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DESIGN REVIEW

Good project and building design is, at least in part, a subjective undertaking, and community demands must be balanced with project economics and creativity. Careful drafting of review standards and flexibility in administration can help smooth design approval although the tension inherent in the process cannot be eliminated.

This report addresses technical aspects of design review in historic areas as well as outside historic areas. It covers legal precedents, conservation districts that preserve the character of existing neighborhoods, and innovative design standards for big-box retailers and corporate franchises. Guidelines for drafting and implementing design review regulations are provided.

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Design Review

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Design review of projects, a common feature of land-use control systems in England and Europe, has become widespread in the United States as public dissatisfaction with the size and style of new and ever-larger buildings intensifies. Initially spurred by a 1978 U.S. Supreme Court decision upholding New York City's preservation law in *Penn Central v. New York City*,[1] thousands of communities have enacted local preservation ordinances that place strong controls on new construction in historic areas.

And, while historic preservation continues to be the foundation for design review, courts are increasingly comfortable with design review in a much broader context. A growing number of local governments are imposing design review on new buildings and their environs in nonhistoric and suburban settings. Communities both small and large are serving notice that they do not adhere to the dogma "form follows function," and are demanding a greater say in the way buildings are designed and fit in with their neighbors.

This new generation of design review programs in characterized by increasingly sophisticated regulations that make extensive use of graphics and tables to summarize detailed information and illustrate complex concepts like "community character" and "harmonious development." Such visual aids increase the likelihood of even-handed, consistent interpretations of the regulations and decrease the likelihood of even-handed, consistent interpretations of the regulations and decrease the likelihood of court challenges. Jurisdictions also are incorporating design review into all phases of their land-use management systems, from controls on demolition of existing structures to review of site plans and final plans for new construction.

The concern over design of new projects poses some difficult challenges for planners and lawyers charged with the task of drafting and administering design review regulations. Because good project and building design is, at least in part, an inherently subjective undertaking, regulators are confronted with the uneasy task of balancing community demands with project economics and creativity. Careful drafting of review standards and flexibility in administration can help smooth the process somewhat, although the inherent tension in this process cannot be solved by legal means alone.

DESIGN REVIEW IN HISTORIC AREAS

Although the first historic preservation ordinance was adopted by the city of Charleston in 1931, just a few years after the Supreme Court approved of zoning controls in the *Euclid* case, only a handful of cities followed suit over the next several decades. By 1960, there were fewer than 50 such ordinances, confined mostly to cities that relied heavily on historic buildings as tourist attractions. However, urban renewal and highway building in the 1960s spurred growing concern over demolition of historic buildings and prompted the adoption of stronger ordinances in many localities. When the Supreme Court placed its stamp of approval on local preservation ordinances in the *Penn Central* case, the die was cast, and today, communities across the country are exercising strong controls, not only over historic buildings but also over the design of new construction in historic areas.[2]

Perhaps the most visible, and often most controversial, power exercised by local preservation commissions is the review of applications for demolition or alteration of landmarks or for new construction in historic areas (often referred to collectively as applications for certificates of appropriateness). An application to demolish a landmark often will engender heated arguments, bringing commissions and their planning advisers face-to-face with the difficult task of juggling and balancing preservation goals with economic and political pressures. Dealing with alteration proposals—often less controversial than demolitions, but far more

frequent—is no less difficult. The challenge here is to encourage upgrading and continued maintenance of existing landmarks and to guide the process of change so that it is sympathetic to the existing character of the historic area. In all but a few historic areas, freezing things in time would be neither feasible nor desirable.

Setting standards for reviewing such applications is a tricky task. Preservationists are concerned that a demolition "not have an adverse effect on the fabric of the district" or that new construction not be "incongruous," but rather that it should be "in harmony" with the "character," "significant features," or "atmosphere" of the area. Each of these terms is subjective and needs to be defined and limited in some fashion to give applicants reasonable notice of what is expected of them and to allow courts to judge the validity of the local decision.

Setting standards for reviewing applications for changes in historic areas is a tricky task.

The process of setting standards to govern this review and establishing sound administrative procedures to apply them is crucial, not only from a legal standpoint but also as a way for preservationists to evaluate where their preservation program is leading. What kind of development, if any, do they really want in the local historic area? How do they intend to evaluate proposed changes? What is the most efficient and fairest way to administer review standards? These key questions are discussed below, with emphasis placed on the points in the process at which planners should pay close attention to standards and procedures.

Review Standards

While preservation controls raise a host of legal issues,[3] one of the most important involves the standards to be used by an agency in reviewing an application for new construction in a historic district. Generally, the failure of an agency to establish in advance coherent written standards and regulations to be applied in all cases amounts to a denial of due process. Although preservation standards often are based on taste, and are thus subjective to a certain degree (for example, some ordinances prohibit new construction in a historic area if it is "incongruous" with existing structures), sufficient standards can be articulated so as to pass judicial muster and give permit applicants some advance notice of what is required of them.

In practice, courts have shown great deference to local review bodies in this regard, as witnessed by the language of the Supreme Court in the *Penn Central* case. In rejecting the notion that regulation of landmarks is inevitably arbitrary because it is a matter of taste, the Court observed:

> There is no basis whatsoever for a conclusion that courts will have any greater difficulty in identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of zoning or any other context.[4]

In his treatise on land-use planning law, Professor Norman Williams lists various considerations that might be used by a local commission in determining whether a proposed demolition or change is compatible with the landmark or district:

- The height of a building, its bulk, and the nature of its roof line
- The proportions between the height of a building and its width (i.e., is the appearance predominantly horizontal or predominantly vertical?)
- The nature of the open spaces around buildings, including the extend of setbacks, the existence of any side yards (with an occasional view to the rear) and their size, and the continuity of such spaces along the street
- The existence of trees and other landscaping, and the extent of paving
- The nature of the openings in the façade, primarily doors and windows—their location, size, and proportions
- The type of roof: flat, gabled, hip, gambrel, mansard, etc.
- The nature of projections from the buildings, particularly porches
- The nature of the architectural details, and, in a broader sense, the predominant architectural style
- The nature of the materials
- Color
- Texture
- The details of ornamentation
- Signs[5]

Not all these considerations will necessarily be relevant to every landmark or district, but the list does suggest ways in which broad review standards may be narrowed.

Setting review standards in historic areas with a predominant style. Promulgating adequate review standards is relatively simple in historic areas that have a distinctive style or character. No one would object strenuously if a landmarks commission rejected a proposal to add a redwood railing around a second floor porch in the Vieux Carre district in New Orleans; everyone knows that iron railings are de rigueur. In places like New Orleans, Old Santa Fe, Old Town Alexandria, and Nantucket, the problem virtually solves itself. Thus, in a number of challenges to preservation restrictions, judges had little trouble upholding the action of the local review body because of the district's distinctive style. The legal rationale for those decisions is best explained in an early preservation case, *Town of Deering v. Tibbetts.*[6]

> While determination of what is compatible with the atmosphere of the town may on first impression be thought to be a matter of arbitrary and subjective judgment, under consideration it proves not to be.... [T]he language "takes clear meaning from the observable character of the district to which it applies."

Similar reasoning was employed to uphold a very broad review standard in Raleigh, North Carolina, even though the local district encompassed several architectural styles (*A-S-P Associates v. City of Raleigh*).[7] The Raleigh preservation ordinance required the local landmarks commission to prevent activity that "would be incongruous with the historic aspects of the Historic District." The owner of a vacant lot within the city's Oakwood Historic District claimed this "incongruity" standard was so vague that it amounted to an unconstitutional delegation of legislative authority by the city council to the historic district commission. The Supreme Court of North Carolina, in a well-reasoned decision, found that the incongruity standard sufficiently limited the commission's discretion.

The general policy and standard of incongruity, adopted by both the General Assembly and the Raleigh City Council, in this instance is best denominated as "a contextual standard." A contextual standard is one that derives its meaning from the objectively determinable, interrelated conditions and characteristics of the subject to which the standard is to be applied. In this instance, the standard of "incongruity" must derive its meaning, if any, from the total physical environment of the historic district; the conditions and characteristics of the historic district's physical environment must be sufficiently distinctive and identifiable to provide reasonable guidance to the historic district commission in applying the incongruity standard.

Setting review standards in historic areas without a predominant style. The application of permit review standards to landmarks or districts that do not exhibit a single, distinctive style has been more troublesome to some legal commentators, but, as the cases that follow demonstrate, even when a district lacks a predominant style, courts have almost universally upheld the local commission's decision. In some instances in which an ordinance contained relatively vague review standards, the court attached great importance to other criteria in the local law or regulations that narrowed commission discretion. In others, courts have looked to background reports and surveys that were incorporated by reference into the law. Courts also have relied on procedural protections to uphold broad standards. In still other instances, courts have held that appointing people with special expertise to a commission helps limit what might otherwise have been excessive discretion.

1. Narrowing broad review standards with specific criteria. The typical preservation ordinance sets forth broad review standards for demolition or development permits—often directing the commission to "maintain the character of the district"—and then recites criteria relating to, for example, height, texture of materials, and architectural style to further define that broad standard. Courts have uniformly approved the broad review standard in such cases. A case from the historic small town of Georgetown, Colorado, is an excellent example (*South of Second Associates v. Georgetown, Colo.*).[8] In this case, the plaintiff developer alleged, among other things, that the standard the local commission was to apply in reviewing an application to construct new townhouses—what effect the proposed construction might have upon "the general historical and/or architectural character of the structure or area"—was unconstitutionally vague. The Colorado Supreme Court disagreed. It noted that the phrase "historical and/or architectural significance" was defined in the ordinance, and, more important, the ordinance set forth "six specific criteria that focus the attention of the commission and of potential applicants for certificates of appropriateness on objective and discernible factors."[9]

The court attached particular relevance to one criterion that directed the commission to consider the "architectural style, arrangement, texture, and materials used on existing and proposed structures, and their relation to other structures in the area," reasoning that "these objective and easily discernible factors give substance to the ordinance's historical and/or architectural character." The court cited several decisions from other jurisdictions that upheld similar standards and concluded that the Georgetown ordinance "contains sufficient standards to advise ordinary and reasonable men as to the type of construction permitted, permits reasonable application by the commission, and limits the commission's discretionary powers."[10]

If a local ordinance does not contain such narrowing criteria, the preservation commission would be well-advised to adopt them by way of regulation or informal review guidelines (assuming the commission has power to do so).

2. Standards found in background documents. An excellent example of a court approving a local action based on criteria found in documents outside the preservation ordinance involves the city of New Orleans (*Maher v. City of New Orleans*).[11] In this case, the court upheld the New Orleans preservation ordinance, even though the city admitted it had not articulated any review standards.

> Other fertile sources are readily available to promote a reasoned exercise of the professional and scholarly judgment of the commission. It may be difficult to capture the atmosphere of a region through a set of regulations. However, it would seem that old city plans and historic documents, as well as photographs and contemporary writings, may provide an abundant and accurate compilation of data to guide the commission. And, as the district court observed, "In this case, the meaning of a mandate to preserve the

> character of the Vieux Carre takes clear meaning from the observable character of the district to which it applies."
>
> Aside from such contemporary indicia of the nature and appearance of the French Quarter at earlier times, the commission has the advantage at present of a recent impartial architectural and historical study of the structures in the area. The Vieux Carre Survey Advisory Committee conducted its analysis under a grant to Tulane University from the Edward G. Schneider Foundation. Building by building, the committee assessed the merit of each structure with respect to several factors. For example, regarding the Maher cottage at issue here, the Louisiana Supreme Court noted that the survey committee "was of the opinion that this cottage was worthy of preservation as part of the overall scene." While the Schneider survey in no way binds the commission, it does furnish an independent and objective judgment respecting the edifices in the area. The existence of the survey and other historical source material assist in mooring the commission's discretion firmly to the legislative purpose.[12]

3. Procedural safeguards. Although procedural safeguards may not prevent challenges to review standards, the fact that there are such protections or that a landmarks commission, because of the expertise of individual members, is uniquely qualified to determine whether a demolition or new development might damage the character of a historic area has heavily and favorably influenced a number of courts. In at least two instances, procedural protections have received approving judicial reviews. In the Raleigh case, the court thought such protections helped ensure against arbitrary action.

> The procedural safeguards provided will serve as an additional check on potential abuse of the Historic District Commission's discretion. Provisions for appeal to the Board of Adjustment from an adverse decision of the Historic District Commission will afford an affected property owner the opportunity to offer expert evidence, cross examine witnesses, inspect documents, and offer rebuttal evidence. Similar protection is afforded to a property owner by the right to appeal from a decision of the Board of Adjustment to the Supreme Court of Wake County.[13]

The *Maher* decision from New Orleans contains parallel language.

> The elaborate decision-making and appeal process set forth in the ordinance creates another structural check on any potential for arbitrariness that might exist. Decisions of the Commission may be reviewed ultimately by the City Council itself. Indeed, that is the procedure that was followed in the present case.[14]

The court also observed that the Vieux Carre ordinance "curbed the possibility for abuse...by specifying the composition of that body and its manner of selection."

Similarly, in a footnote to its decision interpreting the Georgetown, Colorado, preservation ordinance, the Colorado Supreme Court acknowledged the importance of a commission's expertise as a safeguard against arbitrary action.

> Although the composition of the commission is a matter exclusively within the municipality's legislative discretion, we note that the membership requirements under Ordinance No. 205 ensured that applications for certificates of appropriateness would be considered by a commission partially composed of persons familiar with architectural styles and zoning provisions in general. Such factors, while not important in the context of the present proceeding, may weigh heavily in a Rule 106 action concerned with an alleged arbitrary enforcement of an otherwise valid ordinance.[15]

The existence of comprehensive background studies, the obvious character of most historic areas, and the application of standards by a uniquely qualified body all serve to distinguish historic preservation cases from those involving architectural review boards and aesthetic controls in less distinct areas. To a large extent, these differences help to explain why courts look so favorably on historic preservation controls, but sometimes view other design controls with a dubious eye. Contrast the historic preservation cases just discussed with an aesthetic regulation case from New Jersey (*Morristown Road Associates v. Bernardsville).*[16] In this case, the court held that review standards such as "displeasing" and "harmonious" as applied to new construction in a nonhistoric neighborhood were unconstitutionally vague. Several courts have specifically recognized that cases like *Morristown* are not applicable to preservation disputes:

> While most aesthetic ordinances are concerned with good taste and beauty...a historic district zoning ordinance...is not primarily concerned with whether the subject of regulation is beautiful or tasteful, but rather with preserving it as it is, representative of what it was, for such educational, cultural, or economic values as it may have. Cases dealing with purely aesthetic regulations are distinguishable from those dealing with preservation of a historic area of a historical style of architecture.[17]

Takings

Another important legal issue associated with design review in historic districts is the "taking" issue. The taking issue refers to the Fifth Amendment to the U.S. Constitution, which states, in part, that: "...nor shall private property be taken for public use without just compensation." The Fifth Amendment is a restriction on the power of the federal government to appropriate private property for its own use, also made applicable to state and local governments by the Fourteenth Amendment. A physical invasion of property by the government (e.g., to build a new post office) is the clearest example of a taking. Yet, a regulation also might so severely impact the value of property that its enforcement is considered a taking.

Courts look favorably on historic preservation controls, but sometimes view other design controls with a dubious eye.

Generally, regulatory takings issues are decided on an ad hoc basis, with the court considering a variety of factors when making its decision, including: the nature of the economic impact, whether the regulation promotes valid police power objectives, the character of the government action, whether the regulation denies an owner all reasonable use of his or her property, and whether the regulation severely impacts the owner' distinct, investment-backed expectations. In the context of historic preservation, the takings inquiry is whether a design review regulation may be so onerous as to constitute a taking.[18] For example, do prohibitions on demolition or alteration, or restrictions on new development, completely limit future development opportunities or deprive the landowner of all reasonable use of his or her land? It is extremely difficult for the landowner to establish a taking under this test, as a sampling of cases illustrates.

Perhaps the most famous historic preservation case to litigate the takings issue was *Penn Central v. New York City*, mentioned above. In that case, Penn Central proposed building a 50-story skyscraper using air rights atop New York City's famous Grand Central Terminal, which had just been designated a historic landmark by the local preservation commission. Pursuant to that designation, any proposed construction or demolition involving a landmark required a "certificate of appropriateness" from the city. The city turned down Penn Central's application for a certificate, deciding that a skyscraper sitting atop the terminal would so affect and change the exterior architecture of the landmark as to be inappropriate. The company appealed, arguing that the denial of the permit kept the company from using its air rights and thus was burdensome enough to constitute a taking. While the lower court agreed and held for the company, the higher courts, including the U.S. Supreme Court, reversed and upheld the denial of the permit. The bottom line in the case, according to the Supreme Court, was the fact that the property had not lost all reasonable economic value—it could still be used as a train station.

Penn Central demonstrates the difficulties a landowner faces in establishing a taking claim: Regardless of the harsh economic and practical effects of a design control regulation—which the courts have made clear are treated no differently than any other land-use controls—it is very difficult to demonstrate that a regulation deprives a landowner of *all reasonable economic value* in his property.

The *Maher* case, mentioned above, also included an alleged taking claim.[19] In that case, a property owner wished to demolish a small bungalow in the historic Vieux Carre district in New Orleans and replace it with an apartment building. The local preservation ordinance forbade the demolition, and the owner sued, claiming, in part, that the ordinance deprived the property of all economic value. The U.S. Fifth Circuit Court held that the ordinance did not constitute a taking:

> Nor did Maher demonstrate to the satisfaction of the district court that...the ordinance so diminished the property value as to leave Maher, in effect, nothing. In particular, Maher did not show that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed.[20]

Because of the substantial legal and practical difficulties faced by property owners in establishing that a regulatory taking has occurred, the taking issue is not as serious a legal concern in the design review context as the setting of adequate review standards. Nevertheless, planners and local officials should keep the takings issue in mind when drafting and enforcing design review programs in historic areas, always considering whether the regulations they draft may someday go too far and subject them to a court challenge.

DESIGN REVIEW OUTSIDE HISTORIC AREAS

The increasing dissatisfaction with the appearance of new buildings and their relationship to surrounding structures and neighborhoods is manifest in the growing number of design review ordinances applicable *outside* historic districts. No longer content to regulate traditional zoning aspects of development such as bulk, setbacks, and the like, communities throughout the country, both small and large, are demanding a greater say about height, architectural styles, building orientation, and many other aesthetic aspects of all new projects.

Initially, this concern over better design was most prevalent in exclusive suburban communities, such as Santa Barbara, California, and Fox Point, Wisconsin, that capture a distinctive architectural style or atmo-

sphere. One of the earliest ordinances was passed by West Palm Beach, Florida, in the mid-1940s, followed by a similar ordinance in Santa Barbara in 1949. Court review of such regulations soon followed.

The West Palm Beach ordinance was struck down in 1947 on the grounds that it bore no relationship to the promotion of public goals (a later decision in Florida, however, would make clear that aesthetic considerations alone are a proper basis for police power regulations). But, with the Supreme Court's pronouncements in favor of aesthetic regulation in the celebrated *Berman v. Parker* case in 1954, state courts began to uphold design review ordinances. Thus, a 1946 law enacted by the village of Fox Point, Wisconsin, near Milwaukee, that required new construction "not to be so at variance with" the exterior appearance of existing structures so as to depreciate property values, was upheld by the Wisconsin Supreme Court in 1955 (see discussion below). *Berman* was cited as controlling precedent in that decision.

By the 1970s, many communities that exhibited a variety of architectural styles and characters got into the act. So-called "appearance codes" proliferated, and today a multitude of design review–related efforts are in place in jurisdictions both large and small across the country. While the bulk of these efforts have been initiated by the public sector, the private sector also has been deeply involved in this movement in some important ways. For instance, many homeowners associations, which are established to oversee the maintenance and upkeep of private residential communities, exercise broad powers over any architectural changes to structures owned by their members.[21] In addition, developers of corporate franchises, such as drug stores, fast-food restaurants, and gas stations, are recognizing that more demure building design and better site plans often translate into better neighborhood relations, and thus increased business.

Design review outside historic areas poses many of the same legal and practical challenges as protecting historic structures. However, experience demonstrates that careful planning and legal draftsmanship, coupled with a strong commitment to common-sense implementation and consistent administration, can do much to make design review work.

Legal Aspects

Design review programs outside historic areas tend not to raise takings issue questions because they are generally geared not toward stopping a project or greatly reducing its size, but more toward ensuring compatibility with surrounding structures and controlling details such as building appearance or pedestrian flow. Rarely will conditions imposed to achieve design goals create an absolute economic deprivation.

Instead, assuming a locality has been granted sufficient power by state statute, home rule, or other authority to regulate design of projects outside historic areas, the key legal issues revolve around the standards and procedures used for design review, and whether they are consistent with due process. The commonsense test used by courts to evaluate contested provisions in such cases is simply whether the standard or review criterion is sufficiently clear such that a person of ordinary intelligence can understand what it means.

The old design review provisions (recently redrafted) from Henderson, Nevada, for example, would have been a prime candidate for a court challenge on these grounds. The regulations noted that an application could fail architectural review if the planning director finds: "...the building alteration or addition so unsightly, undesirable, or obnoxious in appearance or function as to result in substantial depreciation of value of adjacent properties, ...[or] to substantially deter adjacent property owners from maintaining their property." Given the tremendous subjectivity granted the planning director by this standard, the person of ordinary intelligence could be expected to have difficulty understanding what alterations or additions *would* be acceptable.

Generally, design review cases from nonhistoric areas that have reached the courts fall into two categories: those in which the local standards require compatibility of new projects with existing development, and those that require distinctiveness, aimed at preventing monotonous, "cookie-cutter" development. In some instances, local ordinances include both types of requirements (see, for example, *Old Farm Road, Inc. v. Town of New Castle*).[22]

One of the earliest aesthetic regulation cases involved a compatibility ordinance enacted by Fox Point, Wisconsin, an upper-income Milwaukee suburb (*Gates ex rel. Saveland Park Holding Co. v. Wieland).*[23] The ordinance established a board that could not issue building permits unless:

> ...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...in the immediate neighborhood or the character of the applicable [zoning] district...so as to cause a substantial depreciation of property value in the neighborhood.

The trial court invalidated the ordinance on several grounds, including the vagueness of the standards prescribed to guide board review. However, the Wisconsin Supreme Court reversed, holding that the ordinance was a valid exercise of the police power and that the standards were adequate. It noted that courts had encountered little difficulty in assessing the impact of public improvements on private property for purposes of special assessments, and that to determine the impact of a new structure on adjoining ones would involve a similar calculus.

The second category of ordinances, those prohibiting excessive similarity of design, was the subject of scrutiny in a 1985 case involving a Pacifica, California,

ordinance that precluded developments that would be detrimental to the "general welfare" and would be "monotonous" in design (*Novi v. City of Pacifica*).[24] The city denied development permits for eight condominium buildings on the grounds that the anti-monotony provisions were not met. In denying the permits, however, it specifically suggested that, if the project's density was reduced to achieve "at-random building placement, reduction in grading and use of retaining walls, avoidance of the linear monotony and massive bulky appearance, and the achievement of a small-scale village atmosphere characteristic of Pacifica," approval might be granted.

Rejecting the developer's claim that the anti-monotony standard was unconstitutionally vague, the court attached particular importance to the way it was applied in practice.

> The challenged ordinances were not applied to Novi in a vague manner. Indeed, vagueness was never a problem here.... [The developers] demonstrably understood what was required.... [The developers] deliberately chose to litigate rather than mitigate.[25]

A 1984 Ohio case dealt with an ordinance with both similarity and anti-monotony provisions (*Village of Hudson v. Albrecht, Inc.*).[26] The city had created an architectural and historic board of review and directed it to "take cognizance of the development of adjacent, contiguous, and neighboring buildings and properties for the purpose of achieving safe, harmonious, and integrated development of related properties." In addition, the regulations stated that proposed structures should not violate certain look-alike provisions. Under these rules, the board could not approve an application if more than two specified building features were similar, including roof style; roof pitch; exterior materials; location of major design features or attached structures, such as porches and garages; and location of entry doors, windows, shutters, and the like.

Based on this general standard, the board took steps to stop the expansion of a shopping center that was proceeding without its permission. The property owner defended by arguing that the restrictions were unconstitutionally vague.

While two dissenting justices agreed with the owner, stating that the ordinance was based on "vague standards that are beyond any real definition or interpretation," the majority disagreed, citing the existence of other standards in the ordinance that defined "harmonious" as well as requiring that the project be integrated with vehicular and pedestrian traffic patterns. Specifically, the ordinance directed the board to take into account design, use of materials, finished grade lines, dimensions, and orientation and location of all main and accessory buildings in determining if the "harmonious" standard was met.

Contrast a 1993 case from Issaquah, Washington, which perfectly illustrates a successful challenge made by a landowner confronted with a set of vague review standards (*Anderson v. Issaquah*).[27] Wanting to build a large commercial building on land zoned for general commercial use, Anderson, the developer, sought the necessary approval of the Issaquah Development Commission (IDC), the agency responsible for enforcing the city's building design standards. Unfortunately, these standards contained numerous vague terms and concepts (e.g., developments were to be "harmonious" and "interesting") and failed to provide meaningful guidance to the developer or to the public officials responsible for enforcing the provisions.[28]

As originally proposed, the commercial structure was to be built in a "modern" style with an unbroken "warehouse" appearance in the rear; large, retail-style, glass windows on the façade; off-white stucco facing; and a blue metal roof. The property was located on a major boulevard in a "natural transition area" between old downtown Issaquah and an area of new, village-style construction.

Communities are demanding a greater say about height, architectural styles, building orientation, and other aesthetic aspects of all new projects.

During their first review of the project, IDC commissioners commented upon several aspects of the design they found displeasing, including the color scheme, the blankness of the rear wall, and the fact that the relatively plain façade" did not fit with the concept of the surrounding area." One commissioner observed that he did not think the building was compatible with the "image of Issaquah." The commissioners continued the hearing to provide the landowner an opportunity to modify his design.

At the next meeting, the landowner presented modified plans that included a new building color and modified roof materials. Still unsatisfied, the commissioners struggled to provide more specific feedback. One suggested the landowner "drive up and down Gilman [Boulevard] and look at both good and bad examples of what has been done...." Another member requested a review of the shade of blue to be used, noting that: "Tahoe blue may be too dark." The commissioners again continued the hearing to a later date to allow further modifications from the applicant.

At the third IDC meeting, the landowner presented plans that responded to the commissioners' concerns and featured new architectural detailing to break up the façade, additional landscaping, and enhanced rear-wall trim. Still unsatisfied, one commissioner presented a written statement of his "general observations" of the area's architectural character (e.g., "I see heavy use of brick, wood, and tile. I see minimal use of stucco. I see colors that are mostly earth tones, avoiding extreme contrasts."). Another commissioner noted, "There is a certain feeling you get when you drive along Gilman Boulevard, and this building does not give you this same feeling."

After nine months of meetings and investing more than $250,000, the understandably frustrated landowner volunteered to make one final modification the building's facing, but would make no further changes. The IDC chose to deny the application, expressing concern that the proposed building—even with the agreed-upon modifications—would relate poorly to the surrounding neighborhood. The city council and trial court both upheld the denial.

Key legal issues revolve around the standards and procedures used for design review, and whether they are consistent with due process.

On appeal, however, the Washington Court of Appeals found the local design code to be unconstitutionally vague:

> ...[T]here is nothing in the code from which an applicant can determine whether his project is going to be seen by the Development Commission as "interesting" versus "monotonous" and as "harmonious" with valley and mountains. Neither is it clear from the code just what else, besides the valley and the mountains, a particular project is supposed to be harmonious with....
>
> In attempting to interpret and apply this code, the commissioners charged with that task were left only with their own individual, subjective "feelings" about the "image of Issaquah" and as to whether this project was "compatible" or "interesting."
>
> The point we make here is that neither Anderson [the developer] nor the commissioners may constitutionally be required or allowed to guess at the meaning of the code's building design requirements by driving up and down...looking at "good and bad" examples of what has been done with other buildings, recently or in the past. This is the very epitome of discretionary, arbitrary enforcement of the law.[29]

The *Issaquah* case underscores the main point to remember regarding standards for design review: Standards must be sufficiently clear so as to give effective and meaningful guidance to applicants as to what is being required in terms of design without them having to guess, and to the public officials responsible for enforcing the standards.[30] Otherwise, the regulations will be challenged frequently and may have a difficult time withstanding judicial review.

Recent Developments

As discussed, a rapidly growing number of communities are paying attention to design review in areas outside historic districts, spurred by growing citizen concern and supported by favorable court decisions. This section discusses some of the more important recent developments in the field, including the use of new tools and approaches to ensure compatibility of new construction with its surrounding architectural and environmental context, such as conservation districts.

We also consider the use of design review to combat traditionally problematic development types, such as big-box retail stores and corporate franchises.

Conservation districts. Conservation districts, geared to preserving the character of existing neighborhoods, are being considered or have been adopted in a growing number of jurisdictions across the United States as one alternative to more stringent historic district regulations. Many conservation districts have been implemented for areas that fall short of meeting the criteria for a local, state, or national historic designation, but which nevertheless have important cultural, visual, or other significance. Some are intended as step-down, buffer, or transition areas immediately surrounding a protected historic district. Others are directed at preserving the residential character of a neighborhood, maintaining a unique community center, or emphasizing an important cultural element of a community.

Design flexibility is an important attribute of conservation districts as compared to historic districts. Whereas the primary purpose of a historic district is to protect the historic integrity of an area (usually by preventing demolition and requiring appropriate renovation or highly compatible new construction), conservation districts can, depending on how they are drafted, be much more flexible and can allow design elements that might accent or complement a particular neighborhood feature as long as the general character of the area remains intact. Conservation districts also can easily accommodate the protection of more than one style or era within the district.

Conservation districts generally are an effective means of protecting neighborhood character. They can be specifically tailored to the needs of a discrete area, greatly reducing the potential for problems associated with vague design standards applicable to large areas. Moreover, conservation district regulations are typically less stringent than historic district regulations, thus reducing political opposition to their adoption and enforcement. Design guidelines in conservation districts generally are not overly detailed and are developed on the basis of specific neighborhood concerns and features, such as building height, setbacks, bulk, and landscaping.

Conservation districts have been established for many different purposes, and the criteria for the definition of an area typically reflect both the visual elements that need to be protected and the community issues giving rise to the need for protection. The diversity and flexibility of conservation districts also is ap-

parent in the types of activities that are regulated and the way they are administered. The experiences of two cities illustrate some of the successes and problems that have been encountered.

Dallas, Texas, has seen an upsurge in concern about the impact of new projects outside historic areas. As a result, the city has enacted a "conservation district" ordinance that allows citizens to petition for special design and other controls in areas that do not qualify as historic districts. Designation can be initiated only by a majority of landowners in an area and can be granted only if the area contains "significant architectural or cultural attributes" and has a "distinctive atmosphere or character that can be conserved by protecting those attributes." Once the designation process is initiated, the city planning department prepares a conceptual plan for the proposed district that identifies important features and assets worthy of protection. If the city council approves the plan, an ordinance is drafted that may institute special controls on building heights, setbacks, landscaping, and signs, and that may include "...additional regulations the city council considers necessary to conserve the distinctive atmosphere or character of the area."

Several separate districts show the variety of regulated activity. The strictest controls apply to an area containing English Tudor cottages built in the 1930s, with Prairie and ranch-style, noncontextual infill structures built in the 1950s. The character of the infill structures may be preserved and remodeled, but if the style is changed, it must conform to the existing Tudor style. Regulations also include paint color restrictions and significant landscaping controls. Resident participation is extremely high, and the city receives many calls from neighbors about what other neighbors are doing.

Another conservation district in Dallas was established in an English Tudor area to maintain building setbacks that became unenforceable under revised zoning codes. The district protects the existing 60-foot building setback and prohibits fences in front yards. Large porches may be enclosed only with glass or screens, not walls. A third area has less restrictive guidelines and consists of smaller craftsman and Prairie-style houses. Visible elements are subject to review by city staff. Although this district is supported by neighborhood residents, it is typical for small violations to occur without the complaint of other residents.

The enforcement of regulations for all conservation districts in Dallas is by staff review only. Initially, an appeal could be brought before the planning commission, zoning board of adjustments, or the city council. After a problem arose with this approach, however, review was limited to the zoning board of adjustment on the basis of its quasi-judicial authority to determine whether the ordinance was correctly interpreted by the planning director.

In Massachusetts, there is no specific enabling authority for conservation districts, and the requirements for historic preservation status are very restrictive. However, under home rule authority, many municipalities have enacted conservation districts and related ordinances. Because there is a definite awareness of the significant historic architecture in the Cambridge area, there is also a high interest in preserving historically or architecturally significant community features that do not meet rigid historic preservation standards.

Conservation districts are an effective means of protecting neighborhood character.

Compared to the administration of conservation districts in other states, the administration of the Cambridge districts is very structured and complex. There are two levels of review: Mandatory review applies to new structures over 750 square feet, and advisory review applies to all other remodeling and construction. The reviews are conducted by commissions that are administered under the state historic commission management umbrella. The commissions are made up of residents in the district, with one state historic commission seat.

The majority of reviews conducted are in the advisory, nonbinding category. These cases typically consist of remodeling projects, including decks, dormers, and bay window expansions. Some in the private sector generally see this level of review as an unnecessary safeguard and consider the requirement a waste of time. The city sees the process as an educational opportunity and as a means of allowing the public an opportunity to participate and comment.

Even with this structured administrative framework, the two main districts that have been established in Cambridge are functionally very different. The Half-Crown district comprises 75 residential buildings on very small lots near Harvard Square, a major commercial area with significant historical features. The principal interest of the property owners is to protect the residential area from outside influences, particularly office and commercial uses. The property owners are so involved in the district that it is almost self-governing. The group reportedly has a definite "us versus them" approach, which sometimes includes the city in the "them" category.

The second district is the Mid-Cambridge district and includes about 2,000 buildings. Beginning in the 1950s, large houses were being demolished to make way for "modern" seven- to eight-story apartment buildings. In response, the city amended the zoning code in the 1970s to encourage small-scale, townhouse/condominium development and attached single-family additions. This led to problems associated with the resulting high densities, including reduced parking and the loss of yards, open space, and large trees. While this trend slowed during the late 1980s because of the national economy, the conservation district now helps to monitor growth and preserve the neighborhood character. In addition, the area was downzoned as the result of "recasting" the townhouse ordinance.

Because many jurisdictions have conservation districts that have been in place for several years, those drafting new ordinances can now draw on a variety of useful models from around the country. These existing models can be evaluated and used as the basis for developing new ordinances without "reinventing the wheel." Recently adopted programs include Lincoln, Nebraska; Orlando, Florida; and Portland, Oregon, in addition to the examples mentioned above.

Design standards for large retail establishments. The meteoric rise of large-scale retail stores such as Wal-Mart has been one of the headline planning stories of the 1990s. Commonly called "big-box" retailers, these enterprises typically occupy more than 50,000 square feet and derive their profits from high sales volumes. While such stores vary widely in size and market niche, they tend to share common design features, including: large, rectangular, single-story buildings with standardized, often blank facades; reliance on auto-borne shoppers who are accommodated by acres of parking; and no-frills site development that often eschews community or pedestrian amenities such as trees or sidewalks.

Such stores depend on high visibility from major public streets. In turn, their design determines much of the character and attractiveness of major streetscapes in the city. The marketing interests of many corporations, even with strong image-making design by professional designers, can be detrimental to a community's sense of place when they result in massive individual developments that do not contribute to or integrate with their surroundings in a positive way.

An increasing number of communities are worried about the aesthetic blight of big-box retailers (in addition to the economic impact on existing downtown merchants and the sprawl-inducing effects of such development). In response, they are enacting standards and guidelines to control the aesthetics of such establishments. One example is Fort Collins, Colorado, which has adopted some of the most comprehensive guidelines and standards in the country to shape the appearance and impact of big-box retailers. In adopting its new standards, the Fort Collins City Council noted:

> These standards and guidelines are a response to dissatisfaction with corporate chain marketing strategy dictating design that is indifferent to local identity and interests. The main goal is to encourage development that contributes to Fort Collins as a unique place by reflecting its physical character and adding to it in appropriate ways.

Before adopting its big-box standards, Fort Collins already had detailed regulations in place dealing with signage and landscaping, the typical means by which communities attempt to soften the visual impact of retail superstores. Yet Fort Collins was interested in moving beyond such traditional approaches, and at the time was fortunate enough to have a strong economy and a creative staff and local elected officials who could afford to resist the temptation of large tax revenues the superstores might generate. The city decided to focus on requiring a basic level of architectural variety, compatible scale, pedestrian and bicycle access, and mitigation of negative impacts.

Communities are enacting standards and guidelines to control the aesthetics of big-box retailers.

The resulting regulations apply to new "large" retail establishments (i.e., any one or a collection of retail establishments in a single building, occupying more than 25,000 gross square feet of lot area, or an addition to an existing large retail establishment that would increase the gross square feet of floor area by 50 percent). They include both "standards," which are mandatory, and "guidelines," which are not mandatory but are provided in order to educate planners, design consultants, developers, and local staff about the design objectives. The standards are not intended to limit creativity; rather, the city hopes they will serve as a useful tool for design professionals to engage in site-specific design in context. The standards and guidelines address the following issues.

Architectural character. To prevent blank, windowless, faceless facades, the standards

- Forbid uninterrupted length of any facade in excess of 100 feet (by requiring recesses, projections, windows, awnings, and arcades)
- Require that smaller retail stores that are part of a larger principal building have display windows and separate outside entrances
- Direct the use of a repeating pattern of change in color, texture, and material modules
- Dictate variations in roof lines
- Require that each principal building have a clearly defined, highly visible customer entrance with distinguishing features like canopies or porticos.

Color and materials. To ensure higher-quality development, the standards

- Require predominant exterior materials to be of high quality, such as brick, wood, sandstone, or other native stone
- Require facade colors to be of "low reflectance, subtle, neutral, or earth tone colors," and prohibit the use of high-intensity or metallic colors
- Prohibit the use of neon tubing as an accent material.

Relationship to surrounding community. To ensure that superstores are compatible with surrounding streets and commercial and residential development, the standards require

- All facades visible from adjoining properties and / or public streets to contribute to the pleasing scale of features of the building and encourage community integration by featuring characteristics similar to a front facade
- All sides of a principal building that directly face abutting public streets to include at least one customer entrance
- Minimum setbacks for any building facades of 35 feet, within which a six-foot earth berm planted with evergreen trees must be included if the facade faces adjacent residential uses
- Loading docks, trash collection, and other outdoor storage and activity areas to be incorporated into the overall design of the building and the landscaping, so that the visual and acoustic impacts are fully contained
- The provision of community and public spaces such as water features, clock towers, or patio seating areas.

Pedestrian flows. To encourage pedestrian accessibility, the standards require

- Sidewalks of at least eight feet in width along all sides that abut public streets
- Sidewalks along the full length of any facade featuring a customer entrance and any facade abutting a public parking area
- Internal pedestrian walkways to provide weather protection features such as awnings within 30 feet of all customer entrances
- Internal pedestrian walkways must be distinguished from driving surfaces through the use of special paving materials.

Parking lots. To prevent huge expanses of asphalt separating the superstores from streets, the standards encourage structures to be located closer to streets and to break parking areas up into modules separated by landscaping and other features. No more than 50 percent of the off-street parking area for the entire property shall be located between the front facade and the primary abutting public street.

The Fort Collins standards provide a strong model for other communities concerned about mitigating the aesthetic impacts of large-scale retailers on the local landscape. Other jurisdictions should be careful, however, to tailor new standards to their own local political and economic contexts.[31]

Design standards for corporate franchises. Big boxes aren't the only retail outlets being subjected to an increasingly stringent and sophisticated generation of design review programs. Local governments are realizing that smaller-sized businesses may just as quickly erode community character if not properly integrated with their natural and architectural surroundings. Design review can ensure that drug stores, roadside motels, gas stations, and the like are designed so as to respect community character. Such design review efforts have been particularly successful with corporate franchises, especially gas stations and fast-food restaurants, since many of these are controlled by national chains that are beginning to understand how sensitive design can make good business sense. R. L. Fleming in 1994 discussed the evolution of today's standardized franchise designs and explaind how communities can use design review to require corporate franchises to respect community character.[32]

Fleming notes that both gas stations and chain restaurants cater to, and rely heavily on, the automobile, and their most prominent design features are attributable to the car. Since the bulk of their customers arrive by road, corporate marketing departments demand instant recognition from passing motorists. As a result, gas stations feature tall, colorful, well-illuminated signs displaying the corporate logo, often visible from miles away. Chain restaurants rely on oversized architectural details (e.g., golden arches), bright colors, and huge banners advertising the current sale or promotional gimmick. Not only do these stores cater to the automobile, but they also encourage further sprawl by continuing to require more land and higher parking-lot-to-building ratios, and by marketing aggressively to new suburban development. Rehabilitation of older facilities is unusual for both gas stations and fast-food chains, since both find it more cost-effective to invest in new construction.

The need for speed and convenience also influences franchise design, resulting in site plans that emphasize efficiency over respect for community character. Gas stations feature additional pumps to reduce wait times, pay-at-the-pump stations to allow fill-ups without ever entering the store, and broad, brightly lit canopies covering large service plazas to shelter customers from the weather. Anxious to accommodate rushed motorists, stations emphasize self-service and incorporate convenience stores selling quick snacks for the road. Fast-food chains configure sites to allow ample parking and easy auto access to and from the drive-through window. The cumulative effects of such design features are structures and sites that disregard their surrounding community context in favor of the bottom line, allowing marketing concerns to trump aesthetic compatibility.

Fortunately, many such chain stores are locally owned, and independent franchise owners have significant say over such important design issues as decor and landscaping. Some independent owners have learned that compatibility with the surrounding neighborhood makes good business sense. In Asheville, North Carolina, for example, one new chain gas station in the Biltmore Station neighborhood has been designed so sensitively that it almost looks like an annex to the adjacent, historic church. The station's owner notes that his profits are much higher than they would

be if his station looked like any of the surrounding cookie-cutter chain outlets.[33]

Smaller-sized businesses may just as quickly erode community character if not properly integrated with their natural and architectural surroundings.

Not wanting to rely exclusively on enlightened franchisees, however, local governments are using design review to require higher-quality development from the franchises. They are requiring the same types of features, discussed above, that are being applied to big-box retailers: sensitive landscaping, smaller signs, appropriate lighting, setbacks uniform with existing development, muted colors, and architectural styles and materials consistent with local traditions. Also, recognizing that drive-through windows are major sources of revenue for fast-food restaurants, local governments are conditioning approval of such windows (if allowed by the underlying zoning restrictions) on the incorporation of design features that mitigate congestion and traffic-related impacts, such as sidewalks and landscaping.[34]

Opportunities for design review are increasing as corporate franchises move into new areas, such as downtowns, to take advantage of marketing opportunities away from their traditional strongholds, the suburban neighborhoods and interstate highways. Adjusting to these new locations often means tailoring their facilities in sensitive ways, perhaps by adding underground parking or reconfiguring floor plans to fit narrow historic buildings. The major food-service corporations (e.g., McDonald's, Burger King) have shown a willingness to adapt to unusual spaces if it makes good economic sense: Being a good neighbor can promote a healthy corporate image, which translates into increased sales.

Many communities are enjoying significant progress in their efforts to increase the quality of franchise design. The design guidelines for Albemarle County, Virginia, for example, feature a McDonald's restaurant as a model to be emulated, "an example of architecture compatible with historically significant local buildings" (according to the Albemarle County Department of Zoning).

If necessary, however, local officials are going to court to enforce their design review programs, as was illustrated in a 1991 case from Holden, Massachusetts.[35] In that case, a local government refused a request from the Mobil Corporation to install a large, 19-foot canopy, similar to those the company installs on most of its stations, on a gas station in a historic district. A Massachusetts Superior Court upheld the denial, agreeing that the canopy would be incompatible with the surrounding architecture. In its opinion, the court underscored the importance of the local preservation commission's role in preserving the local architectural and cultural heritage.

Communities attempting to regulate the design of corporate franchises should be clear in their guidelines about the exact type of design they want. Extensive illustrations and definitions should be used to explain difficult concepts like "community character" to franchise owners and their architects. Local planners should be ready and willing to negotiate on design issues. They should educate themselves as to the economic needs of a franchise so they can suggest economically feasible alternatives to standard design templates. They should be able to cite examples from similar communities showing how changes mandated by design review required minimal investment (as a percentage of total project cost) and were recouped many times over in good will and customer loyalty. Finally, communities should be firm and strong-willed in enforcing their design review programs, if necessary defending their systems in court. As Ed McMahon, director of the Conservation Fund's American Greenways Program, has noted, "If you accept the lowest common denominator in development, you'll get it every time. If you insist on something better, you'll get that almost every time."[36]

New applications for neotraditional design standards. Neotraditional development, also known as New Urbanist development or traditional neighborhood development (TND), has enjoyed such booming growth and popularity over the last few years that, today, most every planner is familiar with its basic tenets. Neotraditional neighborhoods attempt to recapture the sense of community found in successful neighborhoods that have endured for half a century or more by replicating the design elements of those neighborhoods and by fostering pedestrian-friendly environments that discourage reliance on the automobile.

Many of the most sensitively designed neotraditional developments, such as Southern Village in Chapel Hill, North Carolina, are making extremely positive aesthetic contributions to the communities in which they are built. Typical design features of these developments include: front porches to encourage interaction with neighbors; garages that face alleys, rather than front streets, to de-emphasize the importance of the automobile; and narrow streets to discourage fast traffic in residential areas. Neotraditional developments also feature a mix of land uses to minimize the amount of driving time between home and work and other services, and a variety of housing types to encourage a diverse community, rather than one segregated by income or other socioeconomic factors. Above all, new development is encouraged to merge seamlessly with the surrounding built and natural environment, rather than ignoring the context in which it is built.

What is unusual is the increasing number of design review programs that are applying neotraditional design principles in new and unconventional ways. Local jurisdictions are learning that the principles of New Urbanism may just as easily be applied to a storage warehouse as they can to a residential subdivision.

A good example of this trend is Hudson, Ohio, a fast-growing suburb of Cleveland, which recently adopted design standards for industrial development that incorporate many neotraditional principles. Rather than allowing new industrial development to consist of bland, blank-walled warehouses isolated in an industrial park, as happens in so many communities, the Hudson requirements attempt to ensure that industrial development is compatible to the greatest extent possible with its natural and aesthetic surroundings.

Specifically, the Hudson zoning ordinance requires that all industrial development be consistent with community standards for architectural design. Structures should have elements that are interrelated and ordered.

The size and proportion of windows and wall openings should be related to one another and to the spaces between them within the overall facade. A group of structures should be designed as a single architectural entity, rather than as a collection of unrelated facades. Architectural character and detailing is required for all sides of structures in the public view. Efforts must be made to reduce the overall visual impact of large structures by using berming, landscaping, or architectural solutions to give the illusion of an apparently smaller mass. Building siting and orientation must take into account the relationship of new buildings to the street, parking areas, and other buildings, and must minimize disturbance of vegetation, wetlands, woodlands, riparian corridors, and other natural features. Landscaping and screening requirements provide an opportunity to create and preserve an identity for the specific site, while also relating the site to the community as a whole.

IMPLEMENTING AND ADMINISTERING DESIGN REVIEW

As the law relating to design review both inside and outside historic areas becomes more settled, efficient and effective administration of design review ordinances is becoming increasingly important. Because local planners often are responsible for acting as staff to local review bodies, they are in a position to help improve the administrative and procedural aspects of design review. Below are some general guidelines that communities should keep in mind when drafting and implementing design review regulations.[37] As design review becomes more commonplace, local governments need to take all possible steps to anticipate criticism that design review procedures are overly burdensome and the entire process is inherently subjective.[38]

Employ Community-Based Approaches to Design

As noted above, design review programs in historic areas that feature consistent building styles usually feature the common architectural heritage as a reference point. Because newer neighborhoods do not always have a distinctive architectural style, however, it is particularly important that such areas attempt to reach a consensus on what matters to citizens in the way of design elements. Invariably, as experience is showing, review that goes beyond a primary focus on building design is most effective.

> **Commissions and preservationists are learning the importance of concentrating efforts and attention on major cases and avoiding extended review of minor items.**

Recent advances in computer technology have made the difficult process of defining a community "vision" much simpler and less expensive. Computerized visual simulations are being used heavily in a variety of contexts to assist planners and elected officials in determining what proposed land-use activities will look like if approved. The Minnesota Department of Transportation, for instance, uses computerized visual simulations to help people understand how roads will look using different design options (e.g., different widths, various shoulder treatments, with bike trails versus without bike trails). Other communities are using visual simulations to determine what proposed subdivisions will look like, to show the effect of burying utility wires, and the benefits of tree conservation, among other things.[39]

One particular type of simulation, known as a Visual Preference Survey, is a trademarked technique that allows members of a community to jointly determine what type of development they find most acceptable.[40] A visual simulation generally consists of a series of slides featuring different types of physical environments shown to a group of people who then rate the images they see on a sliding scale, usually "+10" (best) to "–10" (worst). Each participant provides a personal rating for each image; thus, the same image might receive a "+10" from one person who responds very positively and a "– 4" from another person who responds somewhat negatively. Average scores for each image summarize the types of development most acceptable to all participants.

In communities in which such techniques have been used, such as Metuchen, New Jersey, the results have been dramatic, with some images rating almost 100 percent positive and others rating almost 100 percent negative. The survey in Metuchen confirmed that some types of development were very acceptable to a large number of local residents, while others were not.

Across various communities that have used such a process, images typically scoring very high include pristine natural areas, established neighborhoods, and new development designed according to neotraditional principles (e.g., narrow streets, mixed uses, pedestrian-friendly features). Images that tend to score negatively include parking lots, large-scale roads, industrial facilities, and deteriorating urban centers. Traditional

suburban development tends to score poorly when presented alongside neotraditional development.

Advocates of the process note that the technique can be a powerful tool for bringing together disparate interests in the pursuit of a "common vision," which in turn can lay the political groundwork for support of what can often be a contentious regulatory process. Critics of the process, however, note that such slide presentations can be prohibitively expensive in many small- and mid-scale planning projects.

Ensure Administration by a Well-Qualified, Adequately Supported Board

As noted, several court decisions make clear that the application of review standards by an expert board will go a long way towards supporting the reasonableness of the regulatory process. Including architects and other design professionals on such a board comforts the judiciary when claims are made that review standards are vague and the process subjective.

Of equal importance, the review board must have resources available to establish and administer design standards, especially if detailed design review is to take place. A background study and adequate continuing staff support are essential to effective and equitable design review. Communities should seek professional assistance either in-house or through consulting firms to ensure that the review board gets competent advice and that design restrictions are followed in practice.

Supplement Written Design Standards with Visual Aids and Guidebooks

An increasing number of communities are publishing illustrated design books and are undertaking educational efforts in the development community to help reduce delays when applications are submitted. Visual design guides might graphically illustrate, for example, what constitutes a "compatible" or "harmonious" design. Computerized visual simulation tools also can be, as noted above, excellent tools to clarify desired aspects of new construction to potential developers.[41]

Do Not Concentrate Solely on Detailed Building Design Review

Commissions and preservationists are slowly learning the importance of concentrating their efforts and attention on major cases and avoiding extended review of minor items, such as spacing of pickets in a fence, design of wrought iron gates, and similar issues that have led to heated political controversy in the past. Experience shows that government design regulations are most effective in dealing with issues like building height, pedestrian pathways, street furniture, landscaping, and other more straightforward aspects of site design, rather than with the architecture of a specific building. Unless the community desires buildings of a distinct architectural style, it may well be advisable to set general parameters and leave the actual building design in the hands of the developer's architect.

Integrate Design Review with Other Planning Goals

While design review of a specific site can do much to protect the character of an area, the relationship of a project to the overall development in a district is of equal importance. An up-to-date local comprehensive plan is perhaps the best source for determining preferred development principles and patterns for a community.

Keep Records

Now that many local ordinances have real "teeth," local commissions must improve their record keeping, particularly minutes and transcripts from hearings dealing with projects that are controversial and may end up in litigation. The development of an institutional record ensures the consistent interpretation of regulations—and fair treatment of applicants—over time.

Draft Efficient Procedural Requirements

The most effective design review programs are characterized by streamlined administrative procedures that not only comply with the law, but also reduce time and resource requirements for local staff and applicants. Some examples of ways to make procedural requirements more efficient include the following:

- Preparing a succinct summary sheet of local preservation requirements that can be handed out to applicants by building officials.
- Holding preapplication meetings. Misunderstandings can be avoided if the project proponent is given a chance to meet informally with staff and commission members prior to submitting a formal application.
- Imposing time limits. Many local governments are placing limits on the time a local commission has to consider a project once a completed application is submitted. These time limits usually range from 30 to 60 days.
- Allowing generic approvals of preapproved sign designs. Some commissions have published booklets that contain five or six preapproved sign designs for a special area, such as a historic district. If the applicant adopts one of these preapproved signs, the normal review process can be waived.

Be Sure Sufficient Political Will Exists to Enforce and Maintain a Design Review Program

The tale of the design guidelines for the Three Rivers Parkway in Allegheny County, Pennsylvania, sounds a cautionary note for other communities concerning the

political will needed to ensure long-term acceptance and enforcement of design review programs. The parkway connects the new Pittsburgh airport to the downtown and serves as a major gateway into the city of Pittsburgh. Along its route lies a dramatic series of hills and beautiful river valleys, some of which had been obscured by insensitive past development. Pittsburgh, a number of other municipalities, and the county all have land bordering the parkway.

Local governments need to take steps to anticipate criticism that design review procedures are burdensome and that the process is subjective.

In 1992, seeking to create a distinctive new visual identity for this important entry corridor into Pittsburgh and to ensure quality development and protect the natural environment, Allegheny County commissioned a "workbook for implementation" that sought to turn the parkway into an attractive, sensitively designed thoroughfare that could serve as a major economic asset and complement the new airport. The workbook included tough new design standards and guidelines in a variety of areas, including: uniform sign regulations, including controls on new billboards and off-premises signs; buffers, setbacks, and landscaping standards, including tree protection provisions; standards to restore and protect unique and environmentally sensitive areas; and building and site design guidelines intended to ensure compatibility with existing development.

Effective implementation of the workbook required adoption of the design review program by all affected jurisdictions in order to protect as much land along the parkway as possible. Counties in Pennsylvania have only limited land-use regulatory authority. Signing up the municipalities to the popular plan did not prove to be difficult, and, within 18 months, seven jurisdictions had adopted the design standards and guidelines. The popular plan even won a national award for its stringent, farsighted, regional approach to design review. Soon the entire planning effort was threatened, however, when Wal-Mart applied for a permit to build a new mega-store alongside the parkway in North Fayette Township. The proposed big-box development would consume almost an entire stream valley and would have required dozens of variances from the new design guidelines, tree protection regulations, and sensitive lands preservation standards. Local officials hesitated, wondering whether to uphold the design guidelines, deny the variances, and miss out on an opportunity to substantially increase the local tax base; or grant the variances, allow the development, and effectively gut the new plan not only for themselves but for all the communities along the parkway. Local citizens, furious with the proposed development, threatened a lawsuit if the variances were granted and the design standards were not enforced.

In the end, North Fayette Township repealed the design guidelines altogether, choosing short-term economic development over long-term aesthetic enhancement of Three Rivers Parkway. The repeal effectively ruined the chances for uninterrupted implementation of the design standards along the entire parkway. Soon several other jurisdictions followed suit, allowing large, poorly sited and designed commercial development to mar the parkway.

The lesson? Be sure sufficient political will exists not only to adopt a design review program, but also to enforce standards even when tempted with big projects. Just as important, review standards should be no more stringent than the community is willing to enforce. If standards are too tough, the political pressure may be too great to grant variances or repeal the standards altogether, especially when faced with the difficult choice of economic development versus aesthetic compatibility.

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1 438 U.S. 104 (1978).

2 The best local design guidelines for historic areas will address design review issues in the larger context of communitywide needs and preferences, which ideally will be articulated in a comprehensive plan or similar document. For a good example, see the 1995 Historic District Conservation Guidelines prepared for the Over-the-Rhine Historic District in Cincinnati, published by the local planning department. Although prepared specifically for the historic district, the guidelines contain "development principles" applicable to the entire community (e.g., "The development, preservation, and maintenance of housing should be encouraged for persons of all income levels.").

3 For a discussion of these issues, see Christopher J. Duerksen, "Historic Preservation Law," in *The Law of Zoning and Planning*, 4th ed., edited by Arden Rathkopf (New York: Clark Boardman, Co., Limited, 1975), Release 63, 1997; Christopher J. Duerksen, ed., *A Handbook of Historic Preservation Law* (Washington, D.C.: The Conservation Foundation, 1983); Richard J. Roddewig, *Preparing a Historic Preservation Ordinance*, Planning Advisory Service Report no. 374 (Chicago: American Planning Association, 1983).

4 438 U.S. 104 (1978), p. 133.

5 Norman Williams, *American Land Planning Law*, 3.31 Sec. A.07. A good discussion of preservation criteria can be found in Weiming Lu, "Preservation Criteria: Defining and Protecting Design Relationships," in *Old and New Architecture: Design Relationships* (Washington, D.C.: Preservation Press, 1980), 180. As Lu notes, some local ordinances use sketches to illustrate standards. These sketches are typically contained in documents incorporated by reference into the ordinance.

6 105 N.H. 481, 202 A.2d 232 (1964), p. 232.

7 258 S.E.2d 444 (1979).

8 580 P.2d 807 (Colo. 1978), p. 810.

9 The six criteria to be considered were: (1) the effect of the proposed change on the general historic and/or architectural character of the structure or area; (2) the architectural style, arrangement, texture, and materials used on existing and proposed structures, and their relation to other structures in the area; (3) the effects of the proposed work in creating, changing, destroying, or affecting otherwise the exterior architectural features of the structure upon which such work is done; (4) the effects of the proposed work upon the protection, enhancement, perpetuation, and use of the structure or area; (5) the use to which the structure or area will be put; and (6) the

condition of existing improvements and whether or not they are a hazard to public health or safety.

[10] See also *Faulkner v. Town of Chestertown*, 428 A.2d 879 (Md. 1981).

[11] 516 F.2d 1051 (5th Cir. 1975).

[12] Ibid., p. 1063.

[13] *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (1979), p. 455.

[14] *Maher v. City of New Orleans*, 516 F.2d 1051 (1975), pp. 1062–1063.

[15] *South of Second Associates v. Georgetown, Colo.*, 580 P.2d 806 (Colo. 1978), pp. 808–809, n. 1.

[16] 103 N.J. Super. 58, 394 A.2d 157 (1978).

[17] *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444, (N.C. 1979), p. 450. Quoting Arden Rathkopf, *The Law of Zoning and Planning*, 4th ed. (New York: Clark Boardman, Co., Ltd., 1975), Sec. 15.01, p. 15–4. See also *City of Santa Fe v. Gamble-Skogmo, Inc.*, 381 P.2d 13, (N.M. 1964), p. 17.

[18] See David Bonderman, "Federal Constitutional Issues," in Christopher J. Duerksen, ed., *A Handbook of Historic Preservation Law* (Washington, D.C.: The Conservation Foundation, 1983), 350–68. Also see Christopher J. Duerksen and Richard J. Roddewig, *Takings Law in Plain English* (Washington, D.C.: American Resources Information Network, 1994).

[19] 516 F.2d 105 (5th Cir. 1975), *rehearing denied*, 521 F.2d 815 (1975), *cert. denied*, 426 U.S. 905 (1976).

[20] *Maher v. City of New Orleans*, 516 F.2d 1051 (1975), p. 1066. For other cases illustrating the difficulty of a property owner establishing a taking as a result of a preservation ordinance, see *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th cir. 1979) (95 percent reduction in value held not a taking); and *South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646 (1st cir. 1974) (forced 40 percent vacancy of parking lots held not a taking).

[21] William J. Mallett, "Homeowner Associations: Characteristics, Problems, and Prospects (Planning Advisory Service [PAS] Memo) (Chicago: American Planning Association, January 1998).

[22] 259 N.E.2d 217 (N.Y. 1970).

[23] 69 N.W.2d 217 (Wisc. 1955), cert. denied 350 U.S. 841 (1955).

[24] 215 Cal.Rptr. 439 (Cal.App. 1985).

[25] Other cases upholding design review ordinances include *Reid v. Architectural Review Board*, 192 N.E.2d 74 (Ohio 1963); *State ex rel. Stoyanoff v. Berkely*, 458 S.W.2d 305 (Mo. 1970).

[26] 458 N.E.2d 852 (Ohio 1984).

[27] 851 P.2d 744 (Wash. App. 1993).

[28] Excerpts from the challenged design provisions of the Issaquah Municipal Code:

16.16.060(B). Relationship of building and site to adjoining area: Buildings and structures shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials.... Harmony in texture, lines, and masses shall be encouraged....

16.060(D). Building design: Evaluation of a project shall be based on quality of its design and relationship to the natural setting of the valley and surrounding mountains.

Building components, such as windows, doors, eaves, and parapets, shall have appropriate proportions and relationship to each other, expressing themselves as a part of the overall design.

Colors shall be harmonious, with bright or brilliant colors used only for minimal accent. Exterior lighting shall be part of the architectural concept. Fixtures, standards, and all exposed accessories shall be harmonious with the building design. Monotony of design in single or multiple building projects shall be avoided. Efforts should be made to create an interesting project by use of complimentary details, functional orientation of buildings, parking and access provisions, and relating the development to the site. In multiple building projects, variable siting of individual buildings, heights of buildings, or other methods shall be used to prevent a monotonous design.

[29] *Anderson v. Issaquah*, 851 P.2d 744 (Wash. App. 1993), p. 76.

[30] The importance of including more precise review criteria to narrow broad review standards also was illustrated by the contrasting result in the *Morristown* case noted above. Other cases striking down design review provisions include *Hankins v. Borough of Rockleigh*, 150 A.2d 63 (N.J. App. 1959) (regulations invalid in light of active physical development of locality); *R.S.T. Builders v. Village of Bolingbrook*, 489 N.E.2d 1151 (Ill. App. 1986) (regulations invalid due to vagueness and failure of ordinance to prescribe adequate standards to control review commission's actions); and *Waterfront Estates Dev., Inc. v. City of Palos Hills*, 597 N.E.2d 641 (Ill. App. 1992).

[31] For more information on drafting and implementing big-box retail standards and the Fort Collins case study, see Christopher J. Duerksen, "Site Planning for Large-Scale Retail Stores," *PAS Memo*, April 1996. Also see Constance Beaumont, *How Superstore Sprawl Can Harm Communities and What Citizens Can Do about It* (Washington, D.C.: National Trust for Historic Preservation, 1994).

[32] Ronald Lee Fleming, *Saving Face: How Corporate Franchise Design Can Respect Community Identity* (Planning Advisory Service Report no. 452) (Chicago: American Planning Association, 1994).

[33] Paul Clark, "Businesses Can Blend with Beauty," *Asheville Citizen-Times*, December 10, 1996.

[34] See Fleming, *Saving Face*, for an excellent visual essay on franchise design alternatives.

[35] *Mobil Oil Corp. v. Holden Historic District Commission*, Superior Court Civil Action no. 91-01434, December 9, 1992. See the detailed discussion of this case in Fleming, *Saving Face*, 16.

[36] Clark, "Businesses Can Blend with Beauty."

[37] Hamid Shirvani, *Urban Design Review: A Guide for Planners* (Chicago: Planners Press, 1981; and Donald Erickson, "Legislating Urban Design," *The Western Planner* 7, no. 2 (March/April 1986).

[38] For more detailed information on creating and administering an effective design review program, see Mark L. Hinshaw, *Design Review*, Planning Advisory Service Report no. 454 (Chicago: American Planning Association, 1995).

[39] See, for example, *Looking at Change Before It Occurs* (Washington. D.C.: Scenic America, 1993), videocassette, 17 min., which describes various types of two- and three-dimensional visual simulations.

[40] For more information on Visual Preference Surveys, see James Constantine, "Design by Democracy," *Land Development*, Spring-Summer 1992, 11.

[41] See Appendix A, "Visual Simulation Tools," in *Tree Conservation Ordinances: Land-Use Regulations Go Green* by Christopher J. Duerksen, Planning Advisory Service Report no. 446 (Chicago: American Planning Association, 1993).

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