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CODEX IMAGINARIUS: VISUAL CODES IN LAND USE PLANNING AND AESTHETIC REGULATION

*Stephen M. Judge**

INTRODUCTION

New Urbanism, with its appeal to lost values of community and its promise of thriving, dense, walkable, and integrated communities, has captured the imagination of city planners, environmentalists, and civic activists in communities across the country. Architects and planners subscribing to the New Urbanist credo are involved with projects as diverse as urban infill redevelopment in aging cities to wholesale reconstruction of Gulf Coast communities devastated by Hurricane Katrina.[1] Just as broad as the range of communities and situations that New Urbanism has attracted is the breadth of its vision for reshaping the way in which we plan and regulate land use.

This Note aims to single out one aspect of the New Urbanist agenda—the attempt to rethink the way in which development plans are drafted and codified by simplifying codes and replacing or supplementing text with pictorial illustrations—and to analyze its feasibility and impact on the land use planning process. Although there may be plenty of room for discussion on the wisdom and desirability of the New Urbanism movement generally, the questions this Note asks are much less broad: assuming that localities choose to incorporate New

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1 *See* Kevin Fee & Andres Viglucci, *Gulf Coast: New Urbanism Foes of Sprawl Offer Expertise in Rebuilding*, SAN JOSE MERCURY NEWS, Oct. 11, 2005, at BU3, *available at* 2005 WLNR 16450877; Bradford McKee, *To Restore or Reinvent?*, N.Y. TIMES, Nov. 24, 2005, at F1; Jill Rosen, *A New, Improved New Orleans Seen*, BALT. SUN, Sept. 27, 2005, at 1A; Press Release, Cong. for the New Urbanism, Community, Character, and the Response to Katrina (Sept. 17, 2005), http://www.cnu.org/news/index.cfm (follow "Press Releases" hyperlink; then follow "Community, Character, and the Response to Katrina" hyperlink).

Urbanist principles and innovations into planning regulation, can and should they use art to codify those principles?

In Part I, this Note provides an overview of art as law, discussing both the traditional uses lawmakers have found for art and the more novel uses that some New Urbanists propose or employ. In Part II, this Note considers whether art can provide precise enough regulations to satisfy constitutional due process and considers conditions under which visual codes can do so. Finally, in Part III, this Note turns to consider whether visual codes can effectively replace or enhance traditional verbal regulation, given the conditions that such codes must satisfy.

This Note concludes that it is theoretically possible to use a wide variety of images in legal codes, by constructing and interpreting them in a way that constrains their meaning within the accepted requirements of due process. However, this Note goes on to conclude that despite the capacity of images to function as law and some of the benefits of such use, they have enough significant drawbacks that they should only be used in situations where they are easy to interpret and convey a very small amount of legal information—if any.

I. Overview of Art as Law

The use of visual images as law, in the broadest sense, is hardly a new proposition. For as long as maps have signified geographic boundaries, some pictures have had legal effect.[2] The European colonial powers drew narrow lines on maps to divide vast holdings in South America, Africa, and Asia, and these pictures determine the legal borders of dozens of modern day states under the *uti posseditis* regime. Zoning codes divide up municipalities by superimposing colored shapes onto street maps, and the patchwork pages of those codes constrain the use of private property with dramatic effects on its value and its owners' legal rights.

A basic principle of New Urbanism is that "[t]he economic health and harmonious evolution of neighborhoods . . . can be improved through graphic urban design codes that serve as predictable guides for change."[3] No single paradigm represents the form of current and

2 Maps are not the only pictures that have traditionally been given legal effect, but they are focused on here because of their close relationship to land use planning. Patents frequently contain detailed diagrams of devices or processes protected, and trademark protection granted to iconic logos gives them legal effect. An interesting parallel to the discussion of interpreting legally effective pictures might be found in the application of antidilution laws to trademarks.

3 Bill Lennertz, *The Economic Health and Harmonious Evolution of Neighborhoods, Districts, and Corridors Can Be Improved Through Graphic Urban Design Codes That Serve as*

proposed visual codes. Examples of regulations and codes employing visual images range from radical to unremarkable. The development code for an urban infill project in the Park East neighborhood of Milwaukee, while not entirely eliminating traditional regulatory text, describes its essential regulating plan in two pages consisting of an introductory paragraph, a map, a series of images, and a handful of labels.[4] Duany Plater-Zyberk & Co.'s (DPZ) evolving *Smart Code*, on the other hand, retains much of the technical language traditional to urban planning regulations and supplements that language with diagrams and pictures of proposed standards.[5]

New Urbanist proposals to combine graphics and text in a simplified visual code do more than merely expand the scope of previous uses of art in law. Such proposals are a response to the exclusivity, waste, and conflict that riddle our current zoning codes and benefit only the entrenched interests of the status quo—lawyers, in particular—at the expense of livable environments and integrated communities.[6] The importance of images in codes to the New Urbanist vision extends beyond its role in planning and development. Individual ideas and proposals must be viewed within the larger context of what New Urbanism seeks to achieve, which is to radically reorient the way we build our communities and replace "a society of homogeneous pieces, isolated from one another in often fortified enclaves, [with] a society of diverse and memorable neighborhoods, organized into mutually supportive towns, cities, and regions."[7] In short, New Urbanism seeks to help "untangle the mess we have made" of our cities, communities, and selves.[8]

Images have an evocative force unmatched by conventional linguistic codes. They are richer in meaning than words—they feel closer to nature and offer viewers a more direct connection to the objects they represent. New Urbanists know that they are fighting a

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Predictable Guides for Change, *in* CHARTER OF THE NEW URBANISM 109, 109 (Michael Leccese & Kathleen McCormick eds., 2000).

4 Milwaukee, Wis., Park East Redevelopment Plan: Development Code ch. 2 (June 15, 2004), *available at* http://www.mkedcd.org/parkeast.

5 DUANY PLATER-ZYBERK & CO., SMART CODE (version 7.0, 2005), *available at* http://www.dpz.com/pdf/SmartCodeV7.0-6-06-05.pdf [hereinafter DPZ, SMART CODE]; *see also* DUANY PLATER-ZYBERK & CO., THE LEXICON OF THE NEW URBANISM (version 3.2, 2002) [hereinafter DPZ, LEXICON].

6 JAMES HOWARD KUNSTLER, HOME FROM NOWHERE: REMAKING OUR EVERYDAY WORLD FOR THE 21ST CENTURY 147–49 (1996).

7 ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM, at xiv (2000).

8 *Id.*

war of ideas and understand the importance of controlling the language in which that war is waged. According to John Dutton:

> The *Lexicon of the New Urbanism*, written by DPZ, is among the most grandiose attempts at restructuring the language and ideas of urban development in recent decades. . . . But in aiming at a wholesale restructuring of development patterns and representational techniques, the *Lexicon* and codes presented by the New Urbanists are confronting the tremendous inertia of existing conventions.[9]

Given the strength of current land use planning conventions, New Urbanists must "provid[e] assurances that separation of uses is not the only way to guarantee orderly land uses."[10] Visual codes must do more than just simplify the planning process. The proposal to rethink the way codes express legal conceptions of neighborhoods, towns, cities, and regions is inseparable from the proposal to rethink those legal conceptions themselves. By "show[ing] a desired outcome,"[11] pictures can provide their viewers—experts and laypeople alike—with a less mediated experience of not only the *possibility* of rethinking our built environment, but also the superiority of the New Urbanist vision.[12] Using images in codes places the rhetorical force of those images at the center of the planning universe and will, so the New Urbanists believe, wrest control of those codes from the clutches of the entrenched bureaucracy that props up a rapidly failing system.

But regardless of the validity or feasibility of the New Urbanists' ultimate objectives for revitalized communities, unless the images can survive the inevitable constitutional challenges to their precision, they cannot function as law.

II. CAN ART BE LAW?

Legal codes are propositions—they declare what the law is. To have legal effect, an image must convey meaning in a manner precise enough to describe the underlying proposition. The Fourteenth Amendment forbids any State to "deprive any person of life, liberty, or property, without due process of law."[13] The Supreme Court has held

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9 JOHN A. DUTTON, NEW AMERICAN URBANISM: RE-FORMING THE SUBURBAN METROPOLIS 81 (2000). *See generally* DPZ, LEXICON, *supra* note 5.

10 E-mail from Nicole Stelle Garnett, Lilly Endowment Associate Professor of Law, Notre Dame Law School, to author (Jan. 19, 2006, 15:30:30 EST) (on file with author).

11 KUNSTLER, *supra* note 6, at 148.

12 *See* DUTTON, *supra* note 9, at 75 ("Sometimes the rewriting of the codes is presented as a rhetorical device for displaying the relative value of [New Urbanist design principles] in general . . . .").

13 U.S. CONST. amend. XIV, § 1.

that "the first essential of due process of law" is that a statute not be so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application."[14] This Part begins by describing the semiotic aspects of the semantic difficulties in pinpointing the meaning of iconic signs generally.[15] This Part then turns to the question of whether, and how, pictorial codes can express propositions and proposes a theoretical basis on which images can be constructed and interpreted with legally sufficient precision. The final subpart considers the potential effect of a nonlegal use of art in codes—descriptive examples—on the precision of the accompanying verbal text. Part II ultimately concludes that art, under certain limited conditions, *can* be used in regulatory codes, either legally or nonlegally, without automatically violating the Due Process Clause.

A. Vagueness in Theory

The problem of vagueness[16] in pictorial codes arises from the way in which pictures express meaning. Although semiotics—"the study of signs and systems of signification"[17]—is a broad field of study with implications well beyond the essentially linguistic questions of what legal codes look like,[18] two features of signs are particularly relevant to the following analysis. First, a sign may be considered in terms of its conventionality: the degree to which its meaning is assigned by human convention as opposed to nature. Second, a distinction may be drawn between analog and digital signs.[19]

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14 Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

15 Semantics, one of the traditional branches of linguistics, focuses on what words mean in sentences, whereas semiotics, broadly defined as the study of signs, deals with signs—including words—as individual units and is concerned with "*how* they mean." JOHN STURROCK, STRUCTURALISM 22 (1986); Daniel Chandler, Semiotics for Beginners: Introduction, http://www.aber.ac.uk/media/Documents/S4B/sem01.html (last visited Jan. 19, 2006). Although there is much disagreement over semiotics' proper scope of inquiry, for present purposes it is the mode of analysis, not the scope of application, that is important.

16 The terms "vague" and "vagueness" are used in this Note in a general sense to mean not precise enough to provide a standard to which a reasonably intelligent person can conform. While, in linguistic terms, there is a difference between ambiguity (equivocation) and vagueness (indeterminacy), most of what is referred to as vagueness refers to the equivocal nature of meaning expressed in images. *See* FREDERICK BOWERS, LINGUISTIC ASPECTS OF LEGISLATIVE EXPRESSION 131–36 (1989).

17 J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1119 (1990).

18 For examples of semiotic analysis applied to the study of law, see generally ROBERTA KEVELSON, THE LAW AS A SYSTEM OF SIGNS (1988); Balkin, *supra* note 17.

19 A third major characteristic distinction among signs is the arbitrariness versus the motivation of a signifier. Umberto Eco is critical of the frequent treatment as

1. Conventionality

Semioticians, following Charles Sanders Peirce, divide the functions of signs into three categories of decreasing conventionality: symbols, icons, and indices.[20] Symbols, including language systems whether spoken or written, are arbitrary and bear no resemblance to the thing being signified.[21] Symbols are therefore purely conventional: the relationship between the signifier and the referent are assigned by convention and must be learned by the user. In contrast, icons, such as pictures, *do* resemble the signified thing: some of the characteristics of icons are thus partially constrained by the referent itself.[22] Indices, which are of least relevance to the present discussion, are signifiers that are directly connected to their referents and include such signs as smoke (signifying fire), fever (signifying illness), and analog clocks (signifying the passing of time).[23]

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synonyms of digital, arbitrary, and conventional, on the one hand, and analogical, motivated, and natural on the other. UMBERTO ECO, A THEORY OF SEMIOTICS 190 (1976). To the extent that this analysis suffers from blending features of arbitrariness into conventionality, it is probably a good example of his point.

20 Charles Sanders Peirce, Elements of Logic, *in* 2 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE ¶¶ 2.247–.249 (Charles Hartshorne & Paul Weiss eds., 1965); Daniel Chandler, Semiotics for Beginners: Signs, http://www.aber.ac.uk/media/Documents/S4B/sem02.html (last visited Jan. 19, 2006). It is important to note that while signs are often referred to as symbols, icons, or indices, it is not particular signifiers themselves that fall into these categories but rather their functions or, in other words, the manner in which the signifier (symbol, picture, etc.) relates to the thing or concept that it represents. TERENCE HAWKES, STRUCTURALISM AND SEMIOTICS 129 (1977). A single sign can, and frequently does, fall into more than one classification.

21 Peirce, *supra* note 20, ¶ 2.249. The terminology of semiotics is not very standardized or always consistent. The term "sign" is generally used to refer to the entire semiotic relationship: the object being represented (object, signified), the thing used to represent the object (representamen, signifier), and the subject to whom the object is represented (interpretant). Peirce himself, however, sometimes used the term sign interchangeably with the term *representamen*. *Id.* ¶ 2.228; Chandler, *supra* note 20. For clarity, this Note uses the expressions "signifier" to refer to Peirce's *representamen*, "referent" to refer to what he calls *object*, and "sign" to refer to the entire relational construct.

22 Peirce, *supra* note 20, ¶ 2.247; Chandler, *supra* note 20. Icons, despite being constrained by the referent, are still conventional to a greater or lesser extent. Take, for example, stick figures frequently used to represent men and women: the picture is iconic, but it does not actually resemble a man or a woman unless we have already learned its meaning. Chandler, *supra* note 20 (citing GUY COOK, THE DISCOURSE OF ADVERTISING 70 (1992)).

23 Peirce, *supra* note 20, ¶ 2.248. Photographs, at least on photographic film, are also examples of indices in the sense that the way in which the photograph is created depends upon a point-by-point relationship between the subject and the photograph.

The natural character of icons explains some of their appeal for community planners. Since pictures of what the code seeks to compel actually resemble the final result envisioned, the visions of participants in the planning process are not obscured by the details of how to accomplish them. For New Urbanists, who must seek to not only design traditional communities, but also convince people to take part in that design and ultimately live in the community, natural iconic signs offer the added benefit of rhetorical strength. In part because they are more "transparent" and thus more likely to be perceived as true, iconic signs are certainly much more evocative than purely conventional symbolic signs.[24] Our society retains a deep cultural connection to the "old-fashioned town,"[25] and the ability of images to evoke images of community and convenience is part of what makes New Urbanism so appealing.

On the other hand, less conventional iconic signs make it difficult to achieve precise and stable meanings. Because linguistic codes are entirely established by convention, the convention provides a lexical constraint on each sign's meaning. The use of dictionaries and other lexicons makes this process explicit: dictionaries find their definitions in the way words are used and control the way those same words are used going forward. In order for images to achieve meanings precise enough to regulate conduct, their meaning must be constrained by convention.

A theoretical method for accomplishing this is presented in Part II.B.2, but first this Note will examine the analog character of iconic signs, which both amplifies the appeal of images in codes and also complicates the difficulty of achieving precise meaning.

2. Analog Versus Digital

Perhaps the most challenging theoretical obstacle to the use of visual images in legal codes arises from the need for semantic precision in the interpretation and application of the law. A sign's—and therefore the larger text that is built from many such signs—ability to

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Id. ¶ 2.281. While photographs may be commonly employed in pictorial codes, their important function in that context is iconic and not indexical.

24 Chandler, *supra* note 20. Of course, no icon is purely natural: even a photograph of a building only resembles the building in certain ways, and it is partly through convention that we determine how close the resemblance must be before the icon is recognized as the signified object. *See id.*

25 So much so that we may be prone to create "hyperreality" by idealizing a past that never really existed. *See generally* UMBERTO ECO, *Travels in Hyperreality*, *in* TRAVELS IN HYPERREALITY 3 (1986).

express meaning in a semantically precise way is influenced by the analogical or digital[26] nature of the sign.

Whereas writing is digital, "involv[ing] discrete units such as words and 'whole numbers' and depend[ing] on the categorization of what is signified,"[27] visual images operate analogically, expressing meaning on a "graded . . . continuum."[28] Semioticians, including Peirce, have contended that declarative propositions cannot be conveyed with images.[29] If this were absolutely true, there would be no need to further explore the question of art as law, since laws must declare what rights its subjects have and what they may or may not do. However, such contentions may overstate the point, and film scholar Bill Nichols explains the problem more helpfully:

> The graded quality of analog codes may make them rich in meaning but it also renders them somewhat impoverished in syntactical complexity or semantic precision. By contrast the discrete units of digital codes may be somewhat impoverished in meaning but capable of much greater complexity or semantic signification. . . . This rich poverty, as it were, of analog codes leads to problems, for it is often difficult *to say what they mean* . . . .[30]

In other words, it is the very process of reducing the range of meanings available from a sign that allows us to meaningfully use the sign in precise communication. While the exact meaning intended may be within an analog image's range of meanings, that meaning cannot be effectively communicated without somehow isolating it, and thus making it digital.

There are, of course analogical features to the written language—writers and speakers constantly make use of the connotations of words or phrases, which cannot be reduced to a single precise meaning. However, what is available in digital symbolic language that is not available to the more analogical icons is a relatively stable and precise denotation,[31] recorded in the pages of dictionaries or law reporters.

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26 The use of the word "digital" in a scientific sense has become ubiquitous since the introduction of digital methods of capturing and reproducing audio and video information. This Note, following the conventions of semiotics, uses the word in a broader sense to refer to any sign composed of discrete units with "intervening gap[s] of non-sense," BILL NICHOLS, IDEOLOGY AND THE IMAGE 47 (1981), rather than continuity from one element to the next.

27 Chandler, *supra* note 20.

28 *Id.*

29 Peirce, *supra* note 20, ¶ 2.291 ("Icons and indices assert nothing.").

30 NICHOLS, *supra* note 26, at 47 (emphasis added); *see also* Chandler, *supra* note 20.

31 *See* NICHOLS, *supra* note 26, at 47 ("The distinction between denotation and connotation found in digital codes like written language becomes indistinguishable

If images are to bear any legal weight, there must be some way to distinguish between an image's denotations and its connotations.

This Note next considers the possible ways in which visual codes may be used as legal propositions with discrete elements and constrained by convention.

B. Pictures as Propositions

In order to function as stable propositions, pictures must be constrained by some sufficiently objective standard. This standard may be explicit, contextual, or both.[32] This subpart looks at three usages of images in regulatory codes. The first section considers maps and diagrams, which are closest to a traditional use of images as law, although New Urbanists are working to dramatically expand their use. The next section considers the use of images to control aesthetic aspects of land use and development. It examines in more detail the attractions and problems of images as law discussed above and proposes a way in which such pictorial aesthetic regulations could be created and interpreted to satisfy due process requirements. Finally, the last section considers the use of graphic illustrations alongside more traditional verbal regulations. Whereas the first two categories propose that images *can*, under certain circumstances, be law, the last section considers the use of images *in* codes but not *as* law.

1. Maps and Diagrams

It is clear that a zoning map, although pictorial and iconic, can express specific legal propositions in conjunction with an explicit reference to a descriptive key—in other words, an explicit standard constraining the meaning of each significant aspect of the map. It is also subject to a contextual constraint that limits the possible range of colored overlays to those listed in the key and limits the meaning of the conventional sign to the meaning specified in the key. If light blue is light commercial and dark blue intense commercial, the zoning map cannot use a shade of blue somewhere in the middle to spec-

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[in images]."). Verbal language is obviously also susceptible to vagueness. Despite the stability provided by lexical definitions of words, they are capable of multiple meanings. The possible meanings of a given word, however, are constrained by a common reference in a way that the meanings of an image are not.

32 In a sense, all lexical constraints depend on context, since the proper lexical reference must be clear from context: the appearance of the word *man* in a German text should not necessarily signify an adult male human being, and a stick-figure person wearing a dress in an aboriginal culture is almost certainly not an invitation to a woman to relieve herself.

ify medium density commercial without explicitly defining the shade in the key. Similarly, although green may be composed of yellow and blue, the zoning map cannot be construed to imply that yellow (industrial) and blue (commercial) are therefore permissible in any green (residential) zone. Nor is it acceptable to assign priority to various zones by reference to the color spectrum, with industrial being a warmer color—whether that means better or worse—than residential, which, in turn, is warmer than commercial. The point is that while there is a wide range of meaning that can be given to colored zoning overlays on a planning map, most of those meanings are excluded from acquiring legal force by the operation of the key and context.

To the extent that diagrams in visual codes perform similar functions in similar ways to zoning maps, their use seems relatively problem-free. For example, in the Park East plan, each block is represented in a series of maps and diagrams that employ both annotations and keys to specify precise setbacks, minimum and maximum building heights, and various façade requirements.[33] Like zoning maps, these diagrams are constrained by explicit reference to a lexicon, in this case the annotations and keys defining what particular features of the visual code mean.

The diagrams indicating permissible building heights generally consist of nothing more than abstract three-dimensional shapes, representing buildings, with a dark band—often there are two distinct shades within the same diagram—around the bottom of the exterior face. While the shapes stand upon what is obviously a map and are clearly recognizable as buildings in context, absent the key designating what the different shaded regions mean they would have no discernable meaning whatsoever.[34] If the image specified only that it related to building height, without providing a key to interpret the shaded regions, there would still be no way to determine the intended relationship between the shaded regions and between the buildings and the rest of the image.

In order to provide a meaningful standard of guidance, each element of the image must be specifically defined. For example, each degree of shading must be given a single meaning. Despite the role it may play in making the image easier to understand, the intuitive relationship between the shading—lighter shading indicating a greater

33 *E.g.*, Milwaukee, Wis., Park East Redevlopment Plan: Development Code ch. 3, at 14–15 (June 15, 2004), *available at* http://www.mkedcd.org/parkeast.

34 A first impression of the pictures might suggest a number of different meanings that are unrelated to the height range actually signified, such as the proper proportion of a building's base to the rest of the building or a requirement that the base be clearly distinct from what is above.

height—is of no legal significance. Dark grey is just as different from medium grey as it is from light grey.

Although codes *can* use maps and diagrams to convey legally significant information, there are other ways to get the same propositions across. Zoning divisions can be described in terms of the streets or other physical features that form boundaries,[35] and diagrams indicating street width, building height, or setback requirements can simply state the required minimums and maximums with reference to a verbal description of the boundaries of the parcels to which the regulation applies. Whether, and in what circumstances, it is efficient or preferable to use such images in codes will be discussed in Part III.B.1. The principle illustrated here—that visual codes must be *capable* of expression in purely verbal codes—is explored further in Part II.B.2 within the context of visual codes in aesthetic regulation.

2. Standards for Aesthetic Regulation

More difficult than the use of maps and diagrams in codes is the use of images to regulate aesthetic features of land use and building design.[36] While aesthetic regulation is controversial, courts have generally found it a permissible exercise of the police power.[37] Although such regulation has been criticized as highly vague in expression, arbitrary in application, and troublingly limiting of free expression,[38] courts have, with more and more frequency, found that aesthetic beauty can be a legitimate public good.[39]

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35 Even without physical boundaries it should still be possible, if more complicated, to express zoning boundaries in terms of every parcel included in the zone.

36 Aesthetic regulation, also known as aesthetic zoning, includes at least "three varieties of municipal regulation whose thrust is predominately aesthetic: sign regulations, architectural review procedures, and historic preservation programs." ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 469–70 (3d ed. 2005).

37 *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43 (1994) (overturning municipal statute that regulated the placement of signs within the respondent's house on First Amendment grounds, but recognizing the legitimate government interest in aesthetic regulation); Berman v. Parker, 348 U.S. 26, 33 (1954) ("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 . . . ." (citing Day-Brite Lighting v. Missouri, 342 U.S. 421, 424 (1952))).

38 *See* John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 410–18 (1981).

39 *See id.* at 371–77.

There are some limits upon a municipality's regulation in pursuit of aesthetic beauty. The regulation may not be impermissibly vague,[40] must be applied nonarbitrarily,[41] and must avoid violating property owners' and developers' First Amendment rights of expression.[42] These are, of course, requirements of *all* laws, but they take on some unique complexity in the establishment and enforcement of aesthetic standards. To begin with, more often than not reactions to beautiful buildings and neighborhoods are gut reactions and difficult to explain. The inherently elusive gut reaction must be explained in a manner precise enough to provide a meaningful standard of guidance to a developer and yet flexible enough to burden free expression no more than absolutely necessary to achieve the public good of aesthetic beauty. In other words, aesthetic regulation must be precise, stable, and flexible.

Images are a convenient way to express aesthetic preferences. Since determining that a building *is* beautiful—or at least that we find it to be so—is much easier than determining what precisely it is about the building that makes it beautiful, the natural quality of images allows the view to refer directly to the building without having to go through the difficult process of describing it in conventional language.[43] Our conceptions of beauty may rely more upon the relationship of parts to the whole than upon the qualities of particular elements in isolation. Beauty is hardly a digital concept, and it would

40 *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

41 *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (holding that an ordinance must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" before it may be declared unconstitutional (citing Thomas Cusack Co. v. City of Chi., 242 U.S. 526, 530–31 (1917); Jacobson v. Massachusetts, 197 U.S. 11, 30–31 (1905))).

42 The question of First Amendment limitations on aesthetic regulations is not covered in detail in this Note. For a description and criticism of aesthetic regulation as applied to the freedom of expression, see John Nivala, *Constitutional Architecture: The First Amendment and the Single Family House*, 33 SAN DIEGO L. REV. 291 (1996). *See also* Costonis, *supra* note 38, at 411–13 (arguing that aesthetic measures premised solely on visual beauty reasoning should not withstand the application of strict scrutiny); Kevin G. Gill, Note, *Freedom of Speech and the Language of Architecture*, 30 HASTINGS CONST. L.Q. 395 (2003) (arguing that municipal censure of architectural expression violates the First Amendment).

43 The claim is not that conceptions of aesthetic beauty are themselves void of conventional definition or that it does not vary with culture, only that the *connection* between the referent that I find beautiful and the image that signifies it is not the result of convention.

be ridiculous to attempt to classify every building we see into the binary categories of "beautiful" and "not beautiful." Not only is there an infinite range of possibilities between the two extremes, but the categories themselves also lack any definitive boundaries.[44] Additionally, it is not always possible to judge, even subjectively, whether one building is more beautiful than another—I may find one building to be just as beautiful as another, but in a different way. Because beauty is not a digital concept, it resists expression in digital signs such as linguistic codes.[45] The easier alternative is to use analog codes, such as images, to express what is essentially an analog concept.

Yet the very features of images that make them a convenient means of expressing aesthetic beauty also challenge their legal sufficiency.[46] As is the case with maps and diagrams,[47] images must be sufficiently constrained, either explicitly or contextually, to provide clear and precise standards. The necessity of such standards, and therefore of such constraints, in effect requires at least a significant digitization of completely graded analog signs. While perfect specificity is neither required nor possible,[48] "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[49]

Iconic signs that lack any explicit or contextual constrains—or at least relatively precise contextual constraints—are too vague to serve as clear standards of guidance. In *Anderson v. City of Issaquah*,[50] the Washington Court of Appeals considered a constitutional challenge to certain aesthetic building design requirements in the Issaquah Municipal Code. The code did not itself contain pictures meant to guide

44 This type of vagueness is what Bowers, following R.M. Kempson, terms "'indeterminacy of meaning.'" BOWERS, *supra* note 16, at 135 (quoting R.M. KEMPSON, SEMANTIC THEORY 124 (1977)). Bowers lists two other primary types of vagueness, in addition to ambiguity (which he distinguishes from vagueness): "'referential vagueness'" where the meaning is clear in principle but difficult to apply to some objects; and "'lack of specification in the meaning of an item, where the meaning is clear but is only generally specified.'" *Id.* (quoting KEMPSON, *supra*, at 124).

45 Of course, there have been many quite successful uses of conventional language to express beauty, most notably through poetry. However, since a primary way poetry achieves its effect is by deliberately making use of the analog properties of language, it does not involve digitization in the same way that a legal code must.

46 *See supra* notes 29–31 and accompanying text.

47 *See supra* Part II.B.1.

48 *See* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language.").

49 Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

50 851 P.2d 744 (Wash. Ct. App. 1993).

developers but instead required compatibility with the existing buildings.[51] The reference to the adjacent buildings, however, performed the same function as the inclusion of photographs of those buildings might have. The adjacent buildings and character of the area as a whole were thus used as iconic signs with legal effect. The court held that Issaquah's requirement was too vague, as it did "'not give effective or meaningful guidance' to applicants, to design professionals, or to the public officials . . . responsible for enforcing the code."[52]

The deficiencies of the Issaquah Municipal Code can be described according to the same constraint-criteria used to describe the permissibility of maps. The code provided no lexicon with which to "read" the design of adjacent buildings that was meant to constrain the applicant's own design. It is difficult to imagine what form such a lexicon would even take. Unlike a zoning map, where purely conventional colored overlays are used to supplement the natural map and give legal meaning to the area represented, it is not possible to overlay actual buildings on a street with conventional symbols indicating the meaning of particular design features. While it might have been possible for the city to create a list of specific attributes that it considered characteristic of the street and therefore required for compatibility, this would have, in effect, eliminated the need for any reference to the iconic sign of the buildings, and replaced that reference with a specific design code, which the city council apparently either did not want or was unable to achieve.[53]

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51 *Id.* at 746. According to the court, Issaquah Municipal Code section 16.16.060(B) at the time provided, in part, that "'[b]uildings and structures shall be made compatible with adjacent buildings of conflicting architectural styles'" and that "'[h]armony in texture, lines, and masses shall be encouraged.'" *Id.*

52 *Id.* at 751 (quoting Brief for Seattle Chapter of the American Institute of Architects et al. as Amici Curiae Supporting Appellant, *Anderson*, 851 P.2d 744 (No. 29148-3-I)). The court further explained that "neither [the plaintiff] nor the commissioners may constitutionally be required or allowed to guess at the meaning of the code's building design requirements by driving up and down Gilman Boulevard looking at 'good and bad' examples of what has been done with other buildings." *Id.* at 752.

53 Reinforcing the difficulty of expressing aesthetic preferences in specific, digital language, the court quotes a Issaquah city council member:

> "[M]aybe we haven't done a good job in . . . communicating what kind of image we want. We all want an image. I bet you if I stated my image it would be certainly different from everyone of you here and everyone in the audience. . . . [I]f we want a specific design, I agree with proponent's counsel, and that is that we come up with a specific district design . . . . We don't have such a design requirement. So we all have to rely on some gut feel. And often times this gut feel gets us into trouble because it could be misinterpreted or misconstrued . . . ."

Id. (alterations and omissions in original).

Images used in codes, however, have significant benefits over references to existing development. If it is difficult to conceive of a way that a city could provide effective constraint on the meaning of "compati[bility] with adjacent buildings"[54] without providing a full-blown design specification, this is a result of the complete lack of control over the signs used to express the rule. Images on paper allow for greater control and flexibility to, either implicitly or explicitly, limit the range of possible meanings they can convey. First, a code could limit the images it includes to specific examples of "good" and "bad" designs, thus eliminating some of the guesswork that the court in *Anderson* found so troubling. Second, the code could provide annotations to the images indicating particular features that are considered essential to compatibility and aesthetic beauty. Finally, in choosing from a much broader range of compatible examples than would be available in a particular neighborhood, those drafting the code can create more specific contextual limitations. Properly used, this approach to visual coding may implicitly accomplish what the first two limitations attempt to do explicitly.

The key feature of selecting a series of images to convey standards of aesthetic beauty and compatibility is the list form that it takes. Lists are often effectively employed in nonvisual codes to overcome problems of vagueness.[55] Three important interpretive maxims that apply to the construction of statutory lists are *noscitur a sociis*, *ejusdem generis*, and *expressio unius est exclusio alterius*.[56] *Noscitur a sociis* is defined by one scholar as "a general rule of similarity whereby any word in a series of words, usually of the same grammatical class, takes on the semantic feature or features which all the other words have in common; in expression, the series of words includes no higher superordinate term."[57] Literally translated as "'it is known by its associates,'"[58] this maxim clearly operates as a contextual constraint on the

54 *Id.* at 746.

55 PETER M. TIERSMA, LEGAL LANGUAGE 81–85 (1999); *see also* Jovan Brkic & Norman Anderson, *Drafting and Interpreting Legal Documents*, *in* 2 LAW AND SEMIOTICS 87, 102 (Roberta Kevelson ed., 1988) ("Illustrative examples give greater precision to the concept being defined without limiting the adaptability of the concept to unforeseen possibilities or changing socio-cultural contexts.").

56 TIERSMA, *supra* note 55, at 83–84.

57 BOWERS, *supra* note 16, at 119. Bowers includes the second part of the definition to distinguish *noscitur a sociis* from the related maxim *ejusdem generis*, which requires a "higher superordinate term"—a term that explicitly defines the manner in which the subordinate terms are used—to function. *Id.* This distinction, discussed in Part II.C, is central to understanding the difference between images used as independent legal propositions and images used as illustrative examples.

58 BOWERS, *supra* note 16, at 119.

meaning of each word in the list. Although each of the listed terms may have meanings not in common with the other terms, the legal effect of these meanings can be excluded by reference to the other terms.[59]

Expressio unius and *ejusdem generis* have been described as specific rules grouped underneath the "'broader linguistic rule'" of *noscitur a sociis*.[60] In lists, the principle of *expressio unius* "suggests that any similar item that the drafter could have included, was indeed included"[61] and naturally applies to lists unless expressly disavowed.[62] *Ejusdem generis* functions similarly to *noscitur a sociis*—both "limit the meaning of a word within a particular class."[63] They are distinct in two ways. First, *noscitur a sociis* constitutes its class implicitly whereas *ejusdem generis* obtains its reference by explicitly "using the *other* expression to invite an inference of class."[64] Second, whereas *ejusdem generis* creates an open list by using the general superordinate term, *noscitur a sociis*, while not necessarily closed, invites the application of *expressio unius* because it does not explicitly include an "*other* expression."[65]

The "image-list" and accompanying interpretive principles must perform a dual role in aesthetic regulation. The list must both define which features are being regulated and also, for each regulated feature, indicate either the available or the excluded choices. In order to be precise enough with respect to what is regulated and flexible enough to allow for individual expression, the list should be structured in such a way as to apply *noscitur a sociis* and *expressio unius* to the list of regulated features while applying *ejusdem generis* to the list of available choices. In principle, this could be accomplished by including a superordinate term that relates to the list of available choices, and thus be open to a number of choices within each regulated category, but no superordinate term that relates to the list of regulated feature.

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59 One of the possible problems with interpreting the language in *Anderson* was that since the genus "adjacent buildings" included both "good and bad" examples, there was no way to discover commonalities between them with respect to what the commissioners considered appropriate for their "'signature street.'" *Anderson*, 851 P.2d at 752.

60 BOWERS, *supra* note 16, at 119.

61 TIERSMA, *supra* note 55, at 83.

62 This disavowal has become very popular as a means of avoiding unwanted narrowing interpretations. *Id.* at 85.

63 BOWERS, *supra* note 16, at 119–20.

64 *Id.* at 120.

65 *Id.*

An example of a functional "image-list" is found in the Milwaukee Park East Code.[66] The code describes four different types of buildings that can be used in three different combinations. The permissible combinations for a particular block are defined by reference to a map,[67] and further specifications governing height restrictions and façade requirements are detailed in specific sections on each block.[68] The description of the building types includes only one general descriptive work for each: "rowhouse," "slab," "core," and "large venue."[69] Above each verbal descriptor is a simple block drawing, apparently representing the general shape that each type must take. In line with each descriptive term and drawing is a set of either two or three photographs of real world instantiations of the general type in question.

It is not clear from the illustration whether the verbal descriptor and the highly general drawings are meant to be "higher superordinate terms" or merely categorical labels that provide a symbolic "term" that can be used to reference the corresponding genus. Normally, the *ejusdem generis* rule applies "only where such 'general words' *follow* a list of generically similar species."[70] Since the information is arranged visually rather than semantically, it does not seem unreasonable to read the listed images as examples limiting the general term rather than defining it.[71] Reading it as a definition may leave us with the proposition that a row house, as far as the code is concerned, means the two row house pictures, and no others, when what we really want to say is that the two row houses pictured are permitted, along with any other row house. Since there is no superordinate term for the genus of features regulated and there is no express disavowal of the *expressio unius* principle, the second general proposition can be read to mean that only those features which are common are regulated. Assuming here that the image-list is meant to stand on its own as an aesthetic regulation,[72] the images in each series can be "read" against

66 Milwaukee, Wis., Park East Redevelopment Plan: Development Code ch. 2 (June 15, 2004), *available at* http://www.mkedcd.org/parkeast/.

67 *Id.*

68 *Id.* ch. 3, at 12–78.

69 *Id.* ch. 2.

70 BOWERS, *supra* note 16, at 121.

71 In other words, the "sentence" can be read "row house: (image1, image2)," rather than "row house = (image1, image2)."

72 One of the problems with the Park East Code is the lack of specificity as to what parts of the code are meant to regulate particular aspects of development, such as aesthetic details. As a whole, the code clearly intends to regulate aesthetics, *see* Milwaukee, Wis., Park East Redevelopment Plan: Development Code ch. 1, at 5–9, but the Regulating Plan in Chapter Two is not specific as to what it regulates. It reads:

each other to extract the common elements. While the application of *noscitur a sociis* is somewhat limited by the shortness of each list, particularly where only two images are used,[73] some precision is added by the juxtaposition of the images. In the case of the "core" genus, the three images reveal several commonalities: all three pictured buildings are at least half-again as tall as they are wide; all of the openings, whether windows or balconies, are vertically aligned; all three have rectangular bases; and all are set back no more than sidewalk distance from the street.[74]

Although such commonalities may not always be readily apparent, they are at least constrained by their context. As the range of meaning of the images becomes more constrained, they lose more and more of the analog character that makes them attractive in the first place. Once the meaning of an image, or feature thereof, becomes sufficiently digital to escape the vagueness problem inherent to analog signs, it becomes stable and precise. The stability and precision, in turn, allow the image to be translated into a verbal statement representing the same proposition. Thus, the threshold question for whether an image is sufficiently constrained in meaning to serve as a constitutionally permissible legal rule can be reduced to the question of whether the legal meaning conveyed by the image can be equivalently expressed verbally.

C. *Nonlegal Illustrations*

The use of visual images in codes as illustrative examples accompanying a more traditional word-based text presents its own separate,

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> The Regulating Plan controls the overall form of streets, blocks and buildings to create the physical character envisioned in the Master Plan. Four building types . . . are grouped in three different combinations. Each block is coded to indicate the combination of building types allowed. . . .

Id. ch. 2. It is vague whether "overall form" and "physical character" are meant to include aesthetic considerations specific to the building façade and design; but, since this vagueness does not arise from the use of images per se, I choose to read the code in a way that best suits my illustration.

73 *Id.* ch. 2; *see* BOWERS, *supra* note 16, at 121 (recognizing that "only two words are necessary for *noscitur a sociis* to operate," but stressing that "its operation is all the safer for having more words than two in the list").

74 Milwaukee, Wis., Park East Redevelopment Plan: Development Code ch. 2. Interestingly, the third picture of a "core" building does not have a discernable base, middle, and top, which is not consonant with the general rules and definitions found earlier in the code. *Id.* ch. 1, at 6. This should not technically be a problem, since the presence of this feature in the other images prevents the absence from becoming a common character of the genus. However, it seems rather confusing to include within the code images of buildings that do not themselves conform to the code.

albeit related, questions and complications. While, at first blush, the vagueness seems alleviated by the presence of the traditional text, the question of the interpretive significance of the examples remains. In order to remain nonlegal, and thus escape the constitutional constraints on vagueness, the images must be illustrations of possibilities rather than of meaning. In other words, visual examples in the legal sense described above tell the developer what is *required*, whereas visual examples without legal significance can simply say what is *possible*.

On the one hand, the combination of precise language and illustrative examples may increase the accessibility of the code and convey aspirational and emotional meaning without losing the precision necessary for legal regulation. This feature of illustrative examples is particularly salient in the context of aesthetic architectural regulation. The process of designing a new building or block consonant with a series of examples is fundamentally a work of analogy: the developer can conform her plans to the precise legal requirements while at the same time freely interpreting the aspirational content of the iconic signs. The operation of analogy in this case provides a maximum amount of flexibility while still guiding, but not constraining, the interpretive freedom of the designer by suggesting a proportional relationship to the original example.

On the other hand, the precise interpretive relationship of the illustrative examples to the legal text can be difficult to predict and can cause uncertainty in the drafting process.[75] The drafter of a contract or law loses control over the interpretation of its language once it acquires legal effect. While the problem is less acute in local government regulation, since a municipal body will get the first crack at implementing regulations, the courts still loom as the final arbiter of legal meaning, especially where the law is too vague to provide meaningful constraint on local regulatory discretion.

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75 Attorneys involved in an attempt to create an informative and comprehensible, yet legally effective, construction contract described their dilemma over the inclusion of diagrams:

> There were legal concerns that [the diagrams] may be taken as a substitute for the text rather than as a guide to it; and that they may create representations not intended in the text.
>
> This seems to be a fundamental problem with explanatory material of any kind in a legal document. It is a particularly acute one when the explanations provide so much information that they threaten the primacy of the text.

David More & Michèle Asprey, *Construction, Deconstruction, Reconstruction: Co-operative Contracting and the C21 Construction Contract*, CLARITY, May 1999, at 8, 10.

If the examples are not to serve a legal purpose, and thus escape the due process constraints on vagueness, they must help us understand what is already a sufficiently precise regulation, without adding to, modifying, or limiting the legal meaning in any way. But a series of images help us to understand the meaning of a general term in precisely the same way that they constrain the legal meaning of the superordinate term in the operation of the *ejusdem generis* principle. In the former case, the legal significance of the illustrations is explicitly rejected; in the latter it is relied upon to prevent the regulation from violating due process requirements. The relationships of similarity between the images not only *allow* lexical constraint of their meaning in context, but also intuitively *encourage* it. In the case of purely extralegal illustrative examples, the verbal regulation being illustrated must itself be sufficiently precise. If, however, the verbal regulation is too indeterminate, the interpreter may look at the regulation in context to determine the legislative intent and insufficiently constrained visual examples will not save the regulation. Furthermore, there is a danger that even if the regulation is sufficiently precise to satisfy due process it may be yet further refined by the image-list; the presence of a list may push the interpreter to view the verbal regulation more generally and the image-list as limiting rather than illustrating the legal meaning.

If graphic illustrations are used carefully, they should be able to stand next to the text without requiring a semantically precise image-list and without interfering with the interpretation of the verbal regulations. Such careful implementations should include an unequivocal disclaimer of any legal effect or regulatory intent. Additionally, because the limiting effect of the *ejusdem generis* principle requires two or more examples of the general type, using only a single illustration to convey the desired ideological and emotive message will help reject any implication of legal significance.

In the final Part of the analysis, below, this Note considers some of the benefits, limitations, costs, and complications that may arise from adoption of visual codes.

III. CAN ART BE GOOD LAW?

Even if art can be law, at least in the limited sense outlined above, there remains the question of whether it would be wise or efficient to replace or augment current development codes with visual images. What would be the benefits of such a move? What would be the costs? Given the limitations of such expression—both inherent and constitu-

tionally required—would pictures in codes even accomplish the tasks imagined by their advocates?

James Howard Kunstler suggests three problems with current code drafting that creating simplified, visual codes might help solve: the exclusivity of the drafting process, the comprehensibility and accessibility of the resultant code, and the prohibitive cost of the lawyers and experts required to explain and implement the code.[76] The analysis that follows considers the impact of using pictures on the creation, implementation, and interpretation of urban planning codes, both in terms of the relative effectiveness in achieving Kunstler's goals and the costs and benefits to municipal land use.

A. Creation

It is at the creation stage that visual codes perhaps have their greatest appeal. Under the land use planning systems currently dominating, Kunstler's jaded, if realistic, view of the process includes: a closed, exclusive plan development; the formalization of a typically unimaginative plan into a legal code comprehensible only to lawyers; and finally a windfall to lawyers who charge to create a legal code that no one can understand and then again to interpret that legal code to any parties involved in the development.[77]

1. Visual Codes and Collaborative Planning

The dominance of legal language, and therefore lawyers, over the process of lawmaking and planning has been criticized on numerous grounds, including the resultant exclusionary power structure[78] and

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76 KUNSTLER, *supra* note 6, at 148.

77 *Id.*

78 For example, one commentator contends that

> [a]s soon as an agreement between citizens becomes a contract, its language moves from the authority of the persons involved to that of the state. Lawyers pore over it, certainly not to clarify it in the minds of the contractors, but to make it conform to the state's interests. . . .
>
> Lawyers, "keepers of arguments" as Auden wrote, are also keepers of power. If power corrupts, it corrupts language and uses it for its own purposes. . . .
>
> . . . .
>
> . . . If it is important that more people be able to read and understand legal documents, is it because such understanding will give them more access to power or because it will align their interests more closely with those of the state?

William H. DuBay, Letter to the Editor, *Deconstructing Legal Language*, CLARITY, May 1999, at 59, 59.

loss of immediacy to the lay citizen.[79] The general incomprehensibility of planning agreements and codes, combined with the limited public participation available in most land use planning,[80] places the citizen on the outside looking in. Collaborative approaches to land use planning, such as that suggested by Professor Alejandro Camacho,[81] may go a long way toward curing the procedural problems of limited public participation, but the problem of the accessibility of code language remains. If the content of the collaborative parties' vision must be translated into complicated legal and technical plans, then the parties lose their control over the vision. If the forum requires a legal or technical sophistication greater than most lay citizens have, it may require significant resources on the citizens' part in order to participate.

Visual codes would not, by themselves, bring about the broad-based participation in planning that many, including New Urbanists, envision. What the use of such codes may provide, however, is a means of overcoming the information and resource gap likely to arise in collaborative methods of land use planning.[82] Even where information is made available to the public prior to collaboration, the incom-

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79 John Lachs argues that

> the loss of immediacy in the legal system. . . . has now become so significant that it endangers . . . the public acceptance of law as a democratic institution.
>
> Mediation shatters the world into varied centers of competence. Exclusive expertise in a field involves the development of special standards and procedures. Even where exclusiveness is not a primary aim, outsiders are naturally shut out . . . .

John Lachs, *Law and the Importance of Feelings*, *in* 2 LAW AND SEMIOTICS, *supra* note 55, at 221, 225.

80 Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions* (pt. 1), 24 STAN. ENVTL. L.J. 3, 36–45 (2005).

81 Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions* (pt. 2), 24 STAN. ENVTL. L.J. 269, 273–303 (2005).

82 In his proposal of a collaborative method of planning, Camacho recognizes that such information and resource gaps exist, and even that "collaborative processes can be more resource and information intensive than their conventional counterparts," *id.* at 315 (citing Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 123 (2000)), but argues that "because the collaborative model facilitates adaptive management of the regulatory process itself through experimentation, evaluation, and revision, collaborative processes should become more inclusive over time," *id.* at 316.

prehensibility,[83] and thus inaccessibility, of much of the information prevents it from meaningfully closing the gap between specialist and lay participants. Information gaps in turn tend to become resource gaps, as the need for extra mediating specialists to translate and explain the complex regulatory language increases the cost of participation in the collaborative forum. Because the visual images created and discussed in the collaborative process are more natural and less conventional,[84] participants do not need to have command of the conventions and expertise upon which traditional development codes are based. This, in turn, reduces the resource costs of participation in the collaborative process. An interested party could simply show up at a planning session and, in theory, become immediately familiar with the proposed process and results without the costly need to waste time attempting to understand needlessly confusing and complex proposals.

Whether collaborative planning takes the form of the New Urbanist *charrette*[85] or a more formalized process, the hope of New Urbanists is that if people "can *see* what they're talking about" it will "elevate[ ] the quality of public discussion about development."[86] The virtues of the elevated participation facilitated are dual. First, participation fosters better site-specific development by enabling all interested parties to provide concrete feedback in language that citizens, developers, local government, and architects can all understand.[87] Second, public participation and accessible expressions of development plans serve a broader didactic purpose. Participants in planning learn about "the costs of current zoning and development policies and the advantages of change."[88] Enhanced participation thus not only facilitates greater consensus in the development of site-specific plans, it also strengthens the broader community through education and, by providing a more direct interaction with the development process, empowerment.

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83 KUNSTLER, *supra* note 6, at 148 ("Zoning codes are invariably 27-inch-high stacks of numbers and legalistic bullshit that few people but technical specialists understand.").

84 *See supra* notes 20–23 and accompanying text.

85 For a description of the *charrette* process, see Nat'l Charrette Inst., What Is a Charrette?, http://www.charretteinstitute.org/charrette.html (last visited Jan. 19, 2005). *See also* DUANY ET AL., *supra* note 7, at 226–27 (describing and advocating for public participation in the planning process); KUNSTLER, *supra* note 6, at 147 (describing the *charrette* as a "democratic process" that will allow transition away from traditional zoning without tearing society apart in the process).

86 KUNSTLER, *supra* note 6, at 148.

87 GERALD E. FRUG, CITY MAKING 162 (1999).

88 *Id.*

2. Limitations and Concerns

While visual codes, as part of a larger collaborative scheme of development planning, do indeed have the potential to foster both greater participation and consensus among all interested parties, it is important to note the limitations and caveats to the use of such codes. First, visual codes are limited in that they cannot overcome all of the challenges to collaborative land use development. Second, the participation-enhancing benefits of visual codes depend upon implementation within a broader collaborative framework.

Inherent in the first limitation is the risk of oversimplification. While the planning process often involves needless complexity in the form of long, virtually incomprehensible zoning ordinances and development agreements, the process is nevertheless inherently complex. Visual codes might overcome some of the information gap in collaborative planning by clearly presenting and developing intended results and providing an intuitive justification of how particular choices are required in view of those results. However, can such codes incorporate and explain the complex environmental, sociological, and market factors that must play an important role in determining both the plan's permissibility within the larger regulatory context and the prospects for long-term success?

A well crafted collaborative process would certainly include the expertise necessary to consider and implement environmental guidelines. However, the technical nature of the relevant scientific information is not capable of visual expression in the same way that aesthetic and functional questions may be. Significant aspects of the planning discussion would thus remain subject to the information and resource gaps that collaborative methods of land use planning entail. Furthermore, because of the complex regulatory scheme to which land use decisions with environmental impacts may be subject, the possibility of achieving a compact, comprehensive, and final plan within a reasonably limited amount of time is diminished.[89]

Similarly, although sociological and market concerns relating to the success of the proposed plan should find a voice in any well designed collaborative forum, the factors that influence residential and commercial investment, as well as the sustained success of planned development, are complex and do not lend themselves to simple vis-

89 Since aspects of the proposed code will need to be subjected to multiple levels of review and revision in nonparticipatory processes, the promise of participant-controlled content is challenged. While this phenomenon is theoretically common to all collaborative planning proposals, see *infra* Part III.C for a discussion of how the use of visual codes, in particular, might complicate this process.

ual explanation. While not necessarily subject to the same regulatory control and revision as environmental issues, this complexity does challenge the information and resource equality envisioned by champions of collaborative planning and simplification through visual codes.

Secondly, a mere shift in the dominant manner of expression from lawyers' English to architects' renderings might simply shift the power to create, control, and interpret planning codes from one privileged group to another.[90] While the content of the code, and, at least, its underlying aesthetic vision for development, might be more readily apparent to lay citizens, the creation-process would be no less mediated by virtue of the use of different types of signs to convey that content. To the extent that visual codes are developed outside of a participatory process or constrain that process, they have the potential to undermine the collaborative enterprise.

Within the context of visual codes as a feature of the broader New Urbanist proposal, it is important to recall that New Urbanism is not primarily focused on procedural reform in a narrow sense. At its core, New Urbanism consists of a series of substantive proposals designed to "reestablish[ ] . . . mixed-use, livable communities; and evolve a design philosophy that is capable of accommodating modern institutions without sacrificing human scale and memorable places."[91] Despite the nobility, intuitive appeal, and pedigree of this traditionalist vision of revitalized neighborhoods and community-centered life,[92] the disastrous consequences of the twentieth century's failed "urban renewal" projects caution against investing too heavily in the particular visions of city planners and dreamers, regardless of their intentions.

90 *See* DUTTON, *supra* note 9, at 150 ("The *Lexicon* [*of the New Urbanism*] has been critiqued for its essentialism as well as its hubris in defining 'appropriate' urban vocabulary and sanctioning 'correct' forms of urbanism.").

91 PETER CALTHORPE, THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM 17 (1993). Gerald Frug notes six design aspects that New Urbanists focus on: "creating multiuse environments, constructing grid systems for public streets, giving priority to the needs of pedestrians, facilitating reliance on public transportation, highlighting the importance of centrally located public space, and establishing focal points and boundaries for urban space." FRUG, *supra* note 87, at 150–51.

92 For example, many substantially similar arguments regarding the health of cities and city life could already be found in JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

B. Administration

The perceived benefits of pictorial codes to the administration of town planning and land use stem from both the increased comprehensibility of such codes and, in Kunstler's words, their ability to "show a desired outcome at the same time they depict formal specifications."[93] If all the parties involved in development decisions regulated by the code can understand the code without translation or explanation, it will reduce the process's current dependence on specialists and lawyers. If the code is easier to understand, the processes required to interpret and implement the code can be significantly simplified.

1. Zoning Codes and Town Planning

While pictures in codes may do their part to reduce the complexity and increase understanding of the code requirements, the effective use of pictures itself depends on a system of land use regulation quite a bit simpler than our current zoning laws. In other words, the current complexity of zoning codes is in large part a response to the complexity of our current land use and planning system.

In order to understand the reasons for this, it is helpful to look a bit more objectively at "the reams of balderdash found in zoning codes."[94] The South Bend, Indiana Zoning Ordinance,[95] which is several hundred pages in length, specifies sixteen different zoning districts, classified into three general types of districts, each with its own general regulations,[96] and two special types of districts;[97] regulates landscaping, lighting, signs, loading, and parking;[98] provides special regulations for certain specific uses;[99] creates an administrative[100] and enforcement structure;[101] and finally provides definitions for many of the terms found in the ordinance.[102] The current system, which prohibits uses in districts unless they are explicitly allowed for in the zoning code, requires a long, complicated code in order to specify what is permitted. Add to this already substantial stack of paper conditions

93 KUNSTLER, *supra* note 6, at 148.
94 *Id.*
95 SOUTH BEND, IND., ZONING ORDINANCE ch. 21 (2005).
96 *Id.* §§ 21-02.01 to -04.11.
97 *Id.* §§ 21-05 to -06.02.
98 *Id.* §§ 21-07.01 to -07.05.
99 *Id.* §§ 21-08.01 to -08.02.
100 *Id.* §§ 21-09.01 to -09.05.
101 *Id.* § 21-10.
102 *Id.* §§ 21-11.01 to -11.02.

for variances, conditional uses, special permits, ad hoc zoning amendments, and an administrative structure to manage the entire thing, and pretty soon you have a "27-inch-high stack[ ] of numbers and legalistic bullshit"[103] sitting in front of you to which you must somehow conform your development.

Simplifying the entire system, which the New Urbanists propose to do, in part, by switching to a density-driven system where most uses are permitted unless explicitly excluded,[104] would probably go a long way towards simplifying land use codes. But what does moving away from verbal codes and towards more visual codes add to this simplification? Certainly, regulations of the built environment such as building size, street width, lighting, setback, and street-level façade characteristics are easier to express in pictures than permissible uses, but are they really more effectively expressed in pictures than with verbal descriptions?

The "exemplary town planning code,"[105] designed by Andres Duany, Elizabeth Plater-Zyberk, and others, and characterized by Kunstler as much better than current codes, has gradually developed into the DPZ *Smart Code* and grown to sixty-three pages.[106] While this is considerably shorter than most zoning codes, it may not be that much easier to follow. The extensive use of tables, grids, and drawings—some annotated and some juxtaposed with verbal descriptions—compresses much more information onto each page than a standard list-based verbal code. While simple graphics may be easier to understand than lengthy verbal descriptions, simple pictures and diagrams with little annotation cannot adequately convey the complexity required by town planning. The more the graphics become too technically detailed, either by annotation or reference to an interpretive key, the more they lose the appeal of simplicity. Furthermore, it is possible that pictures and diagrams may be *more* difficult to under-

103 KUNSTLER, *supra* note 6, at 148.

104 *See* Milwaukee, Wis., Park East Redevlopment Plan: Development Code ch. 1, at 5–9 (June 15, 2004), *available at* http://www.mkedcd.org/parkeast. On the other hand, many New Urbanists want to *require* mixed-uses, which obviously entails prohibiting certain uses once a certain maximum number occur. *See* CALTHORPE, *supra* note 91, at 63 (listing the preferred "minimum amount of public, core commercial and residential uses"); DUANY ET AL., *supra* note 7, at 248 (concluding that lots should be "zoned not by use but by compatibility of building type"); FRUG, *supra* note 87, at 151 ("New urbanists want to replace current zoning laws . . . with laws that require the reintegration of commercial, work, and home life.").

105 KUNSTLER, *supra* note 6, at 148; *see* AM. INST. OF ARCHITECTS, RAMSEY/SLEEPER ARCHITECTURAL GRAPHIC STANDARDS 82–99 (John Ray Hoke, Jr. ed., 10th ed. 2000) (presenting design guidelines prepared by Duany, Plater-Zyberk, and others).

106 *See* DPZ, SMART CODE, *supra* note 5.

stand if oversaturated with technical information by causing information overload. Take, for example, a graphical table detailing "Vehicular Lane Assemblies" in the *Smart Code*.[107] The table consists of twenty-eight different block diagrams classified horizontally into two categories—one-way and two-way movement—and vertically into six different street-parking categories. Within the table cell is a diagram representing the street lanes and parked vehicles, annotated with required street widths and directional arrows, labels designating within which transect zone each street configuration is permitted, and, in small text underneath each diagram, technical information specifying the appropriate average daily traffic, pedestrian crossing, and speed limit for each section. The inclusion of this much information on a single page may be an efficient use of paper, but it does not seem either to be more user-friendly to nonspecialists or to "show a desired outcome."[108]

The point here is not to single out specific aspects of one suggested visual code for criticism or to suggest that pictures and diagrams can never be used effectively in land use regulation and planning. The *Smart Code* contains effective, as well as ineffective, uses of pictures and diagrams, both for nonlegal illustrative purposes and for technical specifications. Additionally, it is relatively new and will doubtless improve over time as local governments attempt to implement it. What is suggested is that pictures and diagrams have a certain limit to the amount of information they can convey effectively, beyond which they become just as—and quite possibly more—inaccessible as their verbal equivalents. Where the information conveyed is limited and the images have a natural connection to the function they perform, pictures may covey the information just as well or better than words and also keep the desired outcome from being obscured in the translation into hundreds of words of legal code. As noted above, the use of maps to divide a region into sections is far easier to understand than an equivalent detailed verbal description of the boundaries of each section.[109] Other less traditional applications should be compared in terms of their functions to the map, as a central case of what is and is not efficient in visual coding.

2. Aesthetic Regulations

Similar difficulties arise with the use of drawings or photographs to regulate the aesthetic features of development. If the regulation

107 *Id.* tbl.3B.

108 KUNSTLER, *supra* note 6, at 148.

109 *See supra* Part II.B.1.

employs the image-list approach described in Part II.B.2, the aesthetic aspects that each list is meant to regulate must be very limited in number and complexity. If a single image-list attempts to regulate too many features, if the features regulated are themselves composed of too many detailed subfeatures or specifications, or if a relatively large number of images are used to express the complex regulation, at least two issues arise.

First, there is the difficulty of image selection. When all that is required is a relatively few commonalities between images, it will not be difficult to find examples with which to build the list. In cases like the Park East Code discussed above,[110] finding examples of buildings satisfying the correct proportions, openings-alignment, and street-face should require nothing more than a camera and a plane ticket to any major American city. However, the task would be more difficult if the image-list were used to describe not only these features, but also the appropriate use of balconies, the proportion of the base to the rest of the building, materials used in façades, and any number of other aesthetic characteristics. Added to the difficulty of finding a series of images that all contain the desired commonalities is the necessity of finding images that share all the desired qualities *but no others.* Since it is the commonalities that define the meaning of what is being regulated, unanticipated commonalities will acquire the same legal force as intended commonalities. Those who create the regulation will know what was intended, but neither regulated parties who did not participate in the creation process nor successor local authorities will be able to tell the difference. While it may be possible in many instances to find the proper images to convey the precise meaning intended by the regulation, the difficulty of construction casts the efficiency of the notion into doubt. It may often end up being much easier simply to verbalize the aesthetic objective.

Second, the problem of visual information overload may occur in the same way here as with overly annotated and complex diagrams and pictures. This may happen both in the case of a single overly complex image-list, as well as in that of a large number of simpler lists. When attempting to extract the intentional meaning of a complex image, certain features will be more prominent than others, either by virtue of their character or the similarity between images. Trying to find more subtle commonalities, and then trying to retain those commonalities while finding further ones, may prove to be more than most nonspecialists can accomplish easily. Where many relatively simple image-lists are used to convey the same complex meaning, the dif-

110 *See supra* notes 66–74 and accompanying text.

ficulty is that the vast amount of resulting images will overload the reader's senses and cause confusion. The reader may carry over commonalities from previous image-lists or blend multiple images in her mind and thus obscure a clear understanding of the intentional meaning of each image-list regulation. In both cases, the reader may be presented with too much information in an unstructured way; the images, either individually or taken as a whole, may contain too much information to be easily assimilated, even where the intended meaning has been constrained enough to make interpretation possible.

C. Interpretation

New Urbanists hope that visual codes, when combined with a collaborative approach to planning which includes broad participation, can help achieve a less adversarial process of development than the current planning model produces.[111] Even if general consensus between all presently interested parties is somehow reached, it is likely that some will find it less costly or more profitable to skirt the system. There will also almost certainly be loopholes to exploit and corners to cut. Beyond that there are the inevitable changes caused by the passing of time. Old developers will leave and new ones will take their place. Positions of authority will change hands. New problems will arise that call for imaginative solutions that some will champion and others will resist. Whatever the cause, disputes will eventually arise, and the parties will seek a definitive interpretation of the rules.

The early stages in the dispute process can be handled administratively, and architects and urban planners, expert in deciphering complicated the visual codes,[112] can be given the task of interpreting and explaining the code to the disputing parties. Since, at least in this government system, there is no "architect king" entrusted with unchecked interpretive authority, we must, fortunately, rely on the courts to review local administrative decisions. While the level of deference given to local authorities in interpreting their own regulatory codes is typically very high, the court must be satisfied that the standard applied is neither impermissibly vague nor applied in an arbitrary manner. The court must therefore interpret the regulation

111 KUNSTLER, *supra* note 6, at 149 ("Because citizens have not been happy with the model of development that zoning gives them, they have turned it into an adversarial process.").

112 And who, apparently, unlike lawyers and traffic engineers, are completely public-minded and would not dream of "profit[ing] financially by being the sole arbiters of the regulations." *Id.* at 148.

itself, if only to confirm that the local authorities' interpretation and application are reasonable.

As discussed above, it is possible to construct a code carefully using visual images such that the regulatory proposition of the image is constrained enough to be translated into a verbal statement.[113] Where the visual regulations are simple and easily verbalized, such as maps, diagrams, and possibly very simple image-lists, the court's task would not be daunting. However, if the meaning of the visual regulation is clear, the dispute is less likely to reach the court in the first place.

In interpreting a more complex visual regulation, there are different possible ways the court could, grudgingly,[114] proceed. First, the court could perform the interpretation without verbalizing its translation if it finds that the regulation was sufficiently clear and applied nonarbitrarily. The losing party, however, is unlikely to be satisfied with such an approach, since she cannot follow the reasoning of the court. Second, the court could require the regulatory authority to submit its own verbal translation of the regulation, which the court could approve or find wanting. This would at least allow the court to express why it accepts or rejects the proposed verbalization and whether it finds the application of the verbalized regulation arbitrary or not. However, the requirement that the regulatory authority express the regulation verbally would seemingly negate whatever perceived efficiency prompted the adoption of a visual code in the first place: the regulator would effectively be promulgating a parallel code—and thereby incurring many of the associated costs—that could be used instead of the visual code. Finally, the court could verbalize its own interpretation and determine whether the administrative authority properly applied its discretion under that interpretation. This approach has similar problems to the second. The court's verbalization would become a parallel and binding expression of the legal proposition, since the verbalization would be part of the court's precedent. In addition to incurring the costs of effectively administering two parallel, redundant codes, the courts particular verbalization would constrain the regulatory authority, causing it to lose a measure of its discretion.

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113 *See supra* Part II.B.

114 It seems unlikely that a court would relish the task of pouring over lists of images to determine their commonalities. Judges are, after all, lawyers and are trained to analyze verbal regulations and statutes. While the principles they would use to interpret visual codes are, in theory, the same as in traditional statutory interpretation, the process is novel enough to make an inherently conservative legal system wary.

The problems with each of the possible judicial approaches further illustrate the Catch-22 of complex visual codes. The process of creating complex visual regulations that are specific enough to satisfy due process requirements necessarily involves constraining them in such a way that they are capable of stable verbalization. Further, any relatively attractive process of judicial interpretation requires that the legal proposition actually be verbalized. At the end of the process, we are left with essentially nonlegal illustrative examples, devoid of any propositional force independent of the binding legal verbalization—and a hefty bill for the costs of producing them.

CONCLUSION

Art can be law. Within the context of development regulations and planning, this Note has considered some of the theoretical and practical questions surrounding the creation, administration, and interpretation of pictorial codes. As Part II.A explored, the analogical and conventional characteristics of iconic signs such as images lead to inherent problems of vagueness that cannot be cured without stripping the images of much their evocative power and constraining the range of meanings the images can signify. Simple images, such as maps and diagrams, are already used in development regulations, but, it was argued in Part III.B, the use of too many such images will create a code that merely swaps one set of specialists for another. More complex images have the theoretical potential to regulate aesthetic preferences, but only if the meaning of those images is rigidly constrained to the point that it can be expressed with an equivalent verbal translation. Such a process is not impossible, and in Part II.B a method was proposed for constructing and interpreting image-lists that take advantage of commonalities between a series of images within a particular genus.

However, with some notable exceptions, art cannot be very good law. Despite the benefits to participation, discussed in Part III.A, the complex nature of land use controls, planning, and development resists the proposed visual simplification throughout the process and especially in the long-term administration and interpretation of the regulations. In the end, when controversies eventually arise and come before the courts, the pictorial regulations will need to be reduced to verbal expression before they can be used as elements of legal reasoning. Even where images are used purely for the purposes of illustration, without any intended legal effect, codes must be carefully drafted to resist any implication of legal significance.

The current codes full of bad legal writing and incomprehensible specifications are not the only option. Law is a conservative profession, but the accessibility of Anglo-American legal language has come a long way from the days of Law French and is likely to continue to improve in the future.[115] Simplification of the land use and planning processes themselves would result in shorter, more accessible codes. For its own sake, as well, New Urbanism should be wary about incorporating the evocative rhetoric of its images into the law. Images capturing the possibilities of reinvigorated neighborhoods as exciting and diverse places should not be dragged through the mud of our adversarial legal system. Once we have beaten and molded these visions to fit the constraints of legal process, what will replace their prophetic voice?

115 *See generally* DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 33–282 (1963) (describing the arc of the "history of the language of the law" from the Celtic invasion of Britain to the early 1960s).