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Aesthetics As A Basis For Regulation

DANIEL RIESEL*

The beginning of my talk is to remind you that the rules of law taught in law school die a very hard death. One rule that deserves to die, but is not yet relegated to historical footnotes, is the rule that limitations on the use of property may not be based solely on aesthetic considerations. This rule is modified by the recognition that if other legitimate interests are present, regulations which have aesthetic considerations as subsidiary or incidental purposes are valid. That is the rule as articulated by Rathkopf¹ and many commentators. Courts still hold that you cannot legislate purely for aesthetic purposes. In my view, no matter what position this principle has had in the past, the body of environmental law that has recently emerged has eliminated any rational basis for the continued life of this principle. There is no longer any reason for the treatment of aesthetics as something alien to our system of land use regulation, and no need to mask aesthetic concerns as public health, safety or welfare, in order to articulate a valid basis for regulation.

Let me pause a few minutes and go over the traditional rule. When you hear the quotes of the experts I think you will all smile, but you will still see some of these principles, which we might not regard as permanent, emerging in the cases in the not so distant past. In one of the cases, *Kern Bill Posting and Distributing Company v. The City of Denver*, the court went out of its way to explain that,

the cut of dress, the color of garment worn, the styles of hat, the architecture of the building, or its color may be distasteful to the refined senses of some, but government can neither control nor regulate in such affairs. The doctrines of the commune invest such authority in the state, but ours is a constitutional government based upon the individuality and intelligence of the citizens. And does not seek, nor has it the power to control him except in those matters where the rights of others are impaired.

So into the sixties, there were cases in which courts, in uphold-

ing ordinances, went out of their way to find that the justification for the regulation in question is something other than aesthetics. There has been, however, a change, and I think that change has been a direct product of our growth and affluence and a manifestation of that affluence in suburbia.

In this connection, recall the *Stover* case in New York.² The Stovers were fairly unhappy residents of the city of Rye. To protest their disdain for the city, they displayed, in their front yard a clothesline hung with old uniforms, underwear, rags and scarecrows. Each year it was put up; after six years and six clotheslines, the city enacted an ordinance prohibiting the display of clotheslines in front or side yards abutting the street. The Stovers were convicted of violating that ordinance. The Court of Appeals held that reasonable legislation designed to promote aesthetic interests is valid and permissible under the exercise of the police power.³ Once it is conceded that aesthetics is a valid subject of legislative concern, the conclusion of that court seems inescapable. If zoning restrictions aimed at insuring neighborhood amenities are to be stricken as invalid, it should be, as one commentator has said, not because they seek to promote aesthetic objectives, but solely because the restrictions constitute unreasonable devices.⁴ The *Stover* case, coupled with the seminal federal case *Berman v. Parker*,⁵ was, some thought, the furthest permissible reach of restrictions on aesthetics or of aesthetic zoning.

But after that, a series of cases were argued and decided in most jurisdictions that enacted zoning for aesthetic purposes. The rationale in the decisions which support such zoning is usually coupled with public health and safety justifications, but still there is a recognition of aesthetics as a legitimate basis for zoning regulation. New York, however, which has long been regarded as the jurisdiction which has led the way in permitting zoning for aesthetic purposes, has attempted to straddle both sides of the fence. The decisions subsequent to *Stover* are not dramatically different: while the judges writing these decisions specifically cite *Stover* and follow its determination that aesthetic purposes will support a restriction on land use, they also examine the impact of the ordinance in relation to the end that it is intended to serve.⁶ "An ordinance which imposes a negligible or modest restraint is likely to be upheld although its pur-

pose is solely an aesthetic one. On the other hand, an ordinance which imposes severe hardship or unreasonable restraint may be subject to a balancing process and held invalid."⁷ Now perhaps this accurately restates the principles that are set forth by Professor Anderson, but we still see, and this is the point, an unwillingness to allow aesthetics alone to serve as a basis for regulation of land. This is true not only in the more restrictive jurisdictions, but also in New York.

We turn now to the second theme of this presentation, and leave the defense of environmental law to another forum. The environmental movement, born in the 1960s, grew out of a concern for aesthetics and a demand for the preservation of natural beauty. When we think of emerging environmental law, three controversies come immediately to mind: the Storm King controversy, the fight over the Grand Canyon dams, and the dispute concerning the indiscriminate and widespread use of DDT.

One of these controversies, the Storm King Mountain controversy,⁸ gives rise to what I would call a lot of hard law. A decade of judicial activism in policing administrative agencies with respect to environmental decision-making and in expanding concepts of standing has followed.⁹ Statutory law favoring citizens groups has resulted.¹⁰ But the heart of the scenic Hudson cases is a statement of the validity and the necessity of aesthetics as a legitimate basis of natural resource allocation and, therefore, of land use planning. The Second Circuit held, in remanding the matter to the Power Commission, that the Commission should re-examine all questions where the court found the record insufficient and all related matters.¹¹ The court ordered that the Commission's renewed proceeding must include, as a basic concern, the preservation of natural beauty and natural historical shrines, and must keep in mind that, in our affluent society, the cost of a project is only one of several factors to be considered.¹² That decision goes on, in less dramatic terms, to specify the need to evaluate aesthetic, conservational and recreational factors in determining the allocation of other natural resources in a basic comprehensive plan, and indicates that aesthetic values should be included in this comprehensive plan for the allocation of federal resources.¹³ The phrase, "best adapted to a comprehensive plan,"¹⁴ is hardly distinguishable from the almost universal requirements that municipal zoning be in ac-

cordance with a comprehensive plan.

After the decision in *Scenic Hudson*, there was a literal outburst of federal and local activity dealing with considerations of natural beauty. A little known legislative act here in the State of New York was the establishment, in 1966, of the Commission on Natural Beauty.¹⁵ That was a rather short-lived political ploy, but one which was in response to the controversies developing after the Storm King case and in response to the recognition that aesthetics and natural beauty can be regulated and should be considered in the regulation of land use.

Another case decided in this period is *Citizens to Preserve Overton Park v. Volpe*.¹⁶ This case, decided by the Supreme Court in 1971, interpreted a section of the national highway legislation. This case was remanded to the district court with directions to consider all factors in the allocation of highway corridors and the preservation of park land.¹⁷ It seems to me that the remand occurred because the federal agency did not give any reasonable interpretation to the legislation it mandated. This case is another recognition that planners and bureaucrats must take aesthetic or natural beauty into consideration.

Between the enactment in 1966 of the particular statute litigated in *Overton Park*,¹⁸ and the actual decision in *Overton Park* in 1971, there was a virtual flood of legislation in the environmental area. At the end of 1969, Congress enacted the first and most important of the environmental statutes, the National Environmental Policy Act.¹⁹ That act made aesthetic objectives a fundamental part of our national policy.²⁰ In NEPA, Congress recognized the profound interrelationship between man's activities and the environment and declared the creation and maintenance of a productive harmony between man and the environment to be a national goal, "to the end, that the nation may assure for all Americans, safe, healthy, productive" and, "aesthetically and culturally pleasing surroundings."²¹ It is interesting that land use regulations designed to promote aesthetically pleasing surroundings are precisely the regulations aimed at by the traditional rule against zoning for aesthetic reasons. The very word "pleasing" conjures up that which the traditional rule held to be an unconstitutional object of government regulation. I think the most surprising thing about the National Environmental Policy Act, or NEPA as it is known in the trade, is

that courts decided that they would enforce the doctrine set out there and put some teeth in it.

Enforcement of NEPA resulted in a tremendous body of case law, much of it dealing with environmental impacts which are aesthetic. It also gave rise to the enactment of little NEPA laws by the states.²² In these state statutes, specific terms direct that state and local administrators take aesthetic values into consideration. The California legislation, for example, contains directions to take actions to insure the environment remains "pleasing to the senses and intellect of man."²³ Further, it is a stated policy of California to insure that the citizens are provided with full "enjoyment of aesthetic, natural, scenic and historic environmental qualities. . . ."²⁴ The New York law is based on a legislative finding that the maintenance of a quality environment, for the people of the state, now and at all times, is healthful and pleasing to the senses and intellect, and the environment is defined to include preservation of objects of historic or aesthetic significance.²⁵

The question may be, of course, how a mere movement of law, found heretofore only in statutes, can result in the death of a rule that has its foundation in constitutional law. I don't know if I can supply that answer, but courts have stated that the world is changing and that law must respond to demands of modern society.²⁶ Even though the meaning of constitutional guarantees never varies, the scope of their application must expand and contract to meet new and different conditions. That deemed to be unreasonable in the past may now be reasonable because of changing community values. Among these changes is the growing notion that towns and cities can and should be aesthetically pleasing and that a visually satisfying environment tends to contribute to the well-being of its inhabitants. The conclusion which flows from this analysis, in my view, needs little documentation: once and for all, the old legal rule should be put to rest.

Aesthetics As A Basis For Regulation

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1. 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 14.01 (4th ed. 1978).
2. *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).
3. *Id.* at 467, 191 N.E.2d at 275, 240 N.Y.S.2d at 738.
4. *Id.* (quoting Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 *LAW & CONTEMP. PROBS.* 218, 231 (1955)).
5. 348 U.S. 26 (1954).
6. 1 R. ANDERSON, *NEW YORK ZONING LAW AND PRACTICE* § 7.16 (2d ed. 1973).
7. *Id.*
8. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).
9. *See, e.g., United States v. SCRAP*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972).
10. *See, e.g., N.Y. ENVIR. CONSERV. LAW* § 3-0301(2)(d)(4) (McKinney 1973).
11. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d at 624.
12. *Id.*
13. *Id.* at 616.
14. *Id.* at 612.
15. 1966 N.Y. Laws ch. 828.
16. 401 U.S. 402 (1971).
17. *Id.* at 416.
18. *Department of Transportation Act of 1966*, § 4f, 49 U.S.C. § 1653(f) (1976).
19. *National Environmental Policy Act of 1969*, 42 U.S.C. §§ 4321-4370 (1976 & Supp. III 1979).
20. *Id.* § 4331.
21. *Id.*
22. *E.g., N.Y. ENVIR. CONSERV. LAW* §§ 8-0101-0117 (McKinney Supp. 1981).
23. *CAL. PUB. RES. CODE* § 21000(b) (West 1977).
24. *Id.* § 21001(b).
25. *N.Y. ENVIR. CONSERV. LAW* § 8-0103.
26. *See, e.g., Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).