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NOTES

Beyond the Eye of the Beholder: Aesthetics and Objectivity

"Beauty has been queen in many areas but has never been a favorite of the law."†

It was once believed that there was enough beauty for everyone, so there was no need to conserve it. Environmental despoilation was justified on the ground that the economic development it facilitated was more important than the beauty that was lost. It has since become increasingly apparent that it is also important to preserve and even improve the aesthetic environment. In response, legislatures have enacted measures that restrict further depredations on both natural and urban areas. The courts, however, have been reluctant to uphold such measures on aesthetic grounds alone. This problem has arisen because of the common judicial belief that aesthetic evaluations and standards are a matter of individual taste, which varies from person to person, and are thus too subjective to be applied in any but an arbitrary and capricious manner.¹ Consequently, according to this view aesthetic legislation violates the due process clause of the fourteenth amendment.²

† Agnor, *Beauty Begins a Comeback: Aesthetic Considerations in Zoning*, 11 J. PUB. L. 260, 260 (1962).

1. Perhaps the best statement of the subjectivity argument is in *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925):

It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard impractical as a standard for use restriction upon property. The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power. We are therefore remitted to the proposition that the police power is based upon public necessity, and that the public health, morals, or safety, and not merely aesthetic interest, must be in danger in order to justify its use.

See also *Mayor & Council v. Turk*, 14 Del. Ch. 392, 407, 129 A. 512, 518 (Ch. 1925); *Forbes v. Hubbard*, 348 Ill. 166, 181, 180 N.E. 767, 773 (1932); *Mayor & City Council v. Mano Swartz, Inc.*, 268 Md. 79, —, 299 A.2d 828, 835 (1973); *People v. Stover*, 12 N.Y.2d 462, 471, 191 N.E.2d 272, 278, 240 N.Y.S.2d 734, 741 (1963) (Voorhis, J., dissenting); Comment, *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81, 91 (1964); Comment, *Aesthetics as a Zoning Consideration*, 13 HASTINGS L.J. 374, 375 (1962).

When aesthetic issues appear in legal controversies, the party that stands to lose on the aesthetic issue has strong motivation to falsify his aesthetic judgments in order to advance his economic interests. If the legal system takes such claims to be genuine aesthetic judgments, aesthetic disagreements are exaggerated. This may be one explanation for the persistence of the subjectivity argument.

2. See, e.g., *Appeal of Medinger*, 377 Pa. 217, 104 A.2d 118 (1954); *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 62 A. 267 (Ct. Err. & App. 1905).

The term "aesthetic legislation," as used in this Note, refers only to legislation that bears upon the *visual* character of the physical environment, rather than to legislation on problems of noise and odor.³ The legal system has handled problems of the latter sort much better;⁴ only the sense of sight has been left unprotected. Perhaps one reason for its neglect is that in order to make an area visually pleasing positive programs, such as zoning, must be used, as well as passive prohibitions of such noxious uses as billboards. Noise and odor problems, which can be resolved by prohibitions alone, have been more easily addressed by the common law doctrine of nuisance.⁵

I. CURRENT STATE OF THE LAW

When legislation protecting aesthetic interests has been enacted in the past, courts have either declared it unconstitutional under the due process clause⁶ or upheld it on the basis of nonaesthetic interests also served by the legislation.⁷ In a controversy where aesthetic

3. This definition also excludes matters that, although sometimes classified as aesthetic by courts and legal writers, are in fact objectionable on other grounds. See, e.g., *Jones v. Trawick*, 75 S.2d 785 (Fla. 1954) (cemetery in residential area); *Hatcher v. Hitchcock*, 129 Kan. 88, 281 P. 869 (1929) (funeral home in residential area); *Sweet v. Campbell*, 282 N.Y. 146, 25 N.E.2d 963 (1940) (funeral home in residential area). See generally Comment, *Funeral Homes: Their Location in the Community as Controlled by Zoning Ordinances, Restrictive Covenants, and the Law of Nuisance*, 20 SYRACUSE L. REV. 45 (1968). Cemeteries and funeral homes are objectionable because they remind people of death, a subject considered unpleasant in our society. The objection is *not* aesthetic as that term is used here. While they may offend people's sensibilities, see Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075, 1078 (1970), they do not directly despoil the visual environment. Indeed, a cemetery's park-like atmosphere and statuary decoration may be visually attractive.

4. For some reason nuisance law is very protective of the nose. While it is difficult to legislate visual standards, noxious odors can be abated without any enabling legislation at all: Common law has held for centuries that nobody has a right to subject another to foul odors, see, e.g., *Aldred's Case*, 77 Eng. Rep. 816 (K.B. 1610) (hog farm); *Duncan v. City of Tuscaloosa*, 257 Ala. 574, 60 S.2d 438 (1952) (chicken farm in city); *Higgins v. Decorah Produce Co.*, 214 Iowa 276, 242 N.W. 109 (1932) (poultry-packing plant), or noxious gases, see, e.g., *United Verde Extension Mining Co. v. Ralston*, 37 Ariz. 554, 296 P. 262 (1931) (copper smelter). For similar cases involving loud noises, see *Kentucky & W. Va. Power Co. v. Anderson*, 288 Ky. 501, 156 S.W.2d 857 (1941) (monotonous humming of power generators); *Gorman v. Sabo*, 210 Md. 155, 122 A.2d 475 (1956) (radio).

5. For discussions of aesthetic nuisance, see Broughton, *Aesthetics and Environmental Law: Decisions and Values*, 7 LAND & WATER L. REV. 451, 458-66 (1972); Leighty, *Aesthetics as a Legal Basis for Environmental Control*, 17 WAYNE L. REV. 1347, 1347-60 (1971); Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1 (1939); Note, *supra* note 3.

6. See, e.g., *Crawford v. City of Topeka*, 51 Kan. 756, 33 P. 476 (1893); *City of Pascaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 62 A. 267 (Ct. Err. & App. 1905); *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965).

7. See, e.g., *St. Louis Gunning Advertising Co. v. City of St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911); *New York State Thruway Authority v. Ashley Motor Court*, 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961). As recently as 1965 a court quoted with approval the statement that

interests have been pitted against interests of some other sort, the aesthetic interests have lost,⁸ and where one party has urged an aesthetic interest in addition to other values, the aesthetic interest has not been taken into account.⁹

This strict traditional view has been under attack since its inception.¹⁰ The partisans of aesthetic legislation have not carried the day, but they have made substantial progress.¹¹ Although a complete analysis is beyond the scope of this Note, it appears that the current state of the law is as follows: Fourteen jurisdictions have accepted or have indicated that they are receptive to the view that legislation based solely on aesthetic considerations is valid.¹² The plurality view,

Specifically, billboard ordinances and regulations, where reasonable, are justified under the police power for any or all of the following reasons: (1) billboards being temporary structures are liable to be blown down and thus injure pedestrians; (2) they gather refuse and paper which may tend to spread conflagrations; (3) they are used as dumping places for dirt, filth and refuse, and as public privies; (4) they serve as hiding places for criminals; and (5) they are put to use by disorderly persons for immoral purposes. . . .

Norate Corp. v. Zoning Bd. of Adjustment, 417 Pa. 397, 404-05, 207 A.2d 890, 894 (1965), quoting 7 E. McQUILLAN, MUNICIPAL CORPORATIONS § 24.380, at 310-11 (3d ed. 1949).

8. See, e.g., Goldman v. Crowther, 147 Md. 282, 128 A. 50 (1925); Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954); White's Appeal, 287 Pa. 259, 134 A. 409 (1926).

9. See, e.g., City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 72 N.J.L. 285, 62 A. 267 (Ct. Err. & App. 1905); Appeal of Lord, 368 Pa. 121, 81 A.2d 533 (1951).

10. Litigation concerning aesthetic regulation first appeared at the beginning of the twentieth century. One of the earliest cases to sustain aesthetic legislation was Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77 (1899), *affd. on other grounds*, 188 U.S. 491 (1903) (statute that set height limits and required ornamentation of buildings in an historic square in Boston upheld). Courts first began to invalidate aesthetic legislation in litigation over billboard control ordinances. See, e.g., City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 72 N.J.L. 285, 62 A. 267 (Ct. Err. & App. 1905). For early defenses of aesthetic regulation, see Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124 (1926); Larremore, *Public Aesthetics*, 20 HARV. L. REV. 35 (1906); Light, *Aesthetics in Zoning*, 14 MINN. L. REV. 109 (1930).

11. Only six courts in the past twenty-five years have invalidated an ordinance that was primarily aesthetic in its impact. Bachman v. State, 235 Ark. 339, 359 S.W.2d 815 (1962); Mayor & City Council v. Mano Swartz, Inc., 268 Md. 79, 299 A.2d 828 (1973); City of Jackson v. Bridges, 243 Miss. 646, 656, 139 S.2d 660, 664 (1962); City of Scottsbluff v. Winters Creek Canal Co., 155 Neb. 723, 728, 53 N.W.2d 543, 547 (1952); Little Pep Delmonico Restaurant, Inc. v. City of Charlotte, 252 N.C. 324, 113 S.E.2d 422 (1960); City of Norris v. Bradford, 204 Tenn. 319, 321 S.W.2d 543 (1958). See also Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960) (general validity of ordinance recognized but specific application held to be arbitrary and capricious).

Two commentators suggest that the liberalization of the judicial attitude toward aesthetic regulation follows the general liberalization in courts' attitudes on the effect of the fourteenth amendment due process clause on exercises of the police power. Ridda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. CAL. L. REV. 149, 150 (1954); Comment, *Outdoor Advertising Control Along the Interstate Highway System*, 46 CALIF. L. REV. 796, 813 (1958). See also Oregon City v. Hartke, 240 Ore. 35, 47, 400 P.2d 255, 261 (1965).

12. Perhaps the strongest support for the view that legislation based solely on aesthetic grounds is permissible is found in Berman v. Parker, 348 U.S. 26 (1954). This case arose out of a community redevelopment program that Congress had enacted for

held by twenty-three states, is that an ordinance based solely on aesthetic considerations is not valid, but that aesthetic legislation is valid if it also serves some other legitimate interest.¹³ In fourteen

the District of Columbia. In upholding the legislation Justice Douglas wrote for a unanimous Court:

It is within the power of the legislature to determine that the community should be beautiful as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

348 U.S. at 33.

Other cases that indicate a receptivity to aesthetic legislation are: *Petition of Franklin Builders, Inc.*, 207 A.2d 12 (Del. Super Ct. 1964); *Rotenberg v. City of Port Pierce*, 202 S.2d 782, 785-86 (Fla. Dist. Ct. App. 1967); *Sunad, Inc. v. City of Sarasota*, 112 S.2d 611 (Fla. 1960); *State v. Diamond Motors, Inc.*, 50 Hawaii 33, 38, 429 P.2d 825, 827 (1967); *Moore v. Ward*, 377 S.W.2d 881, 886-87 (Ky. 1964); *Jasper v. Commonwealth*, 375 S.W.2d 709 (Ky. 1964); *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 557 (1955); *Opinion of the Justices to the Senate*, 333 Mass. 783, 128 N.E.2d 563 (1955); *State ex rel. Wilkerson v. Murray*, 471 S.W.2d 460 (Mo. 1971), *cert. denied*, 404 U.S. 851 (1971) (aesthetic reasons for laws "inextricably intertwined" with many other reasons that give adequate support for the law); *Piper v. Meredith*, 110 N.H. 291, 266 A.2d 103 (1964) (dictum); *Town of Deering ex rel. Bittenbender v. Tibbetts*, 105 N.H. 481, 485-86, 202 A.2d 232, 234-35 (1964); *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964) (aesthetic regulation allowable if it bears on land utilization); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964) (dictum); *In re Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963); *State v. Buckley*, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968) (requirement to fence junkyards upheld); *Oregon City v. Hartke*, 240 Ore. 35, 47-48, 400 P.2d 255, 262 (1965); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955).

13. *Bachman v. State*, 235 Ark. 339, 359 S.W.2d 815 (1962); *Desert Outdoor Advertising, Inc. v. County of San Bernardino*, 255 Cal. App. 2d 765, 63 Cal. Rptr. 543 (1968); *Willison v. Cooke*, 54 Colo. 320, 130 P. 828 (1913); *Murphy, Inc. v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944); *Stoner McCray Sys. v. City of Des Moines*, 247 Iowa 1313, 78 N.W.2d 843 (1956) (aesthetics can be auxiliary consideration); *Ware v. City of Wichita*, 113 Kan. 153, 214 P. 99 (1923); *City of New Orleans v. Levy*, 223 La. 14, 64 S.2d 798 (1953) (*but see State ex rel. Civello v. City of New Orleans*, 154 La. 271, 97 S. 440 (1923)); *Wright v. Michaud*, 160 Me. 164, 200 A.2d 543 (1964); *Mayor & City Council v. Mano Swartz, Inc.*, — Md. —, 299 A.2d 828 (1973); *Sun Oil Co. v. City of Madison Heights*, 41 Mich. App. 47, 199 N.W.2d 525 (1972); *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W.2d 206 (1968); *City of Jackson v. Bridges*, 243 Miss. 646, 656, 139 S.2d 660, 664 (1962); *City of Scottsbluff v. Winters Creek Canal Co.*, 155 Neb. 723, 728, 53 N.W.2d 543, 547 (1952); *Little Pep Delmonico Restaurant, Inc. v. City of Charlotte*, 252 N.C. 324, 113 S.E.2d 422 (1960); *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 528 n.29, 215 A.2d 597, 610 n.29 (1965); *City of Providence v. Stephens*, 47 R.I. 387, 133 A. 614 (1926); *City of Norris v. Bradford*, 204 Tenn. 319, 321 S.W.2d 543 (1958); *Niday v. City of Bellaire*, 251 S.W.2d 747, 750 (Tex. Civ. App. 1952); *Connor v. City of Univ. Park*, 142 S.W.2d 706 (Tex. Civ. App. 1940); *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969); *Vermont Salvage Corp. v. Village of St. Johnsbury*, 113 Vt. 341, 34 A.2d 188 (1943); *Lenci v. City of Seattle*, 63 Wash. 2d 664, 388 P.2d 926 (1964); *Farley v. Graney*, 146 W. Va. 22, 119 S.E.2d 833 (1960). The position of Illinois is unclear. In *Forbes v. Hubbard*, 348 Ill. 166, 180 N.E. 767 (1932), the Illinois court seemed to approve aesthetics as a valid consideration, but in *Neef v. City of Springfield*, 380 Ill. 275, 43 N.E.2d 947 (1942), it indicated that aesthetics should not be considered. Both cases were cited with apparent approval in *Trust Co. v. City of Chicago*, 408 Ill. 91, 100, 96 N.E.2d 499, 504 (1951).

states no case has been found in which the status of aesthetic regulation was before the courts.¹⁴ Thus, while aesthetic legislation has gained substantial support in recent years, only a minority, although an increasing minority, of states will uphold it even where other interests are not served as well. This Note suggests that legislation based solely on aesthetic purposes is legitimate and approves the trend toward this position.

II. THE OBJECTIVITY OF AESTHETIC EVALUATIONS

Judicial uneasiness with aesthetic matters is rooted in the common view that one person's judgment on aesthetic matters is as good as another's. The argument that aesthetic evaluations are subjective involves two beliefs: first, that there can be no consensus in matters of aesthetics; second, that no aesthetic judgment is more or less reasonable than any other because no arguments that rely on publicly ascertainable facts can be given in support of an aesthetic judgment. From this it is concluded that aesthetics is an inappropriate matter for the legal system to deal with¹⁵ because any aesthetic regulation would simply impose one person's taste on another who legitimately holds a different viewpoint, and any such imposition would be arbitrary and capricious.¹⁶ If these two beliefs were true, courts would be justified in refusing to uphold aesthetic legislation. However, recent studies have demonstrated that there is consensus in matters of aesthetics and that aesthetic judgments can be supported by appeal to publicly ascertainable facts.

That there can be general agreement in aesthetic judgment is demonstrated by two empirical studies. The more important is by Shafer, Hamilton, and Schmidt,¹⁷ who showed twenty of one hundred landscape photographs to each of 250 adults, chosen at random in ten Adirondack public camping areas, also selected at random. Each person was asked to rank in order of scenic value five pictures grouped at random in each of four packets. A predictive model was generated on the basis of these data and applied to another set of photographs, some new and some from the original set. To test the predictive model, six further tests were conducted of the same kind, and the results of five of the six tests agreed with the predictions.¹⁸ It was thus established that there is a substantial convergence in the

14. Alabama, Alaska, Arizona, Georgia, Idaho, Indiana, Montana, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, and Wyoming.

15. *E.g.*, Comment, 13 HASTINGS L.J. 374, *supra* note 1, at 377.

16. *See, e.g.*, *Trust Co. v. City of Chicago*, 408 Ill. 91, 96 N.E.2d 499 (1951); *Stoner McCray Sys. v. City of Des Moines*, 247 Iowa 1313, 78 N.W.2d 843 (1956); *Hitchman v. Oakland Twp.*, 329 Mich. 331, 45 N.W.2d 306 (1951).

17. Shafer, Hamilton & Schmidt, *Natural Landscape Preferences: A Predictive Model*, 1 J. LEISURE RESEARCH 1 (1969).

18. *Id.* at 15.

aesthetic judgments of a cross-section of people looking at photographs of scenic areas. The authors of the study believe that it is reasonable to assume that these results are applicable to evaluations of natural landscapes themselves.¹⁹

In the second study, by Kaplan, Kaplan, and Wendt,²⁰ each of eighty-eight subjects rated approximately one third of fifty-six slides for complexity and preference on a five-point scale (each was rated separately).²¹ The slides depicted nonspectacular scenes of three kinds: nature scenes, urban scenes, and scenes combining both natural and man-made features. The investigators found that natural settings were so vastly preferred over urban settings that only one nature slide was rated lower on the preference scale than the most preferred urban slide.²² Thus, this study indicates very strong agreement on the aesthetic superiority of natural over urban settings.

Although the two studies are somewhat limited in scope, they do demonstrate the falsity of the belief, held by many of those who claim that aesthetic evaluations are subjective, that no consensus can be reached on aesthetic matters.

The second belief, that arguments relying on publicly ascertainable facts cannot be given in support of aesthetic judgments, is refuted by two kinds of evidence: evaluation and criticism in the arts, and evaluation of the aesthetic character of landscapes.

Art critics commonly support their evaluations by such arguments. For example, in his review of Frank Lloyd Wright's project for House on the Mesa, Denver, Colorado, Hitchcock says:

The concrete block shell system is combined with the cantilevered slab roof on isolated supports to produce an architecture as weightless and non-massive as that of Le Corbusier. . . .

The use of ornament is restricted on this house to a few accents of pierced blocks. But the three dimensional design is very rich, not to say complicated. The variations of level, the emphasis upon the suspension of the glass walls of the living room, the independence of the cantilevered roofs, the different degrees of extension of the separate units lead to a multiplication of lines and planes. Yet the whole is firmly tied together by the long corridor and solid wall which protects the whole complex on one side. . . . [T]his latest house of Wright's is a striking aesthetic statement. . . .²³

In this discussion Hitchcock gives three reasons for his evaluation

19. *Id.* at 14.

20. Kaplan, Kaplan & Wendt, *Rated Preference and Complexity for Natural and Urban Visual Material*, 12 *PERCEPTION & PSYCHOPHYSICS* 354 (1972).

21. *Id.* at 354. The subjects were asked to indicate "how intricate or complex" and "how pleasing" they found the slides. *Id.*

22. *Id.* at 355.

23. Hitchcock, *Frank Lloyd Wright—Model in the Exhibition*, in *MODERN ARCHITECTURE INTERNATIONAL EXHIBITION* 38, 38 (Museum of Modern Art 1932).

that the home has aesthetic merit: first, the arrangement of the concrete block shell system and the cantilevered slab roof; second, the contrast between the sparse ornamentation and the complex three-dimensional design; third, the unifying placement of the corridor and the wall. Hitchcock thus gives, in support of his aesthetic judgment, arguments that rely on specific and perceivable features in the work and that consequently can persuade others of the reasonableness of his position. The kind of reasoning that supports aesthetic judgments in the visual arts should carry over to judgments of aesthetic quality in the environment. In both cases the visual attractiveness of the object is evaluated, and the reasoning process in both is built on the same factors—for example, the interplay between colors and the relationships of the forms and lines when viewed from various angles. In fact, in the case of legislation imposing architectural controls some of the aesthetic evaluations that will be called for will be precisely the same as those used in architecture criticism.

Four studies relating to the aesthetic evaluation of landscapes apply even more directly to the aesthetic regulation of the natural environment and demonstrate that arguments appealing to descriptive features can be decisive. In a two-part study Leopold focused upon the aesthetic quality of rivers,²⁴ comparing twelve selected sites in the Hells Canyon area of Idaho. In the first part of his study, he identified forty-six descriptive characteristics²⁵ and described up to five distinguishable descriptive categories for each characteristic. Assuming that aesthetic merit is a function of uniqueness,²⁶ he then calculated a uniqueness ratio for each descriptive characteristic,

24. L. LEOPOLD, QUANTITATIVE COMPARISON OF SOME AESTHETIC FACTORS AMONG RIVERS (Geological Survey Circular 620, 1969).

25. He divided these into physical factors, such as river patterns, width, depth and velocity, basin area, erosion of banks, and width of valley floor; biological and water quality factors, such as water color, turbidity, floating material, fauna, and pollution evidence; and human use and interest factors, such as incidence of trash and litter, artificial controls, accessibility, vistas, and land use. For a complete list of factors and the assignment of evaluation numbers to descriptive categories, see *id.* at 2-3.

26. That uniqueness, or originality, as it is usually expressed, contributes to aesthetic value is generally recognized by writers in aesthetics. See, e.g., M. BEARDSLEY, AESTHETICS: PROBLEMS IN THE PHILOSOPHY OF CRITICISM 460 (1958); Gallie, *The Function of Philosophical Aesthetics*, in AESTHETICS AND LANGUAGE 13, 26-27 (W. Elton ed. 1954); Meager, *The Uniqueness of a Work of Art*, in AESTHETICS AND THE PHILOSOPHY OF CRITICISM 520 (M. Levich ed. 1963). See also I. KANT, CRITIQUE OF AESTHETIC JUDGMENT § 46 (J. Meredith trans. 1911). But nobody holds, as Leopold does, that aesthetic merit is a function of uniqueness alone, or that there is a high correlation between uniqueness and aesthetic merit.

For a treatment of uniqueness as a source of economic value when applied to an area of scenic value, see Krutilla & Cichetti, *Evaluating Benefits of Environmental Resources with Special Application to the Hells Canyon*, 12 NATURAL RESOURCES J. 1 (1972).

using as his basis the number of sites that shared each descriptive category. The more unique an area was according to his formula, the more aesthetically valuable it was considered to be.²⁷

In the second part of his study, Leopold assumed that the spectacular character of rivers is a function of their size and apparent speed, and that of mountains is a function of their height and the narrowness of adjoining valleys.²⁸ After making calculations based on these factors for each of the twelve sites, he concluded that the river valley of Hells Canyon was the most spectacular.²⁹ Leopold then compared Hells Canyon with four other sites known for their aesthetic merit—the Merced River in Yosemite National Park, the Snake River in the Grand Teton National Park, the Yellowstone River in Yellowstone National Park, and the Grand Canyon of the Colorado River. Of these, the Grand Canyon was found to be the most majestic, as one would expect. Hells Canyon was a close second, followed by a virtual tie between the Yellowstone River and the Snake River in the Tetons.³⁰

The factors used in both of Leopold's calculations are strictly empirical and thus publicly ascertainable.³¹ For example, in the first part of the study the width of the river, its depth at low flow, its velocity, and its bankfull depth were measured in feet, and the basin area was measured in square miles.³² Similarly, in the second part of the study, valley character was determined by graphing valley width, height of hills, degree of scenic outlook (determined by the number of scenic features observable), and urbanization (determined by number of buildings, houses, roads, and other factors indicating use by man).³³

In a second study Weddle developed a system similar to Leopold's to evaluate the landscape in the Clyde Estuary in England for the purpose of recommending a location for the development of large-scale industry that would least disrupt the aesthetic character

27. The famous Hells Canyon site was the second most unique of the twelve sites, and by assumption the second most desirable. L. LEOPOLD, *supra* note 24, at 7. Leopold's assumption did not work for the most unique location, which turned out to be a very ordinary river valley scene. This result was due to its being the only ordinary scene in a group otherwise consisting of spectacular sites; if the study had also included other ordinary river valleys, this particular site would certainly have been far below the others on the list.

28. *Id.* at 7, 10.

29. *Id.* at 10.

30. *Id.* at 12.

31. It is arguable that three categories—special views, historical features, and misfits—are not strictly empirical. But, in light of the large number of descriptive categories used, the elimination of these three would have little effect on the evaluation of any site studied.

32. L. LEOPOLD, *supra* note 24, at 2.

33. *Id.* at 7-9.

of the area.³⁴ He divided his analysis into two parts: the inherent landscape quality of a site, and its acquired quality. The former was determined by a comparative evaluation of ten factors,³⁵ in which each area was rated objectively on a three-value scale. A similar evaluation was made for landscape values, based on the presence of residents, day visitors, and resident vacationers,³⁶ and a total evaluation was calculated from these data.³⁷ Like Leopold's, this system provides an objective, empirical measure of the visual attractiveness of a landscape.

Sargent's system of evaluating landscapes deals with scenery along highways.³⁸ He established two experimentally derived categories—distance ratings, and variety and interest ratings. Each site was given a rating of zero to five in each of the two categories, depending, in the first, on the distance to the horizon, and in the second, on the number of features such as hills, fields, forests, water, farmsteads, distant villages, ledges, and land improvements.³⁹ A separate evaluation was made, where appropriate, for eyesores and for points of interest, such as historic monuments, old mills, and natural phenomena. The only features of this evaluation that are nondescriptive in any sense are the degree of distastefulness of the eyesores and the amount of intrinsic interest in the points of interest.⁴⁰ All other factors were determined according to an objective measuring or counting process.

Yet another approach to the evaluation of landscape features is found in the Upper Great Lakes region highway planning study,⁴¹

34. Weddle, *Techniques in Landscape Planning: Landscape Evaluation*, 55 J. TOWN PLANNING INST. 387 (1969).

35. The ten factors were grouped into four categories: viewpoints and foreground (subdivided into (1) viewpoints—abundant and varied, offering a variety of prospects; (2) framing—by rocks, trees, and other features; (3) foreground—of farmland, parkland, shore, attractive buildings, other features); view (subdivided into (4) structure of interesting land forms and vegetation color, texture, and massing; (5) land use—farming, field, boundary hedges, walls, industry, urban areas; (6) objects—architectural or engineering, water, boats, birds, animals; (7) edges—where one kind of landscape gives way to another); background (subdivided into (8) objects—sea, islands, ships, structures; (9) structure—of land forms and vegetation massing); and lighting (which consisted of (10) prevailing climate, light, shade, shadow, clouds, light reflecting from water or clouds). *Id.* at 387.

36. *Id.* at 388.

37. *Id.*

38. Sargent, *A Scenery Classification System*, 21 J. SOIL & WATER CONSERVATION 26 (1966).

39. *Id.*

40. These attributes were considered only on a comparative basis, not on an absolute scale. Disagreements are likely to arise only in borderline cases. *See* text accompanying note 47 *infra*.

41. 5 Edwards & Kelcey, Inc., Upper Great Lakes Region, Highway Planning Studies Summary Report (undated). Unlike the other four approaches, this study multiplies together the factors used, rather than summing them.

which determined the aesthetic value of a view along the highway by a consideration of five factors: the number of observable scenic features, whether or not a scene is viewable from both directions of travel, the inherent interest of the scene,⁴² the possible viewing time, and the angle of view.⁴³ Using this information, one can lay out a highway to take advantage of the best scenes available.⁴⁴

Like the analogy to art criticism, these four studies show the possibility of pointing to publicly determinable descriptive factors in support of aesthetic judgments.⁴⁵ It is not suggested that any one of the approaches discussed above will be applicable as such in a particular case, for a formula must be devised that includes all the relevant factors for each kind of aesthetic judgment.

Since it is possible to make reasonable arguments to support aesthetic judgments, it follows that it is possible to develop expertise in making such judgments and arguments. Individuals who may be considered experts in aesthetic matters are scattered throughout the disciplines of planning, architecture, land development, landscape architecture, civil engineering, art, and art criticism.⁴⁶ If the legislature deems it necessary, these experts can be called upon to assist in the drafting of aesthetic legislation, or they can be used as a planning or review board to implement the legislation once it has been enacted.

The fact that reasonable and objective aesthetic evaluations can be made does not mean that uncertainty will never arise in borderline cases. But this should not invalidate a scheme of legislation as a whole. The law need not demand absolute certainty. It should be sufficient for the courts, if the legislature finds that the interest is important, that in the large majority of cases there can be general consensus in aesthetic judgments and that these judgments can be supported by reasoned arguments appealing to publicly ascertainable facts.⁴⁷

42. The inherent interest of a view is determined by comparing it to other views. For a similar approach, see note 40 *supra* and accompanying text.

43. *Edwards & Kelcey, Inc.*, *supra* note 41, at 12.

44. *Id.*

45. See also Linton, *The Assessment of Scenery as a Natural Resource*, 84 SCOTTISH GEOGRAPHICAL MAGAZINE 219 (1968). For a summary of the present state of the art of landscape evaluation, see Zube, *Scenery as a Natural Resource: Implications of Public Policy and Problems of Definition, Description and Evaluation*, 63 LANDSCAPE ARCHITECTURE 126 (1973).

46. JOINT COMMITTEE ON DESIGN CONTROL, PLANNING AND COMMUNITY APPEARANCE 22-23, 58-62 (H. Fagin & R. Weinberg ed. 1958). The academic discipline of aesthetics would also be a valuable source of expertise.

47. *Cf. J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (Taft, C.J.): "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to . . . [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."

III. PRECISION OF AESTHETIC STANDARDS

The charge that aesthetic matters are subjective may also indicate another sort of belief. It may be argued that, even though aesthetic judgments need not be subjective, it is impossible to draft workable and precise standards for inclusion in aesthetic legislation.⁴⁸ Three types of existing statutory programs—billboard controls, scenic area and scenic easement programs, and community planning—will be discussed in order to demonstrate that legislation directed primarily to aesthetic ends can and does exist, although both courts and legislatures may not always acknowledge it explicitly, and that it can contain standards that can be easily applied.

A. Billboards

Billboard controls⁴⁹ have generally been upheld by the courts, but usually on the basis of nonaesthetic interests.⁵⁰ For instance, such ordinances have been upheld on the grounds that the lots behind billboards are often used as dumping places by robbers and looters⁵¹ or that the signs might fall upon pedestrians in heavy winds or be-

48. See, e.g., *Mayor & City Council v. Mano Swartz, Inc.*, 268 Md. 79, —, 299 A.2d 828, 833 (1973) (court overturned sign ordinance with detailed standards).

49. Billboard controls, like other regulations, are enacted under the police power. Courts will uphold statutory programs under the police power only if they promote a legitimate police power objective—traditionally health, safety, morals, and general welfare. See, e.g., *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 494, 162 N.W.2d 206, 209 (1968). Recent cases have held that aesthetics is a legitimate objective under the “general welfare” category. See *In re Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963).

When the statute requires a taking of property, as, for instance, when the state prohibits an existing billboard for which the landowner is receiving rent, the power of eminent domain, rather than the police power, is applicable. Traditionally, eminent domain can be used only when the property is taken for a “public use.” *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598 (1908). However, in *Berman*, discussed in note 12 *supra*, a case that involved taking for slum clearance purposes, the Supreme Court held that the taking could be justified, as protecting the interest of “public welfare,” on aesthetic grounds alone. See note 12 *supra*. The Court spoke in terms of “public purpose” and “police power,” instead of “public use,” so the case may indicate that aesthetics is a legitimate purpose for regulation as well as taking. Although the approach taken in *Berman* may be an aberration, it does indicate that the interests to be weighed against aesthetic values in taking cases are similar to those involved in enacting regulations, with the additional factor that, when eminent domain is involved, competing property interests will usually be reimbursed to some extent if aesthetic considerations are found to outweigh them. See generally *Cunningham, Billboard Control Under the Highway Beautification Act of 1965*, 71 MICH. L. REV. 1295, 1356-59 (1973).

Subjectivity may be a problem in both eminent domain and regulation cases, for enactments under the police power and under the power of eminent domain are subject to the requirement of the due process clause that legislation not be arbitrary or capricious.

50. See note 7 *supra*; *Cunningham, supra* note 49, at 1347-50.

51. See, e.g., *St. Louis Cuning Advertising Co. v. City of St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911).

come fire hazards.⁵² Only recently have courts upheld billboard regulations on primarily aesthetic grounds.⁵³

Since almost all billboards are aesthetic evils, if aesthetic grounds were its primary motivation a legislature would prohibit billboards altogether.⁵⁴ This is substantially the position taken by the Highway Beautification Act of 1965,⁵⁵ which requires each state to prohibit visible "outdoor advertising signs, displays and devices" within one-eighth mile from the nearest edge of the right-of-way of interstate and primary highways.⁵⁶ Since the aesthetic interest in prohibiting billboards does not invariably weigh more heavily than competing nonaesthetic interests,⁵⁷ exceptions can be made for directional and other official signs conforming to national standards,⁵⁸ on-premise advertising,⁵⁹ traveler information signs in designated places,⁶⁰ and signs in industrial and commercial areas.⁶¹

Since the prohibition established by the statute is absolute within a clearly delineated area and the exemptions are narrowly defined, problems of indefiniteness of application have not arisen. For example, in *Markham Advertising Co. v. State*,⁶² which involved an extensive attack by the entire state advertising industry on a state billboard control act implementing the predecessor of the Highway Beautification Act,⁶³ the problem of vagueness was not even raised.

52. See, e.g., *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269 (1919).

53. See, e.g., *In re Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

54. In general, this cannot be done without paying just compensation to owners of existing billboards. See, e.g., *State Highway Dept. v. Branch*, 222 Ga. 770, 152 S.E.2d 372 (1966). See also *Markham Advertising Co. v. State*, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969).

55. Pub. L. No. 89-285, 79 Stat. 1028 (codified at 23 U.S.C. §§ 131, 136, 319 (1970)). This Act is extensively discussed in Cunningham, *supra* note 49.

56. 23 U.S.C. § 131(b) (1970).

57. See discussion of competing interests in text accompanying notes 108-27 *infra*.

58. 23 U.S.C. § 131(c)(1) (1970).

59. 23 U.S.C. § 131(c)(3) (1970).

60. 23 U.S.C. § 131(f) (1970).

61. 23 U.S.C. § 131(d) (1970).

62. 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969).

63. Act of April 16, 1958, Pub. L. No. 85-38, § 12, 72 Stat. 95. The standards set up in the state act were similar to those of the Highway Beautification Act of 1965. See Highway Advertising Control Act of 1961, WASH. REV. CODE § 47.42 (1961), *as amended*, (Supp. 1972).

The statute in *Markham* designated "protected areas" and "scenic areas," within which no person was permitted to erect or maintain a sign except as provided by the statute. WASH. REV. CODE 47.42.030 (1961), *as amended*, (Supp. 1972). Protected areas were the strips within 660 feet of the edge of the right-of-way of interstate highways, and scenic areas were similar strips along state highways within public parks, federal forests, public beaches, public recreation areas, national monuments, and all other areas outside the boundaries of incorporated cities or towns specially designated by the state legislature. WASH. REV. CODE § 47.42.020 (1961), *as amended*, (Supp. 1972). Within protected areas four types of signs were permitted: directional or other official signs,

Billboard control regulations that are designed primarily for aesthetic ends can be defined by the legislature in such a way that there is minimal uncertainty of application.

B. *Scenic Areas and Easements*

In a related effort to preserve the beauty of the countryside, a number of states have recently adopted programs to protect scenic areas,⁶⁴ either by purchasing such areas in fee simple or by taking scenic easements under the power of eminent domain.⁶⁵ An example of the manner in which aesthetic standards can be established for scenic areas programs is demonstrated by the California program, enacted under its 1966 Scenic Areas Act.⁶⁶ In the selection of scenic areas an absolute standard is not appropriate, for, unlike the control of billboards, this is an affirmative program, rather than a mere prohibition. A choice must be made among several areas, many of which may be worth preserving. Therefore, the California legislature delegated to the Department of Public Works the responsibility for implementing its program of "conservation of scenic lands," rather than setting out all the relevant criteria in the statute.⁶⁷ The criteria established by the Department pursuant to this delegation indicate, among other things, that the areas selected should contain features that will attract the eye of a passing motorist, such as:

- (a) Typical pastoral scenes containing an expanse of open land and interesting cultural elements;
- (b) Attractive or interesting growth of natural shrubs, vines, trees, or timber stands;
- (c) Views of water or wetlands, such as lakes, stream beds, or ocean shores;
- (d) Interesting rock outcroppings or other geologic formations such as bluffs or cliff faces;
- (e) Mountain or alpine valley views;
- (f) Selected desert views;

on-premise property sale or lease signs, signs advertising activities within twelve miles, and travel information signs. Within scenic areas signs of the first of these three types were permitted. WASH. REV. CODE § 47.42.040 (1961), *as amended*, (Supp. 1972). Regulations authorized under the statute further limited permissible signs to one sale or lease sign for each property owner and one sign advertising on-premise activities, and limited the size and spacing of permitted signs. 73 Wash. 2d at 411, 439 P.2d at 252.

64. For a summary of such programs as of 1968, see Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENVER L.J. 167 (1968). For an analysis of scenic resources in forest areas and the development of a cataloging scheme and vocabulary for discussing them, see R. Litton, *Forest Landscape Description and Inventories* (U.S. Forest Service, Dept. of Agriculture, Research Paper PSW-49, 1968).

65. Such action was upheld as a legitimate "public use" in *Kamrowski v. State*, 31 Wis. 2d 256, 142 N.W.2d 793 (1966). See also Cunningham, *supra* note 49, at 1357-59.

66. CAL. STS. & HWYS. CODE §§ 895-97 (West 1969).

67. CAL. STS. & HWYS. CODE § 895 (West 1969).

- (g) Attractive urban landscape views;
- (h) Historically interesting and appealing sites.⁶⁸

In using terms such as "attractive" and "interesting," the regulations establish only general criteria, which may not in themselves seem sufficiently precise. However, the Department did also enumerate more specific criteria, such as: The area should be outlined, if possible, by natural features, if it lacks natural boundaries, it should be long enough to hold the attention of a motorist passing at fifty miles per hour for at least thirty seconds, and the area's maximum width should generally be limited to that in which billboard controls may be exercised.⁶⁹ In addition, after the initial site selection is made by a selection team, but prior to acquisition of the scenic area, the Highway Department's Landscape Architect reviews the site for general conformance to the criteria.⁷⁰ This utilization of expertise makes it unnecessary to have criteria drafted with the precision necessary to guide the decisions of laymen. In consequence, the criteria used in the California program are sufficiently specific to permit effective implementation.

C. Community Planning

In urban areas, as opposed to the countryside, aesthetic regulation focuses upon the visual character of a given commercial or residential area.⁷¹ Zoning, the most common form of community planning, has usually been upheld on the ground that industry should be separated from the residential parts of a town for reasons of health and safety.⁷² However, whatever the rationale given, zoning, and its private counterparts, have also been the primary method of preserving and improving the aesthetic environment.⁷³ Two types of

68. CAL. DIVISION OF HIGHWAYS, DEPT. OF PUB. WORKS, REPORT ON ACQUISITION OF SCENIC AREAS ADJACENT TO STATE HIGHWAYS (1966), excerpted in Cunningham, *supra* note 64, at 215-16.

69. Cunningham, *supra* note 64, at 216.

70. *Id.* at 215-16.

71. While the focus of aesthetic control in urban settings is usually on residential areas, more regulation of industrial areas should be encouraged. For the residents of a city, the aesthetic character of the residential areas is probably perceived to be the most important. Comment, *Government Control of Land: Protecting the I-Know-It-When-I-See-It Interest*, 62 NW. U. L. REV. 428, 446 (1967). But in fact a large majority of urban dwellers spend a majority of their waking hours in other parts of the city. Thus, it is important to make commercial areas as pleasing as residential areas, insofar as this is possible.

72. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

73. Several commentators have noted the primarily aesthetic character of zoning ordinances. See Anderson, *Architectural Controls*, 12 SYRACUSE L. REV. 26 (1960); Norton, *Police Power, Planning and Aesthetics*, 7 SANTA CLARA LAW. 171, 172 (1967); Comment, *Zoning: Aesthetics: the Chameleon of Zoning*, 4 TULSA L.J. 48, 54 (1967); Comment, *Aesthetic Control of Land Use: A House Built Upon the Sand?*, 59 NW. U. L. REV. 372, 372 (1964).

regulations have a particular impact on the visual character of a city: (1) requirements prescribing minimum set-backs, side distances, and areas, and maximum heights; and (2) architectural controls.

The impact of the first type of regulation is aesthetic in that minimum distance requirements (setbacks and side distances) provide a desirable measure of regularity to the spacing of houses along a street; they may also encourage landowners to use the areas on which they cannot build for planting lawns, trees, shrubs, and flowers.⁷⁴ Minimum area requirements, although primarily intended to control population density and average income,⁷⁵ also enlarge the area available for lawns, trees, shrubs, and flowers. Maximum height limitations preserve the skyline of a city, as well as provide light and air for the inhabitants.⁷⁶ Since these requirements are normally set out in terms of specific measurements, their application should present no subjectivity difficulties.

More difficult problems arise when a community attempts to impose architectural controls on buildings. Such ordinances prohibit excessive dissimilarity in the architectural character of the buildings in an area, and, commonly, excessive similarity as well.⁷⁷ Typically, a board of review administers such ordinances and is required to consider the facade, the size and arrangement of windows, doors, and porticos, and other significant features of design.⁷⁸

One of the purposes for which architectural review boards have been used is to preserve the character of historically significant sections of cities.⁷⁹ For instance, a commission has been established in New Orleans to pass upon the erection or modification of any building in the Vieux Carré section (the French Quarter) of the city.⁸⁰ The commission is to evaluate the full plans and specifications

74. See, e.g., *In re City of New York*, 57 App. Div. 166, 68 N.Y.S. 196, *aff'd.*, 167 N.Y. 624, 60 N.E. 77 (1901).

75. See, e.g., *Simon v. Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942).

76. While maximum height limitations have usually been sustained by courts on nonaesthetic grounds, see, e.g., *Welch v. Swasey*, 214 U.S. 91 (1909), minimum height limitations have been struck down as being for aesthetic purposes, see, e.g., *122 Main St. Corp. v. City of Brockton*, 323 Mass. 646, 84 N.E.2d 13 (1949).

77. Anderson, *supra* note 73, at 30. For examples of such ordinances, see Babcock, *Billboards, Glass Houses and the Law*, HARPER'S MAGAZINE, April 1966, at 20, 24-25.

78. Anderson, *supra* note 73, at 20.

79. See, e.g., *Opinion of the Justices to the Senate*, 333 Mass. 783, 128 N.E.2d 563 (1955); *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 557 (1955); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964). On the preservation of the historical character of historic areas, including a discussion of the statutory standards for Vieux Carré, Nantucket, and Williamsburg, see Comment, *Aesthetic Zoning: Preservation of Historic Areas*, 29 FORDHAM L. REV. 729 (1961). For an early case upholding the use of a commission to administer regulation of buildings to preserve their aesthetic quality, see *Walnut & Quince St. Corp. v. Mills*, 303 Pa. 25, 154 A.2d, *appeal dismissed*, 284 U.S. 573 (1931).

80. *New Orleans, La., Vieux Carré Ordinance*, March 3, 1937, reproduced in part in 4 R. ANDERSON, *AMERICAN LAW OF ZONING* § 26.93, at 177-80 (1968). The ordinance

of the exterior of any such building⁸¹ in light of the purpose of the ordinance: "that the quaint and distinctive character of the Vieux Carré Section of the City of New Orleans may not be injuriously affected, and . . . that the value to the community of those buildings having architectural and historical worth may not be impaired . . ."⁸² The application of these standards to a particular structure is left to the discretion of the committee, at least a portion of whom must be trained and practiced architects, experienced in making precisely this sort of decision.⁸³ Since architects presumably know what sorts of facts to appeal to in supporting this sort of judgment, the requirements of specificity are not as great as they would be if there were no administrative board of experts, and they appear to be met in this case by the standards set forth in the statute's statement of purpose. It should be noted that the committee is not called upon to make an evaluation of the intrinsic aesthetic merit of a building, but only to determine whether its structure is in accord with that of other buildings in the area. This calls only for a comparison, not a judgment of the absolute worth of the proposed building or modification. In litigation over historical center protective legislation, courts have had no difficulty in finding sufficiently concrete standards in rather vaguely worded statutes.⁸⁴

Architectural controls are also used to establish and maintain a distinctive aesthetic character in more recently established neighborhoods. Like historical center regulation, these controls are typically administered by a board of experts who are called upon to determine whether a proposed structure fits into the character of a given neighborhood. While such regulations should be sustainable on purely aesthetic grounds, they are often tied to the maintenance of property values; as such they can be upheld even in those jurisdictions where aesthetic regulation is valid only where other purposes are also served. However, insofar as these ordinances uphold property value, they do so only by means of regulating the aesthetic character of a neighborhood.

is based upon LA. CONST. art. 14, § 22A, and has been upheld consistently in court. *City of New Orleans v. Levy*, 223 La. 14, 64 S.2d 798 (1953); *City of New Orleans v. Pergament*, 198 La. 852, 5 S.2d 129 (1941); *City of New Orleans v. Impastato*, 198 La. 206, 3 S.2d 559 (1941). See also *State ex rel. Civello v. New Orleans*, 154 La. 271, 97 S. 440 (1923).

81. Vieux Carré Ordinance § 3, in 4 R. ANDERSON, *supra* note 80, § 26.93, at 178.

82. Vieux Carré Ordinance § 3, in 4 R. ANDERSON, *supra* note 80, § 26.93, at 178.

83. Vieux Carré Ordinance § 2, in 4 R. ANDERSON, *supra* note 80, § 26.93, at 177.

84. See, e.g., *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 557 (1955); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964); *Town of Deering ex rel. Bittenbender v. Tibbetts*, 105 N.H. 481, 202 A.2d 232 (1964); *Manhattan Club v. Landmarks Preservation Comm.*, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (1966). But see *City of West Palm Beach v. State ex rel. Duffey*, 158 Fla. 863, 30 S.2d 491 (1947).

*Reid v. Architectural Board of Review*⁸⁵ involved an ordinance that acknowledged that considerations other than the protection of property values might be at issue. The ordinance established three objectives: the protection of the property on which the building was to be constructed, the maintenance of the character of community development, and the protection of the value of real estate within the neighborhood. The architectural review board established to administer the ordinance was to achieve these objectives by regulating the design, use of materials, finished grade lines, and orientation of new buildings in the light of "proper architectural principles."⁸⁶ The plaintiff proposed to build a house that on its face would not appear to affect property values adversely: It was to be of substantial size and equivalent in value to the other homes in the upper-middle-class suburb of Cleveland. However, its proposed design—a flat-roofed complex of twenty modules hidden behind a ten-foot wall—contrasted sharply with the surrounding structures, most of which were conventional two-and-one-half story homes.⁸⁷ The review board, which consisted of three registered architects with ten years of experience, rejected the plan on the ground that "it does not maintain the high character of community development in that it does not conform to the character of the houses in the area."⁸⁸ Unlike the review board, the court was not content to rest its decision on purely aesthetic grounds. Although not required to do so by the ordinance, it upheld the decision in part on the basis of its finding that the proposed structure would be likely to depreciate the value of three adjacent lots.⁸⁹

Like the court in *Reid*, legislative bodies are often reluctant to let architectural controls rest on noneconomic grounds alone and require that the aesthetic incongruity of a proposed structure threaten economic harm before architectural controls may be invoked. For example, the ordinance involved in *State ex rel. Stoyanoff v. Berkeley*⁹⁰ prohibited the construction of buildings that were "unsightly, grotesque and unsuitable structures, detrimental to the stability of value and the welfare of surrounding property, structures, and residents, and to the general welfare and happiness of the community" ⁹¹ Under this statute the architectural board denied permission to build a pyramid-shaped house in a neighborhood consisting of Colonial, French Provincial, and English residences, valued

85. 119 Ohio App. 67, 192 N.E.2d 74 (1963).

86. 119 Ohio App. at 68, 192 N.E.2d at 76.

87. 119 Ohio App. at 70-71, 192 N.E.2d at 77.

88. 119 Ohio App. at 68, 192 N.E.2d at 75.

89. 119 Ohio App. at 71-72, 192 N.E.2d at 77-78.

90. 458 S.W.2d 305 (Mo. 1970).

91. 458 S.W.2d at 306-07.

generally from 60,000 dollars to 85,000 dollars. The court upheld the board's decision. While a pyramid-shaped house may be an architectural tour-de-force, there is good reason to think that it would indeed be "unsightly, grotesque and unsuitable" in a very traditional neighborhood. However, that it would reduce the value of neighboring property, or even threaten the stability of its value, is much less certain. Thus, while the ordinance in this case requires a finding that property values are threatened, economic factors appear in fact to have played a very minor role in the board's decision.

An ordinance that relied even more strongly upon the detrimental effect that aesthetic incongruity may have on property values was involved in *State ex rel. Saveland Park Holding Corp. v. Wieland*,⁹² where the court upheld a zoning ordinance that required, as a condition precedent to the issuance of a building permit, that a three-member building board, two of whom had to be architects, make a finding that "the exterior architectural appeal and functional plan of the proposed structure will, when erected, not be so at variance with either the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood or the character of the applicable district established by Ordinance . . . as to cause a substantial depreciation in the property values of said neighborhood . . ." ⁹³ However, as in *Stoyanoff*, the court placed little emphasis on the protection of property values. Although it pointed out that the ordinance could be upheld in the interest of protecting property values,⁹⁴ the court cited *Berman v. Parker* for the proposition that the rule against zoning for purely aesthetic considerations may no longer be the law.⁹⁵ Furthermore, the court made no inquiry into whether there would in fact be a substantial depreciation of property values in this case. This court appears to have gone one step further than *Stoyanoff*, finding that, under *Berman*, the ordinance could be upheld without reference to economic harm and that the village's decision to invoke architectural controls only where a substantial diminution of property value was threatened was not mandated by law.

These three cases illustrate that, while some courts appear unwilling to uphold architectural controls for nonhistorical neighborhoods on aesthetic grounds alone and prefer instead to rely on unexamined economic consequences that may result from aesthetic incongruity, the criterion that is in fact often applied is aesthetic. The "diminution of property values" that is often used to justify a result is measured only by reference to aesthetic qualities, and the

92. 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955).

93. 269 Wis. at 265, 69 N.W.2d at 221 (emphasis added).

94. 269 Wis. at 267-70, 69 N.W.2d at 220-22.

95. 269 Wis. at 271, 69 N.W.2d at 222, citing *Berman v. Parker*, 348 U.S. 26 (1954).

determination that such a diminution will occur is usually made by a board of architects, not a board of assessors.

Like other programs examined above, architectural control legislation does not employ standards for the determination of aesthetic merit as precise as those used in the studies described in Part II.⁹⁶ However, this is not a fatal flaw, for typically an administrative board is set up to implement the programs and apply the standards established by the legislature, and the administrators are chosen from experts in aesthetic questions. In architectural control programs, for example, the review boards usually consist of architects. Similarly, the California scenic easement and scenic area program requires that the site selection team include a landscape architect, if possible. Only billboard control programs and restrictions such as those requiring minimum setbacks are not implemented by experts. In both of these cases, however, uniform aesthetic standards can be set out in some detail at the legislative level. The legislature can determine, for example, that all billboards are aesthetic evils. Setback requirements similarly take a uniform approach and can be defined in terms of specific measurements. In the other cases, it is assumed that the experts will use criteria similar to those used in the studies described in Part II, on the basis of which they can make decisions that are objectively supportable. The provisions for drawing upon expertise should make these regulations, the primary impact of which is aesthetic, workable and precise enough for effective implementation, despite the lack of explicit and detailed statutory standards.

IV. VALIDITY OF AESTHETIC REGULATION

Once it is acknowledged that aesthetic judgments and standards can be objective, it does not follow that aesthetic legislation should be upheld in every case. The legislature must weigh other, competing values in determining whether to enact a particular aesthetic regulation.

As the current state of the case law indicates, many courts and commentators apparently assume that of itself aesthetics has no value.⁹⁷ Statutes enacted for aesthetic purposes have been defended, not on aesthetic grounds, but rather on the grounds that they prevent urban decay⁹⁸ and that they promote property values,⁹⁹ the tourist

96. See text accompanying notes 24-44 *supra*.

97. See cases and authorities cited in note 1 *supra*.

98. Note, *Aesthetic Considerations in Land Use Regulation*, 2 WILLAMETTE L.J. 420, 431-32 (1963).

99. See, e.g., *Town of Lexington v. Govenar*, 295 Mass. 31, 36-37, 3 N.E.2d 19, 22 (1936); *Vickers v. Township Comm.*, 37 N.J. 232, 248, 181 A.2d 129, 137, *appeal dismissed*, 371 U.S. 233 (1962); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955).

industry,¹⁰⁰ safety, morality and decency,¹⁰¹ efficiency,¹⁰² contentment and civic pride,¹⁰³ and the love of one's country.¹⁰⁴ In fact, it might be suggested that attorneys should defend aesthetic laws on other grounds if possible and rely on purely aesthetic arguments only if the ordinances in question cannot be otherwise justified.

But this should be wholly unnecessary. It is here suggested, as some philosophers have believed,¹⁰⁵ that aesthetics is an intrinsic value which, consequently, does not need justification by appeal to other values to which it contributes. In fact, the federal government has acknowledged the intrinsic nature of aesthetic value in the National Environmental Policy Act of 1969,¹⁰⁶ which provides that

In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . (2) assure for all Americans . . . esthetically and culturally pleasing surroundings . . .¹⁰⁷

As has been demonstrated above, the requirements of due process need not bar the implementation of regulations based solely on aes-

100. See, e.g., *Merritt v. Peters*, 65 S.2d 861 (Fla. 1953); *City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 S.2d 364 (1941).

101. "Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency." *Perlmutter v. Greene*, 259 N.Y. 327, 332, 182 N.E. 5, 6 (1932). See also Kelsey, *The Place of Aesthetics in Comprehensive Zoning in Massachusetts*, 43 MASS. L.Q. 60, 64 (1958) (incongruous structures lead to indifferent maintenance of surrounding buildings and increase cost of municipal services for police, fire, and accident protection); Sayre, *Aesthetics and Property Values: Does Zoning Promote the Public Welfare?*, 35 A.B.A.J. 471 (1949) (aesthetic interests related to morals as well as general welfare).

102. Note, *Aesthetics as a Justification for the Exercise of the Police Power or Eminent Domain*, 23 GEO. WASH. L. REV. 730, 748 (1955) (cheerful hospital decor aids recovery, aesthetically pleasing classrooms stimulate learning).

103. *State ex rel. Twin City Bldg. & Inv. Co. v. Houghton*, 144 Minn. 13, 20, 176 N.W. 159, 162 (1920), *revg. on rehearing* 144 Minn. 1, 174 N.W. 885 (1919).

104. "If a person has grown up in an attractive and well-ordered community, rather than an ugly, blighted one, certainly his affection for home—his neighborhood—his town, his state and nation—will be the stronger. Certainly he will rise to its defense more quickly and more whole-heartedly." Note, *supra* note 102, at 744.

105. See, e.g., J. DEWEY, *ART AS EXPERIENCE* (1934); J. DEWEY, *EXPERIENCE AND NATURE* 67-102 (1929); M. BEARDSLEY, *supra* note 26, at 539-43; G. MOORE, *PRINCIPIA ETHICA* 200-07 (1956). In fact, some philosophers hold that all other values are valuable only insofar as their ultimate base is aesthetic. See, e.g., J. DEWEY, *EXPERIENCE AND NATURE* 67-102 (1929); G. SANTAYANA, *THE SENSE OF BEAUTY* 21-25 (1896); D. PRALL, *A STUDY IN THE THEORY OF VALUE* 200-01, 274-75 (1921).

106. Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1970)).

107. National Environmental Policy Act of 1969, § 101(b), 42 U.S.C. § 4331(b) (1970). See also Federal-Aid Highway Act of 1968, § 18, 23 U.S.C. § 138 (1970): "It is hereby declared to be the national policy that special effort should be made to preserve that natural beauty of the countryside"

thetics. If aesthetic value is recognized as intrinsic, it can be weighed alone against other interests by legislatures and courts. At times it may in itself justify the enactment of a given regulation; in other cases, it must be compromised to accommodate competing values.

Although it is not the purpose of this Note to propose the balance that should be struck, it is useful to point out examples of the kinds of competing factors that a legislative body may appropriately weigh in particular situations. For illustrative purposes, the interests that compete with aesthetics in the three statutory programs detailed above will be examined.

The groups opposed to sign control ordinances, for example, include sign companies and the owners of land on which signs are located, who are usually paid an annual fee by the advertisers.¹⁰⁸ In addition, a general sign control program may make it difficult or impossible for certain businesses—particularly service stations along primary highways; restaurants, motels, and shops catering primarily to travelers; and privately owned tourist attractions—to advertise their goods and services to their primary customers. The total elimination of advertising signs, without at least providing informational signs as a substitute, will injure the patrons of such enterprises as well, for they will not be able to find the businesses that cater to their needs. However, a legislature need not choose between prohibiting such advertising altogether, as defenders of aesthetic interests may wish, and abstaining from regulation, as the advocates of competing interests would urge. A legislative body may, for example, permit only on-premise signs,¹⁰⁹ and it may even limit on-premise advertising in terms of number of signs per enterprise and distance from the location of the enterprise.¹¹⁰ It may allow only informational signs, which list businesses likely to be of interest to travelers, or adopt the approach taken by many turnpikes of posting a sign at each exit noting the availability of motel, food, and gas services designated only by type and indicating that more detailed information is available at designated places, such as tollbooths. Where the advertising is purely commercial, the Supreme Court has declared that the first amendment does not bar governmental restraints.¹¹¹

A more difficult problem arises when signs are used for political,

108. It should be noted that the prohibition of existing signs may be considered a taking that must be compensated by the state. See note 49 *supra*. On the valuation of such interests for eminent domain purposes, see Atherton, *Valuation Problems Involving Aesthetic Programs*, in *JUNKYARDS, GERANIUMS AND JURISPRUDENCE: AESTHETICS AND THE LAW* 112, 122-25 (Proceedings, ABA Section on Local Govt. Law, June 2-3, 1967).

109. See, e.g., *In re Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967) (township zoning ordinance).

110. See, e.g., WASH. REV. CODE § 47.42.045 (Supp. 1972).

111. *Valentine v. Christensen*, 316 U.S. 52 (1942). Cf. *Breard v. Alexandria*, 341 U.S. 622 (1951).

rather than commercial, advertising, for such signs are arguably entitled to special protection under the first amendment. The Michigan Attorney General, for example, recently ruled that federal and state constitutional protections of freedom of speech require that the display of political advertising signs by a property owner cannot be prohibited or controlled by local regulations.¹¹² This result, however, does not seem compelled by either the state or the federal constitutions.¹¹³ In *Kovacs v. Cooper*,¹¹⁴ the United States Supreme Court upheld the application of a Trenton, New Jersey, prohibitive ordinance to the making of comments concerning a labor dispute from a sound truck. The Court ruled that "[t]he preferred position of freedom of speech . . . does not require legislators to be insensible to claims by citizens to comfort and convenience"¹¹⁵ and found that reasonable regulation of such information-conveying techniques is constitutional.¹¹⁶ The Michigan Attorney General could have similarly pointed out that if local legislative bodies find that the proliferation of political campaign posters has reached the point where it has become a public nuisance, reasonable regulation for the aesthetic benefit of the community is legitimate as long as politicians can effectively communicate their views to the public by other means. In fact, most political posters convey very little information but rather consist primarily of simple messages urging a vote for the candidate advertised. *Kovacs* permits citizen claims of comfort and quiet reasonably to limit freedom of speech; the interest in a visually attractive neighborhood should similarly permit reasonable limits on other forms of political advertising.

In *People v. Stover*¹¹⁷ a court did uphold the application of a prohibitive ordinance in the face of freedom of speech claims when

112. Mich. Atty. Gen. Op. No. 4777, May 7, 1973. The opinion notes the distinction between commercial and political advertising, *id.* at 3, and also suggests that prohibitions of political advertising would be constitutional if an unlawful act, such as trespass, were involved. *Id.* See also *Peltz v. City of South Euclid*, 11 Ohio St. 2d 128, 228 N.E.2d 320 (1967).

113. The Michigan Constitution provides: "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or the press." MICH. CONST. art. I, § 5. This provision appears to be based on the first amendment to the United States Constitution and has not been given separate meaning by Michigan courts. Thus, the interpretation of the two constitutions on this point should be identical.

114. 336 U.S. 77 (1949).

115. 336 U.S. at 88.

116. In contrast, in *Saia v. New York*, 334 U.S. 558 (1948), the Supreme Court invalidated a soundtruck-control ordinance that prohibited the use of such devices except for dissemination of news items and matters of public concern permitted by the chief of police. The Court found this statutory provision too widely drawn, because it prescribed no standards for the discretion exercised by the chief of police.

117. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963).

the damage to the aesthetic environment was severe. In that case, the defendants had hung old clothes and rags on clotheslines in the front and side yards of their corner house in a residential district as a protest against the high taxes imposed by the city. After the protest had continued for five years, the city enacted an ordinance prohibiting the erection and maintenance of clotheslines in a front or side yard abutting a street and brought suit against the Stovers. The court rejected the Stovers' defense based on the right to symbolic speech, and, despite the prosecution's argument that the ordinance was sustainable on the basis of economic and safety considerations, found aesthetic interests sufficient to support the application of the ordinance where the proscribed conduct was "unnecessarily offensive to the visual sensibilities of the average person."¹¹⁸

The primary adverse effect of a second kind of legislation—scenic area and scenic easement programs—is on those interested in the further development of the areas in question. These programs overlap the sign control programs to a certain extent, but scenic area and easement programs, unlike sign control ordinances, typically prohibit signs altogether, with no exceptions, instead of merely limiting them.¹¹⁹ Another interest that competes with the aesthetic interest in these cases is that of the owner whose land is taken. However, easements or fees simple are taken under the power of eminent domain, and compensation must be paid to the landowner.¹²⁰ Thus, a legislative finding that the aesthetic interest outweighs the interest of the landowner does not completely sacrifice the interest of the landowner, as it might in a purely regulatory program.

Zoning regulation for aesthetic purposes is opposed, for the most part, by those who have traditionally opposed zoning for other purposes. As with scenic areas programs, these include individual property owners who want to use their property for purposes, often very profitable, that are forbidden by an ordinance and commercial es-

118. 12 N.Y.2d at 468, 191 N.E.2d at 276, 240 N.Y.S.2d at 734. It is not altogether safe to place too much reliance on *Stover*, because on its facts it might now be overruled on the basis of the symbolic speech protection given in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). See Comment, *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81, 99 (1964).

On the limitations of the application of the first amendment to aesthetic interests, see generally Note, *Drug Songs and the Federal Communications Commission*, 5 U. MICH. J. L. REF. 334, 341-45 (1972). See also *People v. Radich*, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970), *affd. by an equally divided court*, 401 U.S. 531 (1971).

119. See, e.g., Mullen, *Scenic Easements: Techniques of Conveyancing*, in *JUNKYARDS, GERANIUMS AND JURISPRUDENCE: AESTHETICS AND THE LAW*, *supra* note 108, at 230, 240-42.

120. See, e.g., *McCoy v. Union Elevated R.R.*, 247 U.S. 354, 365 (1918): "The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the market value of his property under a rule of law that makes it impossible for him to obtain just compensation." See generally 1 P. NICHOLS, *EMINENT DOMAIN* § 4.8 (rev. 3d ed. J. Sackman 1964); 3 *id.* ch. 8 (1965).

tablissements that want to locate in areas restricted to other uses.¹²¹

Sometimes these interests will be expressed in terms of the freedom to develop one's property as one pleases. For example, a property owner may claim that controls prevent the building of an architecturally unique building and thus restrict artistic freedom and experimentation. Indeed, it is quite possible that this occurred in *Reid v. Architectural Board of Review*.¹²² However, while the general imposition of architectural controls may give rise to a stifling conformity that would eliminate creative innovation,¹²³ the total prohibition of controls would deny to those who so desire the opportunity to live in architecturally planned communities. So long as unregulated areas exist where architects may build as they please, it is arguable that architectural nonconformity is not unduly restricted by controls.

One competing interest that must be weighed by a legislature in deciding whether to impose any kind of aesthetic legislation is the expenditure of government money that may be necessary. Aesthetic zoning regulations can be included in present zoning programs and administered for a relatively small additional expenditure. Similarly, architectural review boards are relatively inexpensive. But the purchase of scenic easements and scenic areas, the elimination of billboards, and the preservation of wilderness areas are often quite costly.

Once aesthetic legislation has been enacted, the courts are likely to be called upon to distinguish those measures that strike a reasonable balance between competing interests from those that are unreasonable, either as such or as applied in particular cases. Regulations within the scope of the police power will be presumed valid,¹²⁴ and the challenger will be required to show the unreasonableness of the balance made by the legislature. However, even if aesthetics in general is accepted as a valid purpose of legislation, a particular regulation may be invalidated if it is found to be an arbitrary and capricious exercise of the police power.

In *Sunad, Inc. v. City of Sarasota*,¹²⁵ for example, the Supreme Court of Florida held that the distinctions made in an ordinance limiting the size of advertising signs in business and industrial dis-

121. For a description of a controversy between the supporters of legislation enacted at least partially for aesthetic control and the industrial supporters of the development ethic, see N.Y. Times, July 16, 1972, § 3 (Business and Finance), at 1, col. 6.

122. 119 Ohio App. 67, 192 N.E.2d 74 (1963). See text accompanying notes 85-89 *supra*.

123. See Babcock, *supra* note 77, at 30.

124. *New Orleans Pub. Serv., Inc. v. City of New Orleans*, 281 U.S. 682 (1930); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Sullivan v. City of Shreveport*, 251 U.S. 169 (1919); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

125. 122 S.2d 611 (Fla. 1960).

tricts were unreasonable and discriminatory. Under the ordinance, wall signs at "point of sale" locations could be unlimited in size, while wall signs at other locations were limited to 300 square feet, and all other signs were limited to 180 square feet. Petitioner was a lessor of billboards of 300 square feet, a size standardized throughout the United States in order to reduce the costs of making posters. The court held that, although aesthetics is a proper basis for regulatory legislation, the distinctions made in this ordinance were not justifiable on aesthetic grounds:

[W]e find insurmountable difficulty to a decision that a wall sign 300 square feet in size at non-point of sale would not offend while a sign of the same size on one of petitioner's billboards would, or that an unrestricted wall sign, at point of sale, would be inoffensive but one of petitioner's signs would shock refined senses, or for that matter, that a roof, ground, or other sign could be only 180 square feet while a wall sign could be at least 300 square feet and, if at point of sale, unlimited.¹²⁶

Sunad illustrates some of the difficulties that may be encountered in judicial review of aesthetic legislation. While it does demonstrate that a court may uphold aesthetic regulation in general but still invalidate a particular ordinance, it is not at all clear that the court was correct in finding this ordinance to be arbitrary and unreasonable. The court evaluated the statutory distinctions on aesthetic grounds alone¹²⁷ and ignored the fact that the ordinance necessarily involved a legislative balancing of the interest of aesthetics, which may have in itself demanded a complete prohibition of advertising signs, and competing nonaesthetic interests. For example, a prohibition of all signs would infringe upon the needs of advertisers to make their products known, a need that is particularly strong at the point of sale. The point-of-sale/nonpoint-of-sale distinction may have represented a compromise with these interests. The distinction between wall signs and billboards may similarly have represented a compromise between aesthetic and business interests. The supporters of the former may have been willing to allow larger signs on walls, where the aesthetic damage has already been done, in exchange for stricter limits on billboards, which may encroach upon and further destroy existing vistas. Thus, the court should have asked whether the distinctions made in the ordinance represented a reasonable compromise between aesthetics and other, nonaesthetic, interests, and not whether they were reasonable on aesthetic grounds alone.

The judiciary must acknowledge the importance of aesthetic in-

126. 122 S.2d at 614-15.

127. 122 S.2d at 614.

terests, instead of concealing them behind other, "more respectable" objectives.¹²⁸ Currently, aesthetic controls are usually upheld in practice, if not on aesthetic grounds alone. Consequently, it is unlikely that an express recognition of purely aesthetic interests will open the gates to a flood of legislation that would not otherwise be enacted.¹²⁹ In fact, it has been suggested that a more honest approach would put the opponents of particular aesthetic regulations in a better position to attack them, for the primary issue will be faced directly.¹³⁰ The question of the validity of legislation enacted solely for aesthetic purposes will be raised more insistently in the future. The increase in the general level of aesthetic interest and sophistication,¹³¹ and the reduction of our natural aesthetic resources will create a rising demand for the preservation of the environment that must be effectively accommodated by the legal system.

128. See text accompanying notes 98-107 *supra*.

129. Anderson, *Regulation of Land Use for Aesthetic Purposes—An Appraisal of People v. Stover*, 15 SYRACUSE L. REV. 26, 33-40 (1963).

130. *Id.*

131. See Steinbach, *Aesthetic Zoning: Property Values and the Judicial Decision Process*, 35 MO. L. REV. 176, 183 (1970). See also Burch, *How American Taste Is Changing*, FORTUNE, July 1959, at 115.