjective elitism.[26] Billboards are limited in function, standardized in design and parasitical to nearby public spaces; they are subject to special-

22. Dukeminier recognized that his ideas could not be comprehensively developed because of the limited resources for his research. *See* Dukeminier, *supra* note 4, at 218.

23. *Id.* at 230. City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941) (upholding New Orleans Vieux Carre Ordinance); Opinion of Justices, 333 Mass. 773, 128 N.E.2d 557 (1955) (upholding an act establishing a historic preservation district commission for Nantucket); *but see* City of West Palm Beach v. State *ex rel* Duffey, 158 Fla. 863, 30 So. 2d 491 (1947) (voiding ordinance requiring new buildings to "substantially equal adjacent buildings or structure in . . . appearance, square foot area, and height").

24. Dukeminier, *supra* note 4, at 233-36. *See* Murphy v. Westport, 131 Conn. 292, 90 A.2d 177 (1944); General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935), *appeal denied*, 297 U.S. 725 (1936); General Outdoor Advertising Co. v. Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930); Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5 (1932). *But see* Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977), *appeal dismissed*, ___ U.S. ___ (1978), and Suffolk Outdoor Advertising Co. v. Halse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed*, ___ U.S. ___ (1978), discussed in Comment, *The Truth About Beauty: The Changing Role of Aesthetics in Billboard Legislation*, 9 ENVT'L L. 113 (1978).

25. Williams, *Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 34-36 & 40-48 (1977); Steinbach, *Aesthetic Zoning: Property Values and the Judicial Decision Process*, 35 MO. L. REV. 176, 180-83 (1970).

26. "You know, it is always life that is right and the architect who is wrong." LeCorbusier, quoted in P. BOUDON, LIVED-IN ARCHITECTURE: LECORBUSIER'S PESSAC REVISITED 2 (1972).

ized design controls not applicable to either the function or design issues of buildings and site plans.[27]

What has been lacking since Dukeminier's article is an appropriate game to play with the piece "beauty" in reviewing buildings and site plan designs where no genuine distinctive architectural tradition exists. The failure to produce such a game explains why "[t]he courts seem to have adopted an all-or-nothing attitude with respect to aesthetic regulation. At both extremes they have elected to throw up their hands in despair rather than attempt to deal systematically with the issues presented by the facts. . . ."[28] To "deal systematically" one must have a system (or game).

II. SOUND LIMITS AND POLICIES

In order to evaluate the suitability of the current system of design review and to formulate goals by which improvement may be measured, constitutional restraints and values must be considered. The values — freedom of expression and also health, safety, welfare and aesthetics — are compatible with sound principles of architectural review.[29]

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27. W. EWALD & D. MANDELKER, STREET GRAPHICS (1971).

28. *See* Williams, *supra* note 25, at 4.

29. This analysis is not limited to merely procedural factors. *See* DiMento, *Citizens Environmental Litigation and the Administrative Process*, 1977 DUKE L. REV. 409, 440, discussing the purely procedural analysis of "public interest." For an analysis of how useful or unavoidable governmental activity can be improved by fair procedures, *see* Bross, *Circling the Squares of Euclidean Zoning*, 6 ENVT'L L. 97 (1975). This Article will incorporate procedural suggestions in combination with substantive analysis. An inane activity is not less so for being carried out in accord with procedural safeguards; a government program for throwing pies in the faces of ten citizens per day would be no more appropriate because it includes administratively regular methods. The functionaries in the Municipal Secretariat for Pastry Application would likely display the ordinary behavior of bureaucrats. Because the fundamental enterprise of the agency would be pie-throwing, the agency would be directed toward maximizing the enterprise. *See also* Broderick, *Justice in the Books or Justice in Action - An Institutional Approach to Involuntary Hospitalization for Mental Illness*, 20 CATH. U. L. REV. 547, 549-55 (1971). This administrative behavior may be a particular manifestation of the law of instrumentality. This law can best be seen in the actions of a small child who, having received only a hammer as a present, finds that the whole universe is in need of pounding.

"You know what you'd need to put that up in Greenwich, don't you? A zoning variance."

Freedom of expression, as embodied in the first amendment and as a policy encouraging creative diversity, has been the most widely debated substantive limit on regulation for aesthetic objectives.[30] That limit, along with constitutionally derived concepts of

30. *See, e.g.*, Comment, *Architecture, Aesthetic Zoning and the First Amendment*, 28 STAN. L. REV. 179, 201 (1975), in which the author avers: "No one, or no committee, should have the power to reject another person's house design merely because it is thought to be ugly. One's sense of creativity must not be invaded by a cultural, democratic dictatorship." *See also* the Policy Statement of the Board of Directors of the A.I.A.: "the AIA supports maximum freedom for the

privacy and autonomy, has been effectively analyzed by Professor Stephen Williams.[31] Rather than retrace Williams' course, this article will consider the police power itself as a limit on architectural review.

It is hornbook law that the police power can only be exercised to promote "public health, safety, morals or general welfare." The conjunction "or" in the list of police power goals signifies that each goal alone can justify an exercise of the police power — *e.g.*, actions can be taken on the basis of "public health" where no threat to "safety, morals or general welfare is present." "Or," however, is not a basis for selecting one police goal to the exclusion of other goals: the public safety should not be protected against criminals by releasing bubonic plague to kill criminals in the general population.

Some courts have recognized that "aesthetic considerations alone may warrant an exercise of the police power."[32] This ap-

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architect as an artist and professional. . . ." AMERICAN INSTITUTE OF ARCHITECTS, DESIGN REVIEW BOARDS: A HANDBOOK FOR COMMUNITIES 8 (1974) [hereinafter cited as AIA HANDBOOK]. *See also* R. BABCOCK, BILLBOARDS, GLASS HOUSES AND THE LAW 11 (1977).

31. Williams applied his analysis to architectural review boards such as that in Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 192 N.E.2d 79 (1963). *See* Williams, *supra* note 25, at 29-34. Williams considered two problems. First, is the area of aesthetics too vague to permit regulation directed toward aesthetic objectives? Williams found no more intrinsic vagueness in aesthetics than in other legal issues such as freedom or due process. Second, are there other substantive constitutional objections which could be raised to aesthetic objectives? Williams found that the concepts of privacy and autonomy are not sufficiently developed in constitutional law to protect individual rights against design regulations. He suggested that first amendment limits on regulation for aesthetic objectives exist, although well-designed systems of regulation are unlikely to infringe upon them. He urged a balancing of the following factors in determining first amendment protection: the extent to which regulation is based upon concern for people who may suffer independently of their tastes, the likelihood that the regulation or its enforcement will be message-related and the likelihood that the regulation will serve to enhance the expressive character of any and all styles. These factors make *Reid* one of the few building design cases in which Williams would find first amendment obstacles. Because the structure in *Reid* was so unobtrusive, Williams found insufficient impact on involuntary audiences to justify the use of state power to regulate design of a home where no real distinct style - other than suburban miscellany - existed.

32. Oregon City v. Hartke, 240 Or. 35, 49, 400 P.2d 255, 263 (1965) (total exclusion of junkyards from city for aesthetic reasons upheld); People v. Stover, 12 N.Y.2d 462, 191 N.E. 2d 272, 140 N.Y.S. 2d 734 (1963), *appeal dismissed*, 375 U.S. 42 (zoning ordinance prohibiting the hanging of clothes on clotheslines in front or

proach supports the exercise of the police power against an ugly activity because of its ugliness, even when the activity is otherwise safe, sanitary, moral and supportive of the general welfare. The traditional formulation of the police power does not specifically direct that "beauty" be promoted at the expense of safety, health, morality and the general welfare. The foundation of modern case law on the aesthetic element of the police power is found in Justice Douglas' opinion in *Berman v. Parker*:

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled . . . [based on] determinations that take into account a wide variety of values.[33]

Thus, to return to the game analogy, the police power is like a game with many pieces, only one of which is "beauty." All of the pieces must be present to begin play; any one of them alone may ultimately make the decisive move. This game analogy with its interactive pieces — or, in Justice Douglas' phrase, "determinations that take into account a wide variety of values"[34] — is consistent with current understanding of human values in nonlegal settings. Values manifest themselves as part of a whole value system and not in isolation.[35] Values within each individual system tend to be ranked relative to one another, and "beauty" is statistically among the lower-ranking values.[36] Studies of users of

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side yards abutting a street upheld); *but cf.* De Sena v. BZA of Hempstead, 45 N.Y.2d 105, 379 N.E.2d 1144, 408 N.Y.S.2d 14 (1978) (characterization of proposed home with "bowling alley appearance" as an "aesthetic abomination" insufficient grounds for denial of zoning variance); Westfield Motor Sales Co. v. Westfield, 129 N.J. Super. 528, 324 A.2d 113 (1974) (ordinance limiting the size of signs within town upheld). Merritt v. Peters, 65 So. 2d 861 (Fla. 1953) (ordinance regulating location and size of commercial signs upheld); National Used Cars v. City of Kalamazoo, 61 Mich. App. 520, 233 N.W.2d 64 (1975) (ordinance required fences around wrecking yards); City of St. Paul v. Chicago, St. P., M. & O. Ry., 413 F.2d 762 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969) (building height restricted in riverfront area in downtown St. Paul).

33. 348 U.S. 26, 33 (1954). It is ironic that this leading case in aesthetic regulation chartered the widely discredited program of 1950s Urban Renewal. *See* M. MAYER, THE BUILDERS 116-32 (1978).

34. 348 U.S. at 33.

35. M. ROKEACH, THE NATURE OF HUMAN VALUES 11 (1973).

36. *Id.* at 78. The long-term trend is a slow rise in the importance of beauty. *Id.* at 328. Artists rank beauty higher than do other groups. *Id.* at 62.

buildings and site plans evidence a similar systematic ranking of values with "beauty" again relatively low in the hierarchy.[37] As in the game of chess, the positions and the relative power of each piece (or "value") may be inherently assigned in the game's design. On the other hand, the relative power of each piece may result from the pattern of play in a game using equally-weighted pieces, as in checkers where any piece can become king. The usual pattern in land use administration involves case-by-case determinations and the application of policies without predetermined priorities.

The need for an overall system of land use regulation in which a variety of policies are integrated is demonstrated by cases holding that aesthetics can only be considered as one factor in combination with other objectives in the exercise of the police power.[38] What these cases fail to make clear is that, in games with many pieces, the least of those pieces may make the decisive move. As a pawn may checkmate a king, beauty may be decisive in an individual case. A governmental body with general jurisdiction to review all new development for the sole objective of beauty should be avoided; however, beauty may be the dominant concern in particular cases, such as proposed developments in notable scenic areas or in proximity to landmarks.

Legal commentators analyzing the extent of the police power sanctioned in *Berman v. Parker* have emphasized the breadth of

37. C. COOPER, EASTER HILL VILLAGE: SOME SOCIAL IMPLICATIONS OF DESIGN 210-11 (1975). The "god, motherhood, apple pie and flag" lists of objectives in standard zoning enabling acts are not weighted in a priority system. To the extent that such goals are applied, they are weighted case by case. *See* STANDARD STATE ZONING ENABLING ACT § 3; Bassett & Williams, *Municipal Zoning Enabling Act* § 1 in MODEL PLANNING LAWS 31 (1935); *see also* Anderson v. Peden, 30 Or. App. 1063, 569 P.2d 633 (1977), discussing the purposes of a local zoning ordinance. In the innovative land use regulation system of the Oregon Land Conservation and Development Commission OR. REV. STAT. §§ 197.030-197.060 (1977), the state goals and guidelines for land use are not given a predetermined priority or weighting. Meeker v. Clatsop County, 36 Or. App. 699, 585 P.2d 1138 (1978); Anderson v. Peden, 30 Or. App. 1063, 569 P.2d 633 (1977). The same case-by-case adjudication process occurs in the application of comprehensive plan policies to individual problems. Sunnyside Neighborhood Ass'n. v. Clackamas County, 280 Or. 3, 569 P.2d 1063 (1977); Green v. Hayward, 275 Or. 693, 552 P.2d 815 (1975); Commonwealth Properties v. Washington County, 35 Or. App. 387, 582 P.2d 1384 (1978).

38. United Advertising Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964) ("aesthetics and economics coalesce . . . concepts of congruity . . . inseparable from the enjoyment and value of property").

that power but have not discussed the case as one establishing real — albeit broad — limits.[39] While contemporary lawyers balk at an assertion of limits to the police power goals because those limits smack of the ill-favored doctrine of substantive due process,[40] these limits may be viewed as derived from general policy concerns rather than from constitutional doctrine.

The belief that "beauty" should not be an isolated standard for design has been expressed before.[41] One need not have a remarkable imagination to conjure up images of structures designed to realize one value to the exclusion of all others, whether that one value is "beauty" (look but don't touch) or "comfort" (plush velvet wonderland but mind the rats and beware of fire) or "safety" (concrete and castiron bunker). Thus, a system of design review must be tested against the overriding requirement of a workable system of values.

III. The Current Approach to Design Review

A. *Proper Architectural Principles*

In the absence of legal games setting forth the parameters of "proper architectural principles," courts have been willing to ratify design review that incorporates a nonlegal system with some generality of application. For example, in *Reid v. Architectural*

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39. AIA Handbook, *supra* note 30, at 11; Williams, *supra* note 25, at 2.

40. *See* Siegel, *Illinois Zoning: On the Verge of a New Era*, 25 DePaul L. Rev. 616 (1976). A focus on instrumentality rather than ends has characterized American jurisprudence and constitutional law during most of this century. R. Dworkin, Taking Rights Seriously 4-7 (1976).

A return to substantive due process is proposed in several recent works. *See* the analysis in Richards, Book Review, 52 N.Y.U. L. Rev. 1265, 1322-31 (1977); Krier & Schwartz, *Talking About Taking*, 87 Yale L.J. 1295, 1301-05 (1978).

The substance of the police power has received new life in the exclusionary zoning doctrine of Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975). Mt. Laurel emphasized the balancing of a variety of interests in a broad perspective, rather than a few interests in a narrow view. Rose, *The Courts and the Balanced Community* in After Mt. Laurel 14 (J. Rose & R. Rothman eds. 1977).

41. Louis Winnick, quoted in Freund, *What is This Thing Called Beautification?*, Newsletter, Bureau of Community Planning of U. of Ill. (Spring/Summer, 1965): "It is not necessary — it may even be undesirable — to have consensus on urban design principle. What is important is that the subject be taken out of the hands of a few passionate aesthetes and placed before the community at large." Compare the analysis of economic decentralization in R. P. Wolfe, In Defense of Anarchy 74-82 (1970).

Board of Review,[42] the review procedure of Cleveland Heights, Ohio, required submission of proposed structures to a Board of three architects, each of whom had ten years' experience as a registered professional. The Board applied "proper architectural principles," and the court praised "the employment of highly trained personages . . . for the purpose of applying their knowledge and experience." The court observed that

> When borne in mind that the members of the Board are highly trained experts in the field of architecture, the instruction that they resolve those questions on "proper architectural principles" is profoundly reasonable since such expression has reference to the basic knowledge on which their profession is founded.
>
> It is our view, therefore, that [the ordinance] contains all the criteria and standards reasonably necessary for the Board to carry on its duties.[43]

The incorporation of "proper architectural principles" applied by "highly trained personages" has been a widespread solution to the need for a system of design review. Model ordinances employ architects either as board members[44] or as expert advisors to lay boards.[45] Architects constitute ninety-seven percent of the membership on 221 design review boards according to a recent survey.[46]

The model invoked by the courts to resolve design review issues incorporates the traditional tool of design studio/jury criticism used in schools of architecture and the practice of having design awards given by the architectural profession. Architects first experience the application of "proper architectural principles" by "highly trained personages" in the school setting[47] and are later subjected to such judgments in the setting of design awards.[48]

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42. 119 Ohio App. 67, 192 N.E.2d 74.

43. 119 Ohio App. at 70, 192 N.E.2d at 76-77. *See also* State *ex rel* Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970) (board considered "customary architectural requirements" for house and "proper architectural development" of city); State v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955) (three-person board, two of whom must be architects, and the board judges building on "architectural appeal").

44. AIA HANDBOOK, *supra* note 30, at 40. The comment to this AIA model ordinance cited *Reid* as a basis for its emphasis on architect/board members.

45. J. DECHIARA & L. KOPPELMAN, MANUAL OF HOUSING/PLANNING AND DESIGN CRITERIA 477 (1975).

46. AIA HANDBOOK, *supra* note 30, at 9.

47. J. WADE, ARCHITECTURE, PROBLEMS AND DIAGNOSES: ARCHITECTURAL DESIGN AS A BASIC PROBLEM-SOLVING PROCESS §§ 1.3 & 1.4 at 12-17 (1977). E. RASKIN, ARCHITECTURE AND PEOPLE 6 (1974).

48. R. SOMMER, PERSONAL SPACE: THE BEHAVIORAL BASIS OF DESIGN 5 (1969).

An initial problem in evaluating the current system of design review is to consider whether or not "proper architectural principles" even exist. Robert Gutman has observed that:

> Architectural theory is the set of principles that guide the architect in making decisions . . . . [T]he current despair over the state of theory is said to arise because the principles of the modern movement did not establish the appropriate priorities among the variety of . . . elements that are part of any design scheme. It is claimed that the recent theory was too occupied with the symbolic and aesthetic . . . and ignored the function of a commodious, workable environment.[49]

Gutman's doubts are buttressed by the observations of Robert Sommer who criticized the inability of modern architects to implement their own "form follows function" mandate:

> [I]t is curious that most of the concern with functionalism has been focused upon form rather than function. It is as if the structure itself . . . has become the function. Relatively little emphasis is placed upon the activities taking place inside the structure. This is predictable in the case of the architect who, in his training and practice, learns to look at buildings without people in them.[50]

The logical result of the modern movement's priorities is manifested in the decision of one modern master to live in an old building from which he could view the pure form of his modern apartment designs.[51] Fortunately for the master, he had no occasion to experience the interior of his towers which were "generally . . . shoddy and shabby" with some features that "would not be acceptable in a public housing project."[52]

B. The Sources of "Proper Principles of Design"

1. Design awards

When architects gather together to apply their "principles," their judgments show a disproportionate emphasis on the aesthetics of exteriors. Accordingly, Sommer has called design awards an "extensive system of self-congratulation within the design profes-

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49. Gutman, *The Questions Architects Ask*, in PEOPLE AND BUILDINGS 34-35 (R. Gutman ed. 1972). *See also*, A. HUXTABLE, *supra* note 7, at 48-50.

50. R. SOMMER, *supra* note 48, at 3.

51. P. BLAKE, FORM FOLLOWS FIASCO 73 (1977).

52. M. MAYER, *supra* note 33, at 34, quoting remarks attributed to the builder of the towers.

sions" which would be "reasonable if architects are giving themselves awards for sculpture."[53]

The results of such exterior-oriented standards are illustrated by the Pruitt-Igoe Public Housing Project in St. Louis, which had to be dynamited after it rapidly deteriorated into an appalling slum. This project was an American Institute of Architects (A.I.A.) award-winning design as a result of the attractiveness of its glossy photographs.[54] Its many faults as livable space have been exquisitely detailed by scholarly studies[55] and by romantics who questioned even the aesthetics of Pruitt-Igoe in three dimensions.[56] In a more recent instance, the Urban Development Corporation of New York was praised by the A.I.A. for "attractive designs" while those same designs threatened to incinerate — through faulty wir-

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53. R. SOMMER, *supra* note 48, at 5. This so-called "glossy print" view may not be aesthetically sound. "Perception of these art forms occurs in a situation of experiential totality. . . . In architecture, there are no spectators; there are only participants." J. FITCH, *supra* note 2, at 4.

It is not clear whether the traditional awards are for the merits of the architect or the photographer. "More often than not, it [architectural photography] makes a building look better than it is." Gapp, *The Exacting Business of Shooting Buildings*, Chicago Tribune, Nov. 12, 1978 (magazine) 28, 70. Gapp recounts techniques used in photo preparation, including the screening of surroundings with portable greenery, the positioning of all window blinds at the same height and the removal of screens. Although it was reported in 1977 that "award juries are not instructed to question the users of buildings," C. HEIMSATH, BEHAVIORAL ARCHITECTURE 27 (1977), the AIA may be altering its approach to design judgments. The AIA has used an interdisciplinary team to visit the actual site of the Detroit Renaissance Center. Gribbin, *Architects take Swipe at RenCen*, Detroit News, July 16, 1978, § 1 at 1. The change may be connected to the election of Elmer Botsai, a specialist in "architectural pathology," to the AIA presidency. Goldberger, *supra* note 8, at 54.

54. M. MAYER, *supra* note 33, at 198.

55. O. NEWMAN, DEFENSIBLE SPACE 56-59, 105, 193-94 (1972); Rainwater, *Fear and the House-as-Haven in the Lower Class*, in PEOPLE AND BUILDINGS 299 (R. Gutman ed. 1972); Yancey, *Architecture, Interaction and Social Control*, in ENVIRONMENTAL PSYCHOLOGY 449 (2d ed. 1976).

56. J. SIMONDS, LANDSCAPE ARCHITECTURE: THE SHAPING OF MAN'S NATURAL ENVIRONMENT 198 (1961):

> [T]he author, in working along with public housing, has discovered that the very openness of a project is at first the thing that has the most appeal to families [moving in]. . . . But soon they become dissatisfied. . . . What they want, what they miss, what they unconsciously long for, are such congregating places as the carved and whittled storefront bench . . . the cool shade of a propped-up grape arbor, the meandering alleys, dim and pungent, the leaking hydrants, the hot bright places against the moist dark places. . . ."

ing and lack of fire exits — those occupants not already frozen by lack of weatherproofing.[57] Obviously, design awards based solely on exterior aesthetics provide a suspect standard for determining the proper principles of design.

2. Architectural education

The school setting for the application of "architectural principles" is also suspect as a model for public design review. Dean Wade has described the design studio architectural jury and defended its suitability as a teaching technique. The technique, as described, resembles the case method used in law school instruction. Both methods of instruction are comparable to learning to swim by being thrown in the ocean.[58] Each of these methods requires students to accept facts in instructors' hypotheticals and to be dragged through grueling public performances to defend solutions to the hypotheticals.[59]

Architectural teaching differs from law teaching in other respects which are critical in their implications for design review. In comparison to law professors who purportedly apply Occam's Razor to cut down unsupported generalities to precise terms, teachers of architecture "respond to the 'Gestalt,' the perceived totality of the project being presented."[60] Because architecture teachers respond to the "Gestalt,"[61] there is considerable flexibility in the weighting of critical values applied. . . . [I]n the judgment process there is no explicit weighting of the judgmental values. There is no explicit proportioning of importance among the many issues that architectural criticism addresses."[62]

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57. M. MAYER, *supra* note 33, at 279-81.

58. J. WADE, *supra* note 47, at 17.

59. J. WADE, *supra* note 47, at 14-15. Wade's account is reminiscent of dramatizations of law school in various incarnations of J. OSBORN, THE PAPER CHASE (1971). Even aphorisms about the career choices of A, B & C students of law and architecture are similar. Wade claims that in architecture, "The B student works for the C student, and the A student teaches." *Id.* at 8. Correspondingly, the legal aphorism states that "the A student teaches, the B student judges, and the C student is the backbone of the law." If architectural review boards become grandiose institutions, perhaps the role of the B student of architecture will become the equivalent of judging.

60. J. WADE, *supra* note 47, at 15.

61. That "Gestalt" is "undoubtedly composed of [such things as] beautiful draftsmanship . . . well organized drawings, and sensitively chosen colors and materials." *Id.* at 16.

62. *Id.*

Thus, the existing system of architectural education fails to properly articulate substantive standards to balance the competing values in design review. This system also falls short of the legal procedural requirements that decisions be made with "articulate consistency,"[63] and with discretion properly structured to insure fair, regular and consistent decisions.[64] "Design criticism has tended to be random and disordered."[65]

C. *Buildings in Relation to Setting*

Site plan review governs the harmonious arrangement of buildings and other structures on the land.[66] Unlike architectural review of glossy photographs, site planning is carried on three-dimensionally and recognizes that a site is a system.Its goal is to support human behavior and it seeks to understand the persons for whom the site is being planned.[67] The proper proportioning of values in design demands that the architecture of a building be considered in relation to the natural and man-made setting in which it will be placed. Typically, however, there is a severance of building review from site plan review.[68] Although various rationales have been advanced for such a division of labor,[69] this severance into discrete functions seems to be caused by the "sculptural" orientation of the architectural profession.[70]

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63. Dworkin, *supra* note 21, at 1064.

64. *See generally* K. DAVIS, DISCRETIONARY JUSTICE 97-161 (1969). *See also*, the discussions in DiMento, *supra* note 29, and Comment, *Aesthetic Zoning*, 11 URBAN L. ANN. 295, 303, 305 (1976), recommending due process as a limit on zoning for aesthetic objectives.

65. J. WADE, *supra* note 47, at 14.

66. Preface to K. LYNCH, SITE PLANNING at ix (2d ed. 1971).

67. *Id.* at 3-4. Information about topography, geology, hydrology and the like involves considerations beyond the two-dimensional glossy surface.

68. *See*, J. DECHIARA & L. KOPPELMAN, *supra* note 45, separating site plan review (§ E-1) from architectural review (§ H-17). The limitation of architectural review boards to building issues is typified by ordinances which have been litigated. *See also* Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 192 N.E.2d 74, 76; Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1975); Gumley v. Board of Selectmen, 358 N.E.2d 1011, 1014-15 (Mass. 1977).

69. *See, e.g.*, Loving Hills Developers Trust v. Planning Bd. of Salem, ___ Mass. ___, 372 N.E.2d 775 (1978); Lionel's Appliance Center v. Citta, 156 N.J. Super. 257, 383 A.2d 773 (1978); remarks by Professor Jan Krasnowiecki, Discussion on Session II (June 4, 1973), reported in CENTER FOR URBAN POLICY RESEACH, FRONTIERS OF PLANNED UNIT DEVELOPMENT 187-92 (R. Burchell ed. 1973) [herinafter cited as FRONTIERS OF PUD].

70. "Some architects don't consult when their buildings may be going up side by side or across from one another." Gribbin, *supra* note 53, at 10.

Even when the goal of design review is limited to aesthetics, architecture without site planning is likely to be a crippled art. For the actual users of a building, beauty is far more a function of what can be seen from inside the building than a function of the appearance of the building from the outside. Those users dislike views of other buildings; the "preferred views are distant open views, and closer views of grass, trees and human activities."[71] Thus, aesthetics from the user perspective may be benefited more by buildings that make themselves inconspicuous than by buildings that set themselves apart as modern sculpture.[72]

When site plan review is directed toward a wider range of goals, the beauty aspect of building design diminishes in importance even further. A design goal as elementary as "quiet," in contrast to "beauty," is likely to have the greater impact on users' perceptions of the pleasantness of their spaces.[73] The placement of buildings without regard to natural settings and man-made environments can have serious and sometimes fatal impacts. Social and physical ecologists have called attention to a variety of those impacts,[74] some of which show that other values, including health, safety and welfare, have not been considered.

For example, the architectural response to the oppressive summer heat waves in midwestern cities[75] has been air condition-

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71. C. COOPER, *supra* note 37, at 215-20.

72. Gans, cited in C. COOPER, *supra* note 37, Foreword at x. "[D]esigners frequently want user data that allows them to develop innovative designs but empirical findings indicate that many people prefer conventional designs."

73. C. COOPER, *supra* note 37, at 219. Marans & Rodgers, *Evaluating Resident Satisfaction in Established and New Communities*, in FRONTIERS OF PUD, *supra* note 69, at 203, 212-15. The site plans of "aestheticians" tend to be on grand scales and uninhabitable in practice. *Compare* P. BLAKE, THE MASTER BUILDERS: CORBUSIER, MIES & WRIGHT (1977), *with* M. MAYER, *supra* note 33, at 96-102.

74. *See generally* B. HENDLER, ENVIRONMENTAL PRINCIPLES FOR SITE DESIGN AND REVIEW (1977); I. MCHARG, DESIGN WITH NATURE (1969); R. MOOG & P. INSEL, ISSUES IN SOCIAL ECOLOGY (1974); D. CANTER & P. STRINGER, ENVIRONMENTAL INTERACTION (1975). According to these authors, serious consequences include fatigue, nervousness, and learning impairment from noise; reduced work efficiency from faulty illumination; flooding and erosion from run-off where vegetation is removed heedlessly and where impermeable surfaces cover the land; aggressive behavior by those who are hot and crowded; and disease from groundwater contamination.

Keller, *Friends and Neighbors in a Planned Community*, in FRONTIERS OF PUD, *supra* note 69, at 238-39, notes a trend among home buyers toward interest in the total environment beyond their single dwelling.

75. Clarke, *Some Climatological Aspects of Heat Waves in the Contiguous United States*, 5 ENVT'L RESEARCH 76, 84 (March, 1972). Heat can have an effect

ing, but air conditioning can aggravate the problems of heat for those outside the building who feel the so-called "heat island" effect[76] and for those inside the building who are unable to acclimatize to heat.[77] Other architectural responses to extremely hot weather have been similarly anti-social to outsiders. For example, mirror-coated glass which reduces thermal loading inside a glass structure dramatically increases thermal loading of nearby structures heated by the mirror's reflection.[78] The orientation and placement of buildings on sites in relation to other structures and the surrounding environment can reduce thermal loads without anti-social impacts.[79] The placement of buildings and vegetation can encourage air movement to cut down excessive heat.[80] Furthermore, this attentiveness to placement in conjunction with aerodynamically designed structures also can alleviate the opposite extreme of air movement: the wind tunnel effect that buffets buildings and people in cities.[81] If health and the total environment were considered, such results would not occur.

Attention to a building's design and placement can also promote safety and welfare values by reducing the risk of crime. Oscar

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on mortality. *See, e.g.*, Ellis, *Mortality from Heat Illness and Heat-Aggravated Illness in the United States*, 5 ENVT'L RESEARCH 1 (March, 1972).

76. Buechley, Van Bruggen & Truppi, *Heat Island = Death Island?* 5 ENVT'L RESEARCH 85 (1972). Air conditioners are heat pumps. They do not create coolness out of nothing; they merely transport heat from the inside to the outside of the air conditioned structure. A collection of air conditioned structures raises outdoor temperatures in their vicinity. The collection of many air conditioners in an area full of asphalt and concrete surfaces can dramatically alter the climate. Occupants of cities are most vulnerable to heat death: the larger the city, the higher the heat-related death rate. Clarke, *supra* note 75, at 93.

77. Ellis, *supra* note 75, at 46-49.

78. P. BLAKE, *supra* note 51, at 73.

79. B. HENDLER, *supra* note 74, at 60-61.

80. Clarke, *Some Effects of the Urban Structure on Heat Mortality*, 5 ENVT'L RESEARCH 93 (1972). *Compare* Changnon, *What to Do About Urban-generated Weather and Climate Changes*, 45 J. AM. PLAN. A. 36 (1979).

81. P. BLAKE, *supra* note 51, at 53-54; Gapp, *Sears Tower Plaza Found Least Popular Among Users*, Chicago Tribune, Oct. 26, 1978, § 7 at 1, reporting proceedings of the annual convention of the American Society of Civil Engineers. Many high buildings funnel wind off their surfaces through narrow streets, converting light breezes into gales. E. RASKIN, *supra* note 47, at 51. In Cleveland, Ohio, 73 people claim to have been swept off their feet in one day by a high wind deflected by a new federal building. Architects have become concerned about their legal liability since a Chicago woman sued the designer of the Sears Tower after a gust of wind blew her against a guardrail and broke her jaw. Storch, *Tall Buildings Can be a Blow to the Windy City*, Chicago Tribune, Apr. 1, 1979, at 1.

Newman coined the phrase "defensible space" to describe a range of mechanisms to create "an environment in which latent territoriality and sense of community in the inhabitants can be translated into responsibility for ensuring a safe, productive and well-maintained living space."[82]

The mechanisms suggested by Newman to dampen crime are categorized in terms of human responses to "territoriality,"[83] "natural surveillance,"[84] and "image and milieu."[85] Each of these concepts requires architects to consider and integrate building design, the interrelationships of buildings and the relationship of building and site. For example, "territoriality" can be enhanced by subdividing "building interiors to define zones of influence of clusters of apartment units,"[86] subdividing "developments to define the zones of influence of particular buildings,"[87] and by creating "boundaries which define a hierarchy of increasingly private zones — from public street to private apartment."[88] Similar design mechanisms can facilitate "natural surveillance" and "image and milieu."[89] In sum, beneficial social patterns such as friendly personal contacts can be fostered by the physical structures that peo-

82. O. NEWMAN, *supra* note 55, at 3.

83. Territoriality is simply "[t]he capacity of the physical environment to create perceived zones of territorial influence." *Id.* at 51. A clear boundary between public and private territories allows residents to know when they may challenge intruders and allows intruders to know when they are intruding. The closer one comes to the individual residences, the clearer the boundary must be (a solid door to the home space; a low hedge between sidewalks and private yards).

84. "Natural surveillance" is defined as "[t]he capacity of the physical environment to provide surveillance opportunities for residents and their agents." *Id.* at 78. If the resident cannot see the territorial boundary being violated, the intruder need not fear the consequences of intrusion. As Newman points out, "[m]ost crime in housing is in the visually deprived semi-public interiors of buildings: the lobbies, halls, elevators, and fire stairs." *Id.* at 79.

85. "Image and milieu" may be characterized as "[t]he capacity of design to influence the perception of a project's uniqueness, isolation and stigma." *Id.* at 102. If a public housing project looks like an easy mark to a burglar because, for example, its design is stereotypical of special facilities for the unprotected elderly, the project will invite crime. Such public housing design is the structural equivalent of "kick me" signs. As E. RASKIN, *supra* note 47, at 83 concludes: "architecture is also a medium of communications. It conveys meanings."

86. O. NEWMAN, *supra* note 55, at 67.

87. *Id.* at 53.

88. *Id.* at 63.

89. *Id.* at 78. *See also* O. NEWMAN, DESIGN GUIDELINES FOR CREATING DEFENSIBLE SPACE (1975) [hereinafter cited as DESIGN GUIDELINES].

ple use, while detrimental social patterns such as crime may be consciously discouraged.[90]

The goals of providing for air movement and "defensible space" rank above the goal of aesthetics, according to surveys of the general population and users of design.[91] The implementation of such goals requires a design system that examines the environment in a more comprehensive manner than does current architectural review. While it is tempting to apply the traditional standard of "proper architectural principles" as a design review method, examination of that standard has disclosed that the "principles" do not properly account for competing values and alternative techniques and that its application can be hazardous to users.[92]

III. An Alternative Approach to Design Review

A need exists for an approach which can function within the limits of legality and sound policy. The approach must incorporate an ordered system of values and, if realistic, will be compatible with the methods already used by design professionals whose work is to be regulated.

Designers divide their work into four basic stages:

1. The briefing/programming stage: the demands of the client and possibly the user are explained to the design team and organized into a program;
2. The planning/design stage: the program is translated into a design proposal;
3. The construction or building stage: the design proposal is converted into buildings and landscape;
4. The user stage: the building and site are inhabited.[93]

A major problem of traditional architectural review is that the

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90. *Id.*

91. C. Cooper, *supra* note 37, at 210-11; M. Rokeach, *supra* note 35.

92. Constance Perin has expressed both the temptation and the unpleasant reality:

> When the environmental designer is making relatively small-scale decisions, as in planning several . . . buildings on a site, he is working with a finite data system and a geographic boundary. What he decides, stays decided in concrete and brick. . . . Because this designer can know . . . at a level of detail not accessible to the large-scale designer, it might be assumed that he *does* know. . . . [H]e most often does not know.

C. Perin, *supra* note 1, at 10.

93. Gutman, *supra* note 49, at 344; J. Wade, *supra* note 47, § 2.5.1 at 83.

review is interjected between the design stage and the building stage. At that point, suspicion and resentment can flare among participants.[94] "Architects tend to regard their task as completed once the brief and design scheme have been completed."[95] The architect has produced "a single set of plans — called, in fact, a 'solution.' "[96] Introducing public input only after the "solution" is complete is as senseless as a hypothetical legal system in which lawyers introduce briefs and oral argument only after the judge has issued a written opinion. If input is not introduced in the beginning, "it cannot be effective in directing design, for basic and irreversible decisions will have been made."[97] The alternative system of design review suggested here is notably different from the traditional approach in that it uses effective public input in all phases of the design process.

A. Input in Briefing

For public input to be compatible with the practices of designers, it must begin at the briefing stage when the design team is receptive. "During briefing there is great willingness to consult others . . . about ends and means. . . . The tradition for briefing is so vague anyway that when dealing with briefs the architect is open for guidance and advice from any quarter."[98]

The architects' education through the design studio method indicates why the briefing tradition is vague. Like the case method for law school teaching, the typical design studio contains no institutionalized curriculum on client interviewing. The case method "facts" and the design studio "briefs" are prepared by instructors, and are not elicited from clients through interviewing. As a result, these methods develop the abilities of problem-solving and defending the solution, which are markedly different from the skills needed to talk to a client. Problem-solving and oral aggressiveness in defense of the solution are skills of the good school architect and the good school lawyer.[99] In contrast, the skills of the counseling

94. AIA HANDBOOK, *supra* note 30, at 38.

95. Gutman, *supra* note 49, at 344. Site planners, by contrast, continue to modify plans even after a site is occupied because "site design is a learning process in which coherent systems of form, client, program, and site gradually emerged." K. LYNCH, *supra* note 66, at 5.

96. C. PERIN, *supra* note 1, at 11.

97. C. HEIMSATH, *supra* note 53, at 26.

98. Gutman, *supra* note 49, at 355-57.

99. *See, e.g.*, T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 10-12 (1972).

lawyer and the interviewing architect include the ability to listen to and understand the clients' needs and accurately summarize client input after reflection.[100]

The architect's openness to input in the briefing stage, however, does not guarantee participation by clients whose demands are supposed to be fundamental. As in the lawyering process, a combination of interviewer ineptitude and client insecurity will obstruct lines of communication. The client building a dream house may be inhibited from forcefully expressing his needs by the emotional significance of the home itself[101] and the reverence for a master builder.[102] Clients who infrequently deal with the lawyering and architectural professions may be more reluctant to express their desires than in common consumer contexts, such as aggressively dealing with a used car salesman.[103]

Different modes of thinking further compound the communication block between architect and client. "The visual thinking of the architect contrasts greatly with the abstract analytical thinking of . . . most laymen, and represents a serious impediment to fruitful dialogue between them."[104] Psychologist Robert Sommer, finding words alone ineffective for communicating with architects, formed the habit of taking several eight-by-ten glossy prints whenever he discussed a topic with designers.[105] Unfortunately, the average client is rarely so well prepared with appropriate glossies (or even cartoons!). As a result of communication blocks in the briefing stage, "values, priorities and goals . . . are written and followed by the physical designer in the absence of a fully expressive

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100. *Id.*

101. *Id.* at 19-27.

102. Goldberger, *supra* note 8, at 54. The reverence and awe for the professional raise disproportionately high expectations for miraculous results so that attribution of flaws to the "master builder" is often beyond the architect's actual power of control. The need to lower malpractice rates has led some architects to describe their role in the design process as minor "facilitators." *Id.*

103. M. MAYER, *supra* note 33, at 33-34. The regular user of professional services may rank the professional somewhat lower than a used-car salesman. *See also How to Choose a Lawyer (and What to do Then)*, CONSUMER REPORTS, May 10, 1970, at 284-90.

104. R. SOMMER, *supra* note 48, at 5.

105. *Id.* The communication gap is particularly severe between lawyers and designers since law demands analytical thinking while architecture demands spatial intuition. Professionals in both fields tend to use their habitual modes of thinking without regard to its appropriateness to the problem at hand. *See* Ornstein, *The Split and the Whole Brain*, HUMAN NATURE 76, 80-81 (May, 1978).

set of specifications by the client or the ultimate inhabitants."[106] The opportunity for input at the briefing stage would abate some emotional fears that freedom of expression will be stifled. "Architectural problems cannot be phrased so precisely that only a single design or even a limited group of designs are proper solutions to any stated problems. Instead the architectural problem is so loosely stated [even with a well-detailed building program] that many solutions are possible."[107] Input at the briefing stage still permits flexible, innovative solutions to problems in design.

B. Input in the Design Stage

After the briefing stage, the next opportunity for public input occurs during the design stage, although that stage has greater potency in limiting design choices. In the design stage, architects look to standard practices, regulations, existing solutions and innovations[108] in producing the solution to a proposal. The public input could take the form of code-type regulations. Some of the means needed to reach the sorts of goals discussed previously are suited to codification. For example, certain aspects of "defensible space" can be achieved by choice of construction materials and methods; Oscar Newman has drafted specific codes on construction techniques and hardware for mailboxes, doors and windows.[109]

Although the stability of data regarding proper methods and materials of design may enable the enactment of codes addressing particular subjects, the code approach would have its weaknesses. A fundamental difficulty with codes is their glacially slow response when their data base becomes obsolescent. Because of this slow response, the "so-called 'minimum standards' [established by codes] frequently have little ascertainable relation either to health or to social costs."[110] Another difficulty with specific codes is that

106. C. PERIN, *supra* note 1, at 3. The science of user analysis does not depend on presenting paper plans to clients before construction. This science is subject to the reality that ordinary people cannot respond to spaces that they have not experienced. Canter, *Buildings in Use*, in ENVIRONMENTAL INTERACTION, at 172 (1976). Therefore, user data is based on the observation of existing occupied spaces, which is informative because people with similar cultural backgrounds in similar settings react alike to similar spaces. The architect need not know the particular user of his design to employ user studies; he need only know the types of users. *Id.*

107. J. WADE, *supra* note 47, at 23.

108. *Id.* at 85-86.

109. DESIGN GUIDELINES, *supra* note 89, at 163-206.

110. E. BANFIELD & M. GRODZINS, GOVERNMENT AND HOUSING IN METROPOLITAN AREAS 78 (1958).

designers might assume that a particular goal need not be actively sought in the design solution so long as the code sections on that issue have been complied with. Thus, if a code addressed the "defensible space" problem only in terms of the proper hardware for mailboxes, doors and windows a designer might stop at this point and fail to tackle other solutions to "defensible space."[111] An effective design program must include an issue as part of both its ends and its means. Codification places an issue into the means level alone.

Because the state of the art in design is ever-changing, constant revision of a code system would be necessary to keep the code consistent with improving data.[112] However, constant code revision is not always feasible, so public input might be more effectual through the use of design guides that take the functional role of standard practices and existing solutions. Design guides would simply offer a variety of means to reach program ends. For example, if one program goal is "protection from the weather for passers-by," the design guides can outline a range of techniques to achieve that program goal.[113] If a city has or is developing a concentration of high-rises, design guides could require wind tunnel testing to guarantee minimum wind vortex by new structures' interaction with existing and planned buildings.[114] Solar design guides could be incorporated if solar energy use is a city goal. In locations with distinctive architectural traditions, the design guides could limit designers' vocabulary.[115] Not every structure would present

111. Ostensibly these codes are written to protect health and safety and, in turn, the implication is that if health and safety are protected, the environment is healthy. . . . Codification may document all the things one should not do and still be far short of exemplifying what one should do. . . . Codes compound problems by suggesting that all situations are the same.

C. HEIMSATH, *supra* note 53, at 27. Codes also may not document all the things that should not be done. *See, e.g.*, Rice, *Poison Pipes*, Willamette Week, Oct. 23, 1978, at 1, describing cases of lead poisoning from galvanized water pipes.

112. C. PERIN, *supra* note 1, at 20; Gans, cited in C. COOPER, *supra* note 44, Foreword at ix.

113. *See, e.g*, Livingston & Blaynay, Downtown Portland Proposed Development Regulations 7, 17 & 50-52 (November, 1974); Glazer, *It Never Rains at NW 1st and Couch*, Willamette Week, July 24, 1978, at 11. Seppard, *Ideas for Making a City Livable in Winter Assayed in Minneapolis*, N.Y. Times, March 23, 1978, § 1 at 16.

114. Gapp, *supra* note 53.

115. "Any consistent vernacular architecture . . . is, indeed, limited vocabulary design." J. WADE, *supra* note 47, at 133. *See also* Appearance Guidelines of the Village of Oak Park, Illinois, where vocabulary of two historic districts (Frank Lloyd

every design guide issue and the cost may require trading off certain applicable design guides judged more important at a given location.

In sum, design guides would function similarly on a micro scale as the goals and guidelines of Oregon's land use program function on a macro scale.[116] In each instance, the combination of a program element and a design guideline precisely specifies the range of public concerns and creative parameters for the design team to consider. Hidden agendas of goals — vague objections to the aesthetics of a housing project when the motivation is the identity of future tenants[117] — are curtailed by the requirement of a specific program element as the basis of any subsequent complaint about the design solution.[118]

C. *The User Stage*

The optimum source of public input for the program and design is that stage most neglected in the current system, the user stage. Until now, the design philosophy has been "never look back."[119] One simple way to engender feedback from users would be to practice Wolffe's law, which states that "every person who was instrumental in designing a development, [is] required to live in it for a period of time."[120] A more likely way to generate user

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Wright Prairie School District and Oak Ridge-Ridgeland Victorian District) is incorporated into design guidelines.

116. *See, e.g.*, Commonwealth Properties, Inc. v. Washington County, ___ Or. App. ___, 582 P.2d 1384 (1978). The relationship of program elements and design guidelines to specific proposals is comparable to the relationship of comprehensive plans and implementation techniques to specific proposals.

117. AIA HANDBOOK, *supra* note 30, at 16. Under the Lake Michigan and Chicago Lakefront Protection Ordinance, an apartment proposal with state financing and HUD § 8 rent subsidies was rejected by the Chicago Planning Commission. A spokesman for opponents said: "All the block clubs in this area are involved in this. We do not want 100% subsidized buildings along the lake front," in *Rent Subsidy Rejected, Builder Ponders Options*, Chicago Tribune, Sept. 24, 1978, § 12 at 1E; *Outlook on Apartments: Few, Costly, Spartan*, Chicago Tribune, Jan. 7, 1979, § 14 at 2B.

118. The relationship of program elements and design guidelines to specific proposals is comparable to the relationship of comprehensive plans and implementation techniques to specific proposals. For a recent illustrative application of broad statutory finding requirements to a specific factual situation, *see* Commonwealth Properties, Inc. v. Washington County, ___ Or. App. ___, 582 P.2d 1384 (1978).

119. R. SOMMER, *supra* note 48, at 4. *See also* C. HEIMSATH, *supra* note 53, at 27.

120. Wolffe, Comments on Session II, in FRONTIERS OF PUD, *supra* note 69, at 186.

input would be through the studies of social scientists, whose program suggestions[121] and design guidelines[122] are developed from user evaluation data. To be effective, these data must be considered at the program stage, when the user's needs are first evaluated.

D. Scaling the Public Intervention

The extent of public regulation in the program and design stages can be scaled to the degree of public interest in the project. The scaling can be based on factors such as the size and ability of staff, reliability and detail of current user data, likely impacts of bad design on captive audiences and respect for the autonomy of a dwelling's occupant.

In evaluating the plans for a single-family home to be occupied by the client, the design review system can offer the designer's client brief/program assistance and design guidelines concerning the arrangement of interior spaces. This assistance could include suggested checklists and questions for clients dealing with designers.[123] If an interior design issue clearly has major public impact, the design review system may be made mandatory. For example, energy efficiency and reduced water consumption could be subjects of mandatory regulation, beyond the extent they might already be regulated by traditional building codes. The structural exterior and site plan, particularly at the boundaries of the site, could be more closely regulated, although aesthetic regulations should be invoked for single-family dwellings only if a "distinctive architectural tradition" is present or if the proposed design is "blatantly offensive."[124]

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121. Marans & Rodgers, *Evaluating Resident Satisfaction in Establishing New Communities*, in FRONTIERS OF PUD, *supra* note 69, at 212-15; Keller, *Friends and Neighbors in a Planned Community*, in FRONTIERS OF PUD, *supra* note 69, at 238-39.

122. *See, e.g.*, C. COOPER, *supra* note 37; and DESIGN GUIDELINES, *supra* note 89. HUD has allocated $500,000 for technical assistance to urban environmental design. 6 HOUS. & DEV. REP. (BNA) 437-38 (Sept. 19, 1978).

123. *See, e.g.*, CONSUMER REPORTS, *supra* note 102.

124. The "blatantly offensive" standard is noted in Williams, *supra* note 25, at 33. Williams' suggestion that the standard could be violated only by an individual in a unique financial position has been validated in a recent incident. Sheik Mohammed al Fassi spent $2.4 million of his father's cash to purchase and decorate a Beverly Hills mansion in a colorful genital theme. N.Y. Times, Apr. 23, 1978, § 1 at 22, col. 3. But even the young Sheik was finally confronted with the forces of conventionality in the person of his father. Time, July 3, 1978, at 69.

For the client-occupied single family dwelling, the communications obstacle between client and designer is less critical, partly because the client and designer are apt to have a shared middle-class value system.[125] Added regulation may be required in circumstances where there is significant social distance between designer and user[126] or where the structure is intended to serve a specialized function.[127] Regulatory intervention is especially critical in situations where such factors are present and the client is a developer who will not be an ultimate user of the site and buildings. When the client is in the land development business, "the most detailed information he [the designer] is likely to work with is financial. . . . It is not even 'economic' data, which might discuss costs in terms of benefits, for example — but simply and strictly dollars available and income to be returned via rents and sales."[128]

E. Administration of Design Review

In several particulars, the design review approach proposed in this article could be administered in a manner similar to other regulatory systems such as the Planned Unit Development (PUD).[129] PUDs are typified by "development flexibility, negotiation, and discretionary application of standards."[130] The suggested early input into the briefing process is kindred to the preapplication conference in PUDs.[131] An approach that considers diverse values in the perspective of a total site plan and building scheme

125. Gans, in C. COOPER, *supra* note 37, Foreword at xii (1975).

126. *Id.*; R. SOMMER, *supra* note 48, at 87.

127. R. SOMMER, *supra* note 48, at 98 (school design) & 120 (bar design).

128. C. PERIN, *supra* note 1, at 10.

129. A "Planned Unit Development" is a flexible technique for developing land that incorporates selected devices from traditional zoning and subdivision control. Unlike the traditional lot-by-lot requirements, PUD regulations apply requirements to a project as a whole and permit discretionary public review of proposed designs. M. MESHENBERG, THE ADMINISTRATION OF FLEXIBLE ZONING TECHNIQUES 19 (1976). *See also* the discussion of flexible building review in *New York City for the Citicorp Center, Marvin, Where Athletic Bearing, Aesthetic Grace Balance*, Christian Sci. Monitor, Feb. 9, 1979, at 19, col. 1.

130. ABA ADVISORY COMMISSION ON HOUSING & URBAN GROWTH, HOUSING FOR ALL UNDER LAW 235 (R. Fishman ed. 1978).

131. For a description of the preapplication conference, *see id.* For an example of a design review ordinance which requires a preapplication meeting in which applicants confer with the county's planning director, *see* MULTNOMAH COUNTY, OR., ORDINANCE 151, § 7.613.1. The amount of detail the applicant must provide at that early stage suggests a process well past the early briefing. *Id.* § 7.614-614.3.

is consistent with the "unitary permit" concept of the PUD.[132] The appropriateness of considering the building design in relation to site plan is recognized in PUD practice.[133] Finally, the consideration of a variety of value-based elements in a design system could well take advantage of a PUD-like bargaining process which allows for tradeoffs to remedy inconsistencies that can arise when the design theory is applied to the actual location.[134] The dimensions of development proceeding in the PUD form — which regularly requires a project of a certain minimum size — can also identify the scale at which the impact of a design can justify public regulation. Certainly in developing suburbs, the PUD scale of development is precisely the scale at which local government has found that significant potential spillover effects of mixed use of higher density can be contained by design changes within the project.

CONCLUSION

Past writing about aesthetic objectives for land use controls typically has expressed concern for the quality of life particularized in terms of aesthetics.[135] Since there has been a "shift from quantitative to qualitative aspects of life" in the special setting of land use regulation[136] and in the population at large,[137] it should not be surprising that aesthetics has been subsumed quietly into land use controls without expressly being designated as "aesthetic controls." This subsumption is not untoward so long as it does not lead to oblivion for aesthetic concerns. "There is no discounting the joys and benefits human nature reaps in contact with beauty of all

132. Krasnowiecki, *Legal Aspects of Planned Unit Development*, in FRONTIERS OF PUD, *supra* note 69, at 101.

133. Nearly five percent of PUD ordinances in a 1973 survey included building architecture standards. Bangs, *PUD in Practice*, in FRONTIERS OF PUD, *supra* note 69 at 37 & 311-13. *See* the treatment of the building design ordinance in Frankland v. City of Lake Oswego, 207 Or. 452, 517 P.2d 1042 (1973).

134. Krasnowiecki, *supra* note 130, at 107. Burchell, *Introduction*, in FRONTIERS OF PUD, *supra* note 69.

135. Berman v. Parker, 348 U.S. 26. *See Preface to Issues* in SOCIAL ECOLOGY at ix-xi, (R. Mous & P. Insel eds. 1974); M. PROMANSKY, W. ITTELSON & L. RIVLIN, ENVIRONMENTAL PSYCHOLOGY 1-8 (2d ed. 1976).

136. Marans & Rodgers, *Evaluating Resident Satisfaction in Establishing New Communities*, in FRONTIERS OF PUD, *supra* note 69, at 197. House & Gerba, *Analytic Techniques for Environmental Decision Making* in FUTURE LAND USE 201-06 (R. Burchell & D. Listokin eds. 1975), describing a "quality of life" matrix for environmental decisions.

137. M. ROKEACH, *supra* note 35, at 328.

kinds. But we can no longer leave it at the satisfying look of things: the satisfactions have also got to come from . . . use."[138]

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138. C. PERIN, *supra* note 1, at 41.