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Aesthetics and the Single Building Landmark

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NOTES AND COMMENTS

AESTHETICS AND THE SINGLE BUILDING LANDMARK

What to one man is food is to another rank poison.
Lucretius*

I. INTRODUCTION

For good reason, zoning for aesthetics alone has been disallowed in the United States. Historically, state and local regulation of land use solely for aesthetic purposes has been struck down as unconstitutional[1] because it has been considered to be outside the limits of the state police power, and impermissible under the fifth and fourteenth amendments to the United States Constitution. This argument rests mainly on two premises. The first is that "beauty" cannot be *defined* by anyone, much less by a collection of individuals.[2] The second premise is that whatever "beauty" may be, it changes so quickly that nothing better than a fleeting definition can be agreed upon.[3] The courts, in holding legislation based entirely on aesthetics to be unconstitutional, have avoided discussing or deciding the issue of what is aesthetically pleas-

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* DE RERUM NATURA, IV, 637.

1. Zoning, since the Supreme Court decided *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), has been considered a valid exercise of the police power, as is other land use regulation so long as it protects the health, safety, and morals of the populace. *See* Mugler v. Kansas, 123 U.S. 623 (1887). *See also* Goldblatt v. Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915). On the history of zoning for aesthetics, *see generally* R. ANDERSON, ZONING LAW AND PRACTICE IN NEW YORK STATE, §§ 7.04-7.15 (1963 and 1972 cum. supp.); Crumplar, *Architectural Controls: Aesthetic Regulation of the Urban Environment*, 6 URB. LAW. 622 (1974); Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955); Masotti & Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URB. L. 773 (1969); Norton, *Police Power, Planning and Aesthetics*, 7 SANTA CLARA LAW. 171 (1967); Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. CAL. L. REV. 149 (1954); Comment, *Zoning, Aesthetics, and the First Amendment*, 64 COLUM. L. REV. 81 (1964); Comment, *Aesthetic Zoning: Preservation of Historic Areas*, 29 FORDHAM L. REV. 729 (1961); Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973); Annot., 21 A.L.R.3d 1222 (1968); *A Bibliography of Periodical Literature Relating to the Law of Historic Preservation*, 36 LAW & CONTEMP. PROB. 442 (1971).

2. *See* note 166 *infra* and accompanying text.

3. *See* notes 12-19 *infra* and accompanying text.

ing. Recently, however, and regrettably, judicial approval of land use regulation for aesthetic purposes alone has emerged and has gained support.[4]

This comment will focus on recent litigation concerning the preservation of aesthetic landmarks under state and local ordinances.[5]

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4. *See, e.g.*, People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, (1963). *See also* notes 32-35 *infra* and accompanying text.

5. This comment deals with state and local, as opposed to federal, landmark legislation. *But see* notes 134-60 *infra* and accompanying text.

Although it has caused far less litigation than state and local legislation, federal law providing for the registration and protection of landmarks is susceptible to similar challenges on aesthetic grounds. The National Historic Preservation Act of 1966, 16 U.S.C. §§ 470b, 470c, 470f, 470h, 470i, 470l-470t (1976), provides for listing property on the National Register of Historic Places but does not prohibit alteration or even demolition of such property. The Internal Revenue Code, however, offers an incentive for refurbishing and penalizes demolition of registered landmarks. Tax Reform Act of 1976, I.R.C. § 191, *as amended by* Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2900, 2903. The tax consequences under Section 191 of The Tax Reform Act of 1976 are briefly these: Depreciable structures, individually listed on the National Register or in districts listed on the National Register, are eligible for (1) accelerated depreciation for approved rehabilitation, (2) five-year amortization of expenses in connection with approved rehabilitaton, (3) ten percent investment tax credit for rehabilitation of certain historic buildings, (4) denial of demolition costs as a business expense deduction, and (5) denial of accelerated depreciation for new buildings constructed on the site of demolished historic structures. *See* Helvering v. United States Trust Co., 111 F.2d 576 (2d Cir.), *cert. denied*, 311 U.S. 678 (1940), where in answer to any challenge of these provisions as constituting a taking, the court stated that no individual has a vested right in the provisions of a tax statute. *See generally* Hessel, *Tax Incentives for Preservation and Rehabilitation of Historic Properties*, 5 REAL ESTATE TAX'N 5 (1977).

The most recent addition to the collection of federal laws on historic preservation is the Archaeological and Historic Preservation Act of 1974, 16 U.S.C. §§ 469a-1 to c (1976). This Act provides funding for the recovery of scientific, prehistoric, historic, and archaeological data which may be lost because of federal construction projects.

The Historic Sites Act of 1935, 16 U.S.C. §§ 461-467 (1976), provides the strongest federal control, that is, the authorization for the government to acquire sites of national historical significance subject to an appropriation by Congress. This delegation was upheld as constitutional in Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939), but has scarcely been used. This Act provided for designation of a building as a National Historic Landmark. Such landmarks are given no protection beyond that of registered buildings, except that they may be acquired.

The opinion of the Solicitor's Office of the Department of the Interior is that registration of a landmark building or district pursuant to the National Historic Preservation Act of 1966 does not violate constitutional due process requirements, either procedurally or substantively. *See* Letter from James D. Webb, Associate Solicitor, Conservation and Wildlife, Department of the Interior, to Robert F. Stephens, Attorney General, Commonwealth of Kentucky (March 3, 1978) *reprinted in* PRACTICING LAW INSTITUTE, HISTORIC PRESERVATION LAW 677 (1979). The Solicitor's Office cites the Act as not placing any use restriction on registered property. *See also* Helvering v. United States Trust Co, 111 F.2d 576 (2d Cir.), *cert. denied*, 311 U.S. 678 (1940), for the proposition that the tax incentives to preserve, not demolish, landmarks involve no property right; Virginia Historic Landmarks Comm'n v. Board of Supervisors, 217 Va. 468, 230 S.E.2d 449 (1976) (upholding landmark recognition alone of historic value as no state action triggering procedural due process inquiries). In its regulations, the National Parks Services of the Department of the Interior sets forth the notice and opportunity to comment procedure in the registration process. 36 C.F.R. Part 60 (1979).

The National Register lists several criteria for the registration of landmarks. These criteria permit listing of districts, sites, buidings, structures, and objects possessing integrity of location, design, setting, materials, workmanship, feeling, and association that (1) are associated with events

Three cases will be utilized to illustrate the dangers inherent in governmental determinations of what is aesthetically pleasing and the costs to society of imposing regulations on private owners of single building landmarks with respect to the admixture of new styles of architecture. It is the thesis of this comment that judicial or legislative determinations of what is aesthetically pleasing cannot properly be made. Neither courts nor legislatures are adequately equipped to make such determinations because "beauty" is incapable of being defined. The nature of "beauty" is such that it is subject to the varied likes and dislikes of the populace. Neither governmental body has the expertise to formulate a definition that would be acceptable to a majority of individuals. Furthermore, such governmental definitions of what is aesthetically pleasing cannot be developed with sufficient certainty to determine what buildings should be designated as landmarks. As such, regulations which attempt to do so are unconstitutionally vague[6] to the extent they rely on aesthetics. These regulations fail to articulate a sufficiently precise standard for a landmark commission determination of which buildings should be designated landmarks, and are outside the permissible limits of the police power.

II. THE BACKGROUND TO ZONING AND AESTHETICS

A. *The Legislation*

Regulation of the use of privately owned land by the government, be it state or municipal, is permitted by the Constitution. Such regulation does not constitute a taking of that property without the payment

significant in the nation's history; or (2) are associated with persons significant in our nations; or, (3) "embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction." 16 U.S.C. § 470 (Supp. 1979); 36 C.F.R. § 60.6 (1979). In the event any actual limitation on the use of buildings listed on the National Register should be enacted, therefore, aesthetic standards alone, as allowed by the registration system, would be at issue. *See also* Gray, *The Response of Federal Legislation to Historic Preservation*, 36 LAW & CONTEMP. PROB. 314 (1971), Hanslin, *Federal Framework For Historic Landmark Protection*, in PRACTICING LAW INSTITUTE, HISTORIC PRESERVATION LAW 31 (1979).

6. Although this comment does not discuss the argument that such ordinances are unconstitutionally vague, that issue merits some consideration. Whether a person of ordinary intelligence would be required to guess at the standards utilized in determining whether a building should be designated as a landmark and whether two persons would differ as to the application of those standards is very likely. *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 1098 U. PA. L. REV. 67 (1960). *See also* United States v. Diaz, 499 F.2d 113 (9th Cir. 1977) (Antiquities Act unconstitutionally vague). *Contra*, United States v. Smyer, 596 F.2d 939 (10th Cir. 1979) (Antiquities Act not unconstitutionally vague).

of just compensation so long as the regulation protects the public health, safety, or welfare. Some courts have held that aesthetic considerations alone are a valid basis for the exercise of the police power apart from the traditional categories. Other jurisdictions have held that protection of the public welfare includes aesthetics.

The problems inherent in extending the limits of the police power far enough to allow the state or locality to forbid certain uses of land merely on account of aesthetics are brought into particularly sharp focus by the recent wave of litigation concerning landmark preservation laws. This legislation, while not expressly labeled as zoning, has been treated by the courts as such.[7] Typically, such an ordinance establishes a board or commission which is authorized to designate a building or neighborhood as landmark property. Aesthetics alone may be the stated basis for a designation.[8] Generally, the ordinance forbids any destruction or modification of a designated building without the commission's approval. That approval may be granted or denied solely on the basis of aesthetic considerations.

While landmark preservation legislation has been challenged as effecting a taking without just compensation,[9] the current public enthusiasm for this preservation has successfully silenced the argument supporting aesthetic freedom to add to or modify such buildings. Rather, most challenges to state restriction of land use have taken aim at the deprivation of a landowner's fullest economic exploitation of the property.[10]

There are, however, two difficulties involved in the operation of preservation laws. First, designation of a building because of its aes-

7. *See* notes 76-80 *infra* and accompanying text.

8. *See, e.g.*, N.Y. GEN. MUN. LAWS § 96-a (McKinney 1977) and NEW YORK, N.Y., ADMIN. CODE ch. 8A, §§ 205-07, 534 (1976); CRESTED BUTTE, COLO., TOWN LAWS, ch. 15, art. 15-2, § 15-2-22 (1979).

9. *See* note 68 *infra* and accompanying text.

10. This paper focuses on the protection and preservation of buildings and architectural districts at least in part on account of their architectural or artistic significance. The problems accompanying legislation regarding monuments only because of their importance in the events of history is not discussed. In the decision that a building or neighborhood is architecturally significant and in any subsequent decision on modification, aesthetics play a major role. *See* notes 86-98 *infra* and accompanying text.

See generally Gertsell, *Needed: A Landmark Decision*, 8 URB. LAW. 213 (1976). Gertsell is of the opinion that the justification for landmark preservation is "exclusively or predominantly aesthetic in nature." *Id.* at 224. Gertsell concedes, however, that on a practical basis, the aesthetic considerations can be supported on other grounds. "Courts seem less reluctant to find an ordinance unconstitutional where the regulation imposes affirmative duties and appears to be aesthetically motivated." *Id.* at 225. He suggests that in aesthetics cases, courts should balance the various interests.

thetic virtues, alone, may be outside the scope of the police power. Second, denial of permission to alter a building merely because the proposed addition would violate the commission's notion of a structure's aesthetic merit may also be unconstitutional. Moreover, the prohibition on modern additions to privately owned historic structures is too often a ban on creativity as well as on full development of the economic value of the property. A state decision that yesterday's structure is beautiful, and that its alteration would impair or destroy its aesthetic integrity, is indeed one generation's feast which may poison another.

B. *What is Art?*

In *Bleistein v. Donaldson Lithographing Co.*,[11] Mr. Justice Holmes clearly set forth the danger inherent in judicial decisions that attempt to define art. Justice Holmes stated:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations. . . . [S]ome works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.[12]

When courts and legislative bodies have endeavored to determine what "art" is, their efforts have been reluctant and strained, to say nothing of unsatisfactory. Customs cases for example, which have been the most frequent source of such definitions, have treated "fine art" as a subset of all art.[13] At an early date, the Court of Customs and Patent Appeals developed the "representational test" for fine art in *United States v. Olivotti & Co.*[14] Under the representational test, sculpture qualified as a branch of the fine arts: carvings out of solid materials imitating natural objects, chiefly in human form, in realistic propor-

11. 188 U.S. 239 (1903).

12. *Id.* at 251. *See generally* 1 J. MERRYMAN & A. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 3-1 to 3-6 (1979). *See also* Derenberg & Baum, *Congress Rehabilitates Modern Art*, 34 N.Y.U.L. REV. 1228 (1959), in which the authors discuss the 1959 amendments to 19 U.S.C. §§ 1201, 1807. For a copyright definition of a work of art, as opposed to a useful article, see the 1976 Copyright Act, 17 U.S.C. § 101 (1976); Mazer v. Stein, 347 U.S. 201 (1954); J. MERRYMAN & A. ELSEN, LAW, ETHICS AND THE VISUAL ARTS, 3-7 to 3-29.

13. United States v. Perry, 146 U.S. 71 (1892).

14. 30 Treas. Dec. 586, 7 Ct. Cust. App. 46 (1916).

tions.[15] That definition of sculpture in terms of even a layman's view is inadequate and almost humorous. It was recognized as such when, in 1928, the famous Brancusi "Bird in Flight" case was decided.[16] Customs officials had challenged sculptor Constantin Brancusi's claim that his bronze work "Bird in Flight," a classic piece of abstract sculpture, was a work of art. The customs officials considered it a "manufacture of metal." The Customs Court, recognizing the need to alter the representational test handed down in *Olivotti*, stated:

> [That] decision was handed down in 1916. In the meanwhile there has been developing a so-called new school of art, whose exponents attempt to portray abstract ideas rather than to imitate natural objects. Whether or not we are in sympathy with these newer ideas and the schools which represent them, we think the fact of their existence and their influence upon the art world . . . must be considered.[17]

In very significant language, the Customs Court concluded that the sculpture was a work of art.

> It is beautiful and symmetrical in outline, and while some difficulty might be encountered in associating it with a bird, it is nevertheless pleasing to look at and highly ornamental.[18]

The inadequacy of the representational test is a superb example of the inability of courts and legislatures to determine what is aesthetically pleasing. Human creativity and taste are ever changing processes, requiring room for growth. Hence, any efforts by bodies of law to set precise standards on a process so constantly and necessarily changing is impossible and arguably beyond the proper spheres of the judiciary and legislature.[19]

III. AESTHETICS IN LAND-USE REGULATION

The major problem with permitting aesthetics to serve as a basis for land use regulation is the fluid meaning of "aesthetics." The very meaning of the word "aesthetics" is unclear to most people. The word derives from the Greek word "α'εσθησις" which means perception.[20] Originally, the term "aesthetics" did not mean beauty to the exclusion of ugliness. The Oxford English Dictionary defines "aesthetic" simply

15. *Id.* at __, 7 Ct. Cust. App. at 48.
16. Brancusi v. United States, T.D. 43063, 54 Treas. Dec. 428 (1928).
17. *Id.* at 430-31.
18. *Id.* at 431.
19. *See* note 166 *infra* and accompanying text.
20. *See generally* W. BATES, PLATO'S VIEW OF ART, 32-62 (1972).

as criticism of taste as a science of philosophy, though a second meaning of the word is "of or pertaining to the appreciation or criticism of the beautiful."[21] Webster's New International Dictionary explains "aesthetics" as a branch of philosophy "dealing with beauty or the beautiful, especially in the fine arts; a theory or the theories of beauty."[22]

The law with respect to zoning for aesthetic reasons alone has changed. Until the 1920's, United States courts staunchly held that zoning for the sole purpose of aesthetics was invalid.[23] Around the turn of the century, judicial abhorrence of land use regulation solely for aesthetics was at its peak. In *Welch v. Swasey*,[24] two Massachusetts statutes limited the height of buildings in Boston but distinguished between residential and commercial buildings mainly on aesthetic grounds. The *Welch* Court held aesthetics alone to be an unconstitutional basis for land use regulation.[25] The Court, however, was uncomfortable with the issue and stated that the presence of an aesthetic basis for the ordinance would not invalidate it.[26]

Zoning itself came before the Supreme Court in 1926, when, in *Village of Euclid v. Ambler Realty Co.*,[27] the Court held that zoning was a constitutional exercise of the police power. One year later, in *Gorieb v. Fox*,[28] the Supreme Court upheld set-back regulations in residential areas of Roanoke, Virginia. The Court responded to the argument that due process had been denied by relying upon *Euclid*, implying but not stating that set-back requirements were within the traditional limits of the police power as were light and air regulations.[29]

The cases dealing with zoning for aesthetics appear to fall into three broad categories: zoning for public health and welfare; zoning for purely aesthetic considerations; or, zoning for reasons not entirely aesthetic.[30] Typically, judicial rejection of purely or predominantly aesthetic zoning has been based upon the fact that, although public

21. 1 OXFORD ENGLISH DICTIONARY 147-48 (rev. 1970).
22. WEBSTER'S NEW INTERNATIONAL DICTIONARY 42 (2d ed. unabr. 1950).
23. *See, e.g.*, St. Louis v. Hill, 116 Mo. 527, 22 S.W. 861 (1893).
24. 214 U.S. 91 (1909).
25. *Id.* at 107. According to one author, this case is the origin of the legal fictions in which courts must indulge to uphold aesthetic regulations. *See* Crumplar, *supra* note 1, at 625.
26. 214 U.S. at 108. *See also* Lucking, *The Regulation of Outdoor Advertising: Past, Present and Future*, 6 ENVT'AL AFFAIRS 179, 183 (1977).
27. 272 U.S. 365 (1926).
28. 274 U.S. 603 (1927).
29. *Id.* at 609.
30. *See generally* Lucking, *supra* note 26, at 660-67.

health, safety, and morals may be at least reasonably safeguarded by legislation, precise aesthetic standards are not susceptible of majority or reasonable determination, at either the drafting or litigation stage.[31]

In *People v. Stover*,[32] a recent case setting forth the extremes of judicial opinion on aesthetic considerations in zoning, the New York Court of Appeals upheld an ordinance prohibiting the erection and maintenance of clotheslines in front or side yards abutting streets.[33] The majority held that zoning ordinances based in part on aesthetics were subject to scrutiny only according to the rationality of the method chosen to achieve an attractive, prosperous, efficiently functioning community. Although the court noted that aesthetics were a proper legislative concern,[34] it acknowledged the city's argument that the clothesline prohibition was intended to provide clear visibility on streets and thereby reduce accidents,[35] and noted that some cases may go too far in the name of aesthetics.[36] The court did, however, stop short of ruling that ordinances based solely on aesthetics were constitutional.

Judge Van Voorhis, dissenting, found that the ordinance was unrelated to the public safety, health, morals, or welfare.[37] Rather, the dissent believed that the ordinance was based solely on aesthetics.[38] Reasoning that aesthetic considerations alone were an unconstitutional basis for upholding zoning ordinances, the dissent correctly noted the inability of a legislative body to determine what is aesthetically pleasing. More significant, however, is the acknowledgment by the dissent that courts have deliberately struck down zoning ordinances based solely on aesthetics because of a proper fear of governmental trespass on the human personality.[39]

A. *Billboards and Aesthetics*

The area of the law in which land use regulation for aesthetic considerations has experienced the greatest development is in cases up-

31. *See, e.g.*, City of Youngstown v. Kahn Bros. Bldg Co., 112 Ohio St. 654, 661, 148 N.E. 842, 844 (1925).

32. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963).

33. The case is noted by Anderson, *Regulation of Land Use for Aesthetic Purposes—An Appraisal of* People v. Stover, 15 SYRACUSE L. REV. 33 (1964).

34. 12 N.Y.2d at 466-67, 191 N.E.2d at 274-75, 240 N.Y.S.2d at 737-38.

35. *Id.* at 466, 191 N.E.2d at 274, 240 N.Y.S.2d at 736-37.

36. *Id.* at 468, 191 N.E.2d at 275, 240 N.Y.S.2d at 738.

37. *Id.* at 472, 191 N.E.2d at 278, 240 N.Y.S.2d at 742. (Van Voorhis, J., dissenting).

38. *Id.* at 470, 191 N.E.2d at 278, 240 N.Y.S.2d at 742.

39. *Id.* at 472, 191 N.E.2d at 278, 240 N.Y.S.2d at 742.

holding billboard prohibitions or restrictions.[40] The early billboard decisions involved ordinances and statutes that contained set-back requirements and size and location restrictions. These decisions rejected such legislation as unconstitutional when it appeared to be based either too heavily or exclusively[41] on aesthetics. Within the past fifteen years, however, an increasing number of jurisdictions have acknowledged aesthetics as a valid purpose for the regulation of billboards.[42]

There appear to be two methods by which aesthetic considerations have been utilized as a valid basis for billboard regulation. The first approach is the admixture of aesthetics into the safety purpose.[43] This approach is a utilization of the traditional safety goals of the police power because billboards can easily distract drivers and pedestrians and cause traffic accidents. The partial judicial utilization of aesthetics, in conjunction with the police power, in upholding the billboard regulation is, therefore, nothing more than finding a bonus in the plan.[44]

The second approach to billboard regulation is purely aesthetic and takes the form of highway beautification and preservation of scenic beauty. This approach to billboard regulation and aesthetics is more troublesome. It is, however, becoming an acceptable rationale in many jurisdictions.[45] A recent example of such a case upholding aesthetics as the sole basis for billboard regulation is *Westfield Motor Sales Co. v. Town of Westfield.*[46] In that case, the court held that zoning solely for aesthetics is not outside the scope of the police power.[47] The court went even further and stated that such action need not be clothed in the legal

40. *See generally* Comment, *The Truth About Beauty: The Changing Role of Aesthetics in Billboard Legislation*, 9 ENVT'L L. 113 (1978) [hereinafter cited as *The Truth About Beauty*].

41. *Id.* at 122. *See, e.g.*, City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842 (1925). *See also* General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930).

42. *See generally The Truth About Beauty*, *supra* n. 40. *See also* note 166 *infra*.

43. *See, e.g.*, H.A. Steen Indus., Inc. v. Cavanaugh, 430 Pa. 10, 241 A.2d 771 (1968). On scenic beauty see E.B. Elliot Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir.), *appeal dismissed*, 400 U.S. 805 (1970).

44. The bonus is often more than aestetic improvement. The Highway Beautification Act, 23 U.S.C. §131 (1976), declares that outdoor signs near interstate highways should be controlled to promote recreational and safety values and natural beauty. States which fail, by legislation, to prevent the construction of outdoor signs within 660 feet within the right of way lose ten percent of their highway funds. *See generally* Lucking, *supra* note 26; Proffit, *Public Esthetics and the Billboard*, 16 CORNELL L.Q. 151 (1931); Comment, *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81 (1964); *The Truth About Beauty*, *supra* note 40; Notes and Comments, *City-wide Prohibition of Billboards: Police Power and the Freedom of Speech*, 30 HASTINGS L.J. 1597 (1979).

45. *See generally* Lucking, *supra* note 26; *The Truth About Beauty*, *supra* note 40.

46. 129 N.J. Super 528, 324 A.2d 113 (1974).

47. *Id.* at __, 234 A.2d at 122.

raiment of traditional, nonaesthetic police power. The court said simply that the time had come to set the need for subterfuge aside. The court's reasoning was primarily that modern times and trends indicate that planning and zoning are basically aesthetic in nature,[48] and that once aesthetic zoning per se is accepted, it may be reviewed for its reasonableness.[49] Other jurisdictions which accept aesthetics as a legitimate basis for billboard regulation, without more,[50] concentrate on the reasonableness of the regulation.[51] These jurisdictions are, however, a distinct minority.[52]

B. *Berman v. Parker*

Berman v. Parker[53] remains as the latest word from the Supreme Court on aesthetics in land use regulation. In *Berman*, the issue was whether Congress, acting as the local government of Washington, D.C., could take, by eminent domain, an entire area of privately owned buildings for destruction in an urban redevelopment program. The aesthetic question involved in *Berman*, therefore, was beautification by destruction of old buildings. The following words of Justice Douglas, writing for the majority, are routinely quoted by those who argue for including aesthetic considerations among the proper objects of the police power.

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the

48. *Id.* at __, 234 A.2d at 120.

49. *Id.* at __, 234 A.2d at 122. *See also* Miami Beach v. First Trust Co., 45 So. 2d 681 (Fla. 1949); John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 339 N.E.2d 709, 716-21 (Mass. 1975).

50. *See, e.g.*. Modjeska Sign Studies, Inc. v. Berle, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977), *appeal dismissed*, 439 U.S. 809 (1978); Suffolk Outdoor Advertising Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed*, 439 U.S. 808 (1978).

51. *See The Truth About Beauty*, *supra* note 40, at 128.

52. *Id.* at 127. These jurisdictions include: Florida, Merrit v. Peters, 65 So. 2d 861 (Fla. 1953); Hawaii, State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967); Kentucky, Moore v. Ward, 377 S.W.2d 881 (Ky. 1964); Massachusetts, Joe Donnelly & Sons v. Outdoor Advertising Board, 369 Mass. 206, 339 N.E.2d 709 (1975); New Jersey, 129 N.J. Super. 528, 324 A.2d 113 (1974); New York, Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

53. 348 U.S. 26 (1954).

> present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[54]

Prevention of further deterioration of a slum is a safety and health consideration.[55] *Berman*, however, does not stand for the proposition that aesthetics, in the absence of other police power considerations, will sustain an ordinance against a constitutional challenge.

Even more important is the fact that one generation after *Berman*, the issue of beautification of our nation's cities is seen in terms of preserving, not leveling, old buildings.[56] The fact that the very method of beautification of the community deemed appropriate in the 1950's is now abhorrent to most communities in the United States,[57] vividly illustrates the principle that aesthetic regulation of land use is a problem that is not susceptible of precise standards and unchanging values. What remains of the aesthetics holding in *Berman* after the Supreme Court's decision in *Penn Central Transportation Co. v. City of New York*[58] is only the proposition that beauty may be imposed by legislation.

IV. THREE RECENT CASES

A. *Penn Central: Not Zoning for Aesthetics*

Advocates of historic preservation have long awaited a decision of the United States Supreme Court upholding a municipal ordinance authorizing the designation and preservation of landmark property. In 1978 the Supreme Court, in *Penn Central Transportation Co. v. City of New York*,[59] upheld the application of New York City's landmarks or-

54. *Id.* at 33 (citation omitted).

55. *Id.* at 34-35. *See also* Citizens Defense Fund v. Gallagher, Cv-78-63-Bu (D. Mont., filed 3 Nov. 1978) (Findings of Fact,Conclusions of Law, and Order).

56. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). *See also* note 166 *infra* and accompanying text.

57. The majority in *Penn Central* acknowledged "the widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody the precious features of our heritage, they serve as examples of quality for today." 438 U.S. at 108.

58. *Id.* at 104.

59. NEW YORK, N.Y. ADMIN. CODE ch. 8A, §§ 205-07 (1976). New York's Enabling statute grants the authority to designate landmarks in New York City to the Landmarks Preservation Commission. N.Y. GEN. MUN. LAW § 96-a (McKinney 1977). The Commission, as required by the Ordinance, is comprised of at least three architects, one historian, one city planner or land-

dinance to prevent the construction of an office tower atop Grand Central Terminal.[60] While that case appears to be the decision validating the regulation of designated landmark sites, it failed to decide the aesthetics issue.

Grand Central Terminal, designed by Reed and Stern, and Warren and Wetmore, was built in 1913. In 1967 it was designated a New York City Landmark, which required the approval of the New York City Landmarks Commission (Commission) of any plans for alteration of its exterior.[61] In 1968, Penn Central Transportation Company, the owner of Grand Central, leased the development rights of the building to UGP Properties, Inc., for construction of a fifty-five story tower atop the Terminal. Immediately thereafter, Penn Central submitted two plans to the Landmarks Commission (Breuer I and Breuer II Revised). Breuer I proposed the construction of a fifty-five story tower while Breuer II proposed a fifty-three story building involving even more alteration of the Terminal's facade than did the first.[62] Both plans were rejected by the Commission, which refused to issue either a certificate of no effect or a certificate of appropriateness.[63] At this juncture, Penn

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scape architect, one realtor, and at least one resident of each New York City borough. NEW YORK, N.Y. ADMIN. CODE ch. 8A § 534 (1976).

60. *See generally* Marcus, *The Grand Slam Grand Central Terminal Decision: A Euclid for Landmarks, Favorable Notice for TDR and A Resolution of the Regulatory/Taking Impasses*, 7 ECOLOGY L.Q. 731 (1979); Note, *From Zoning to Landmark Preservation: The Grand Central Terminal Decision Signals A Shift In Land Use Regulation*, 25 N.Y.L. SCH. L. REV. 39 (1979); Note, *Important Victory Won For Historic Preservation*, 19 NAT. RESOURCES J. 385 (1979); *Penn Central Transportation Company v. City of New York: Landmark Preservation Eludes the "Taking" Clause*, 14 NEW. ENG. L. REV. 317 (1978); *Penn Central Transportation Co. v. City of New York: Landmark Designation; Legitimate Preservation or Unconstitutional Taking*, 25 LOY. L. REV. 205 (1979); *Historic Preservation by Means of Landmark Designation. Penn Central Transportation Co. v. New York City* [*sic*], 30 S.C.L. Rev. 825 (1979).

61. NEW YORK, N.Y. ADMIN. CODE ch. 8A, § 207-2.0(a) (1976) sets forth the procedure for landmark designation. The Commission's written designation, subsequent to a public hearing, is filed with the New York City Board of Estimate, which may approve a designation, or modify one within 90 days. N.Y. CIV. PRAC. LAW §§ 7801-06 (McKinney 1963) provides judicial review of designations, to consider arbitrariness, caprice, or violation of law or procedure.

62. For discussion of both Breuer plans, see Huxtable, *The Stakes are High for All in Grand Central Battle*, N.Y. Times, April 11, 1969, at 28, col. 4; Huxtable, *Grand Central at the Crossroads*, N.Y. Times, Jan. 29, 1978, § 2, at 25, col. 4. It is important to note that the original plans of 1913 proposed a 20-story office tower over the Terminal. 438 U.S. at 104, 115 n.15.

63. A certificate of no effect would authorize alteration as having no detrimental effect on the landmark site. New construction on a site requires a showing of no "effect not in harmony with the external appearance" for a certificate; mere alteration requires proof the work will not destroy, change or "affect any architectural feature." NEW YORK, N.Y., ADMIN. CODE ch. 8A, § 205-5.0(1) (1976).

Certificates of appropriateness are also available if the owner can show economic hardship resulting from the designation. NEW YORK, N.Y. ADMIN. CODE. ch. 8A, § 207-08.0 (1976). Grand Central Terminal was, however, a partially tax exempt railway station, which class of property, unlike certain other partially tax exempt sites, is not eligible for such a certificate. N.Y. REAL

Central was entitled to judicial review,[64] but did not seek it.[65] Instead, the Company brought suit against New York City, charging it with an unconstitutional application of the landmarks ordinance to Grand Central Terminal.

The trial court held that the application was an unconstitutional taking.[66] The Appellate Division reversed, finding that Penn Central had failed to show a deprivation of all reasonable beneficial use of the Terminal.[67] The New York Court of Appeals affirmed that decision, finding that the application of the ordinance was within the restrictions imposed by a "pure due process" analysis of the Constitution.[68] On grounds different from those utilized by the lower courts, the United

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PROP. TAX LAW § 489 (McKinney Supp. 1977). A certificate of appropriateness requires the Landmarks Commission to consider the effect the plan will have upon the "protection, enhancement, perpetuation and use" of the exterior portions with "a special character or special historical or aesthetic interest or value." NEW YORK, N.Y., ADMIN. CODE ch. 8A, §§ 207-6.0(c), (d).

64. *See* note 61 *supra* and accompanying text.

65. 438 U.S. at 118. Approval of the Breuer plans involved aesthetic considerations alone. Penn Central could only have argued economic hardship, a course not open to them owing to the prohibition with respect to partially tax exempt railroad stations. *See* note 63 *supra*. On the aesthetic considerations, see notes 86, 90-92 *infra* and accompanying text. Penn Central failed to seek judicial review of the certificate denials. *See* 438 U.S. at 132-33.

Also, the transferrable and other development rights were available to the owner. Transferrable development rights (TDRs) enable the owner to transfer the right to develop property designated as a landmark to adjacent lots in certain districts, with numerous provisions. These were available to Penn Central in the Grand Central case. 438 U.S. at 114-15. On TDRs *see generally* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Costonis, *Development Rights Transfers: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Marcus, *Air Rights Transfers in New York City*, 36 LAW & CONTEMP. PROB. 372 (1971); Note, *The Unconstitutionality of Transferrable Development Rights*, 84 YALE L.J. 1101 (1975); Note, *Development Rights Transfers in New York City*, 82 YALE L.J. 338 (1972).

Dictum in the Supreme Court's opinion makes a significant statment: "[S]ince appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the air space above the terminal." 438 U.S. at 137. The Court also reasoned that TDRs were available to Penn Central in at least eight nearby occasions. The Court noted in dictum, however, that TDRs would not be just compensation in the case of a taking. They are a mitigating factor in regulatory cases. *Id.* In noting the possibility of a 20-story office tower, the Court referred to the original architectural plans for the Terminal. *Id.* at 137 n.34. Also, a large percentage of single building landmarks are public and, therefore, immune from the constitutional issue raised here, as the dissent indicates. *Id.* at 138 n.1. The majority, however, disputed this proposition.

66. Penn Central Transp. Co. v. City of New York, N.Y.L.J., Jan. 23, 1975, at 16, col. 4, *rev'd*, 50 App. Div. 2d 265, 377 N.Y.S.2d 20 (1975), *aff'd*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978).

67. 50 App. Div. 2d 265, __, 377 N.Y.S.2d 20, 29 (1975), *aff'd*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978). The Appellate Division reasoned that the restriction was necessary and that the only deprivation Penn Central had suffered was that of the *most profitable use* of the property. 50 App. Div. 2d at __, 377 N.Y.S.2d at 29.

68. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978). For an excellent review of the three part analysis used, see Comment, *Grand Central Terminal and the New York Court of Appeals: "Pure" Due Process, Reasonable Return, and Betterment Recovery*, 78 COLUM. L. REV. 134 (1978).

States Supreme Court, in a six to three decision, affirmed[69] the decision of the New York Court of Appeals.

The majority opinion, written by Mr. Justice Brennan, stated the two issues presented: first, whether the use restrictions imposed on the owners by the ordinance effected a taking for public use within the meaning of the fifth amendment; and second, if so, whether just compensation had been paid.[70] The Court ruled that there was no taking in violation of the fifth and fourteenth amendments[71] and, therefore, found it unnecessary to rule on the second issue. The Court determined that the application of the ordinance was substantially related to the welfare of the community, that it permitted reasonable beneficial use of the landmark site, and that it afforded the owner an opportunity to further enhance the property.[72]

Contrasting the opinion of the majority with that of the dissent serves to illustrate the problem to which judicial attention must be addressed before satisfactory disposition of the aesthetics issue in regulation of historic landmarks may be accomplished. The majority found this ordinance to be valid within the limits of the police power because it furthered "the general welfare."[73] The dissent, on the other hand, made no mention of the general welfare. Instead, it strictly confined the police power, allowing it only to abate noxious or dangerous uses of land.[74] The majority relied heavily upon zoning ordinances for support, and likened the landmarks ordinance to zoning and regulation for the general welfare even though it refused to equate the two. The dissent, however, dealt quite differently with zoning, relying upon *Penn-*

69. 438 U.S. 104. The taking issue, while of major importance in the decision, is not the focus of this comment. The Supreme Court held that Penn Central's right to develop the air space above the building had not been taken in violation of the fifth and fourteenth amendments because Penn Central had not been deprived of all reasonable use of the parcel. *Id.* at 135-37. The dissent sharply criticized the majority's test which focused upon the severity of the impact. The dissent neatly structured its argument, finding first, that what had been taken was "property," second, that there had been a taking under the test used in United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945), and third, that a full and perfect equivalent had not been paid. 438 U.S. at 142-50 (Rehnquist, dissenting). For discussions of that matter, *see generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-2 to 9-4 (1978); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976); Costonis, *"Fair" Compensation and the Accomodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

70. 438 U.S. at 122.

71. *Id.* at 138.

72. *Id.* at 129.

73. *Id.* at 138.

74. *Id.* at 143-46 (Rehnquist, J., dissenting).

sylvania Coal Co. v. Mahon[75] for the proposition that noninjurious uses may be prohibited without effecting a taking if the prohibition applies to a broad section of land and thereby distributes the benefit and cost of the prohibition. In essence, then, the dissent in *Penn Central* severely limited the constitutionality of land use regulation. This was accomplished by making zoning—generally accepted as a legitimate exercise of the police power—an exception to the prohibition against taking without just compensation. Such taking is permitted because of the mutual advantage and burden for those affected by it.

A major difficulty in *Penn Central* is the precise nature of the legislation at issue. As stated earlier, the Supreme Court was divided on the question of whether the landmarks ordinance was similar to zoning or whether it dealt with zoning at all. The majority's statement that the ordinance is a valid exercise of the police power does little to shed light on the appropriate standard for measuring the reasonableness of such ordinances. What then is that standard? The New York Court of Appeals stated that *Penn Central* was "not a zoning case. In many ways, the restrictions imposed on the use of the property are similar to zoning restrictions, but the purposes are different, and in determining whether regulation is reasonable, the purposes behind the regulation assume considerable significance."[76] Yet, the New York Court of Appeals did not say what types of legislation the ordinance is.

The United States Supreme Court distinguished this type of ordinance from a zoning ordinance by a subtlety only, doing so in response to Penn Central's argument that New York City's regulation of isolated landmarks differs from zoning or historic district regulation.[77] The Court simply relied on zoning cases, and likened this one to a zoning case[78] but preserved a distinction.

The dissent provided a full discussion of zoning, finding that this case involved zoning "only in the most superficial sense of the word."[79] Mr. Justice Rehnquist, who wrote the dissent, criticized the majority's reasoning. He rejected the majority suggestion that because traditional zoning results in some limitation of property use then New York's landmark preservation ordinance should be upheld to represent the ul-

75. 260 U.S. 393, 415 (1922).
76. 42 N.Y.2d 324, 329, 366 N.E.2d 1271, 1274, 397 N.Y.S.2d 914, 917 (1977), *aff'd*, 438 U.S. 104 (1978). *See id.* at 136 n.2.
77. 438 U.S. at 125.
78. *Id.* at 125-28, 132, 135 n.32.
79. *Id.* at 139-41.

timate in treating different things as alike. He also warned that the rubric of zoning is insufficient to avoid the limits of the fifth amendment.[80]

To satisfy the dissent, the constitutionality of the ordinance should have been tested by stricter scrutiny of the terms "property," "taken," and "just compensation."[81] Believing that the majority failed to meet its obligation to analyze fully the eminent domain cases decided by the Court,[82] the dissent examined takings by contrast to the "nuisance exception to the taking guarantee."[83] The test the dissent applied was whether the forbidden use would endanger the safety, health, or welfare of others.[84] The New York City ordinance does indeed fail this test.

> Appellees are not prohibiting a nuisance. The record is clear that the proposed addition to the Grand Central Terminal would be in full compliance with zoning, height limitations, and other health and safety requirements. Instead, appellees are seeking to preserve *what they believe to be* an outstanding example of beaux arts architecture. Penn Central is prevented from further developing its property *basically because it did too good of a job in designing and building it.* The City of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.[85]

1. Aesthetics and the Designation

The point raised in the dissenting opinion that the building is "too good" deserves serious consideration, particularly in light of the opposition that all landmarks ordinances inevitably face from an owner of commercial property.

The New York City ordinance, particularly as it affected Grand Central Terminal upon its designation as a landmark, gives a major role to aesthetic considerations. At least arguably, it goes beyond the safe limits of the earlier cases upholding challenges to preservation of beautiful, historic structures.[86] Each court in the *Penn Central* case

80. *Id.* at 140.
81. *Id.* at 142.
82. *Id.* at 142 n.4.
83. *Id.* at 145.
84. *Id.*.
85. *Id.* at 145-46 (emphasis added).
86. NEW YORK, N.Y., MUN. CODE, ch. 8A, § 207-2.0 provides that the Landmarks Commis-

paid more than lip service to the aesthetic importance of the building. The Appellate Division labeled Grand Central Terminal a "splendid edifice and a major part of the cultural and architectural heritage of New York City."[87] The Court of Appeals deferred to the determination of the Appellate Division that the significance of the architectural design was great and that it was an excellent example of comprehensive urban design.[88] The United States Supreme Court described Grand Central Terminal as one of the most renowned buildings in New York, a magnificent example of French Beaux Arts architecture.[89]

The courts were not the only bodies impressed by the Terminal's architecture. The Landmarks Commission relied upon the building's aesthetic qualities in making the designation,[90] and also explained that the rejection of Breuer II Revised was for aesthetic reasons. The Commission stated that although it had no rule against additions to designated buildings, the approval of such additions was dependent upon whether the proposed addition is consistent with the original architecture of the structure. The Landmarks Commission did recognize that suggested changes in the Terminal's entrances would improve pedestrian access and be an acceptable means of both perpetuating the use of the building and protecting its exterior.[91] The Commission was unwilling, however, to accept a modification of the Terminal that it deemed inconsistent with the architecture of the existing structure.

> [T]o balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an *aesthetic joke*. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The "addition" would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.[92]

The Commission also found that landmarks cannot be divorced from dramatic settings, saying that alterations must "protect, enhance and

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sion has the power to designate landmarks in order to effectuate the purpose of the law, set out at § 205-1.0, where the ordinance states that many buildings have "special character or a special historical or aesthetic interest or value." *Id.* at § 205-1.0(a) and (b).

87. 50 App. Div. 2d at __, 377 N.Y.S.2d at 25.

88. 42 N.Y.2d at 328, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916.

89. 438 U.S. at 115.

90. See note 161 *infra* and accompanying text.

91. 50 App. Div. 2d at __, 377 N.Y.S.2d at 31.

92. 438 U.S. at 117-18 (quoting the Record at 2251) (emphasis added). The Supreme Court also cited the Commission's response to Breuer II Revised: "To protect a landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off." *Id.* at 117 (*quoting* the Record at 2255).

perpetuate the original design rather than overwhelm it."[93]

The "aesthetic joke" foreseen by the Commission was vigorously challenged by Justice Lupiano's dissent in the Appellate Division. He noted that Marcel Breuer & Associates is a distinguished, award-winning architectural firm which designed the lauded Whitney Museum in New York City, the Department of Housing and Urban Develoment Headquarters Building in Washington, D.C., and other famous edifices.[94] Justice Lupiano also noted that the proposed tower was not inconsistent with the original plans for the twenty-story office tower, the pillars for which are part of the Terminal as it now stands. The dissent was also aware that the removal of certain shops and outdoor advertisements on Forty-Second Street and the creation of a pedestrian arcade by the plan would considerably enhance the exterior of the Terminal by quieting and dignifying its base. Thus, the dissent concluded that the addition of an office tower above the Terminal would not result in the aesthetic joke foreseen by the Landmarks Commission.

2. Two Inconsistent Styles: An Aesthetic Joke?

The historic distaste in American jurisprudence for any exercise of the police power based purely on aesthetic considerations is founded upon reasons uniquely underscored by the Grand Central Terminal case. To parallel the phrase that one man's meat is another man's poison, Beaux Arts architecture is neither better nor worse than Marcel Breuer's modern designs.

More sensitive, of course, though much more easily disposed of by the various courts in the *Penn Central* case by deference to the decision of the Landmarks Commission,[95] is the question of intolerable incon-

93. *Id.* at 118.

94. That designs by Marcel Breuer are themselves "landmarks" is one of the many ironies of the *Penn Central* decision. Marcel Breuer, whose brilliant career began in Das Staattiche Bauhaus formed by Walter Gropius in 1919, designed furniture in his early career. His famous tubular steel armchair of 1925 can be seen in the Museum of Modern Art to which it was donated by Herbert Bayer. In 1937 Breuer joined the Harvard faculty and in 1941 formed his own architectural firm. His accomplishments, to name only a few, include: House II, New Canaan, Connecticut, 1951; Lecture Hall, New York University, Bronx, New York, 1961; St. John's Abbey and University, Collegeville, Minnesota, (together with Hamilton Smith), 1953-63; UNESCO Building, Paris, (together with Bernard Zehrfuss and Pier Luigi Nervi), 1958; Whitney Museum of American Art, New York, 1966.

95. NEW YORK, N.Y., ADMIN. CODE, ch. 8A, § 207-6.0(b)(2) lists those factors governing issuance of a Certificate of Appropriateness. "In appraising such effects and relationship [of the proposed to the existing portions of the building], the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color." *Id.* Such language, particularly when used to deny a property owner the right to add the design of an esteemed

sistency between the two styles of architecture. The protection of the already built style from the admixture, or superimposition, of another was never questioned as a purely aesthetic exercise of the police power. Only in its complaint to the New York District Court did Penn Central directly address the valid aesthetics issue.

> The landmark character of the terminal is highly debatable and at best doubtful. The aesthetic quality of the south facade is obscured by its engulfment among narrow streets and high-rise buildings. It is hardly seen at all except for a short distance to the south on Park Avenue. . . . Moreover, the terminal is set against the backdrop of the harsh and contrasting lines of the Pan-Am building which appears to hang over the terminal and dwarf it.[96]

As subsequent cases have begun to reveal,[97] land use regulation on aesthetic grounds may become the primary issue in cases dealing with landmark preservation laws. Courts may be forced to decide which style is more beautiful, the old or the new, and whether any new style is as beautiful as the old. Aside from the fact that such determinations are almost impossible for any court to make, decisions of this sort should never come before public tribunals. Indeed, if landmark ordinances were "improved"[98] so as to foreclose post-designation confrontations on purely aesthetic grounds, these disputes would not find their way into the courts.

3. The Issue Is Undecided

In upholding the decision of the Appellate Division, the Court of Appeals issued dictum of key significance in explaining some of the irregularities of this case:

> In times of easy affluence, preservation of historic landmarks through the use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future. . . . The statute needs improvement.[99]

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modern architect, might well be challenged as arbitrary. Measured by any set of standards used in evaluating the constitutionality of zoning laws, such factors might be found disproportionately aesthetic and open to many different reasonable interpretations.

96. Appellant's Complaint at para. 20.

97. *See* notes 110-29 *infra* and accompanying text.

98. *See* note 99 *infra*.

99. 42 N.Y.2d at 337, 366 N.E.2d at 1278, 397 N.Y.S.2d at 922.

The Court of Appeals thus excused the inadequacies of the ordinance because of the inability of the City of New York to pay just compensation.

The principal deficiency in the *Penn Central* case can be found in the Supreme Court's unspoken utilization of aesthetic considerations. The undercurrent of the Court's rationale indicates that aesthetics can play a major role in landmark designation and regulation. Yet, the Court failed to pronounce that aesthetics were valid in such a role. The Court accounted for its acquiescence by stating:

> [T]he related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective because it is basically a matter of taste," . . . has a particularly hollow ring in this case. For appellants not only did not seek judicial review of either the designation or of the denials of the certificates of appropriateness and of no exterior effect, but do not even now suggest that the Commission's decisions concerning the Terminal were in any sense arbitrary or unprincipled. But, in any event, a landmark owner has a right to judicial review of any Commission decision, and, quite simply, there is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.[100]

The facts in the case reveal that the Terminal was designated a landmark site on August 2, 1967, after the Commission found that the architecture and other features had a special character, historical and aesthetic interest, and value as part of the development, heritage, and culture of New York City. The Commission also found that Grand Central Terminal is a magnificent example of French Beaux Arts architecture;[101] one of the great buildings of America, because it combined the practicalities of solving a difficult problem with the artistic splendor of its architecture and that as an American railroad station it is unique.[102] In its report, the Commission stated that Grand Central

100. 438 U.S. at 132-33 (footnote and citation omitted).

101. See notes 85 and 92 *supra* and accompanying text. *See also* P. GOLDBERGER, THE CITY OBSERVED: NEW YORK (1979) where the author states that Warren & Wetmore, the distinguished Beaux-Arts firm, was brought in to add "a touch of class to the project," *Id.* at 124, which Reed & Stem had designed. The facade is largely the work of Whitney Warren. The sculpture group at the center of the facade is the work of sculptor Jules Coutan. *Id.* at 124-25.

102. 50 App. Div. 2d at __, 377 N.Y.S.2d at 23, 25. It is extremely important to note that Penn Station, which imitated the Baths of Caracalla in Rome, was destroyed in the 1960's. It is gener-

Terminal evokes a special spirit and that its style "represents the best of the French Beaux Arts." Clearly, these are conclusions of an aesthetic character. Aesthetic considerations and conclusions, therefore, prevented the development rights from being utilized to their fullest, and most beneficial, extent.

Had Penn Central argued that the landmarks ordinance was, in the designation phase and in the prohibition of an addition phase, regulation of land use solely on aesthetic grounds rather than yield on the point that aesthetics and history are valid reasons for land use regulation,[103] the issue would have received more attention and perhaps have been decided. Furthermore, the Court avoided the zoning for aesthetics problem by merely likening the ordinance to zoning but failing to equate the two.[104] Only in its complaint did Penn Central assert that the Commission's standards were inadequate, and that regulations for the "aesthetic good" are unconstitutional.[105] Before the Supreme Court, however, Penn Central "ma[de] no assertion that the preservation of a building of historical or aesthetic importance is not an appropriate objective of governmental action in pursuit of the public welfare."[106]

The city did not fail to avail itself of Penn Central's concession on the appropriateness of such legislation.[107] Citing cases wherein constitutional regulations of land use to protect the "quality of life" were held to include legislation "for aesthetic and other similar purposes," the city contended that the preservation of landmarks is "directly related to the economic and cultural vitality of the City."[108] Yet, careful examination of that accepted view reveals that it is structured upon cases dealing with neighborhoods that are dependent upon tourist trade. Retention of the economic vitality of these areas can only be achieved through operation of a landmarks ordinance which preserves their quaintness and charm.[109] Single building landmarks present very

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ally acknowledged to have been the more beautiful of the two major railroad stations in New York City. The Appellate Division noted, also, that Congress has declared its policy to be preservation of historic passenger railroad terminals such as Grand Central in the Amtrak Improvement Act of 1974, 49 U.S.C. § 1653 (Supp. 1979). 50 App. Div. 2d at __, 377 N.Y.S.2d at 25.

103. 438 U.S. at 147 n.10 (Rehnquist, J., dissenting).

104. See notes 77-78 *supra*.

105. Appellant's Complaint at para. 38.

106. Appellant's Jurisdictional Statement at 11. Both the majority and the dissent note this. 438 U.S. at 129, 132, 147 n.10.

107. Appellee's Brief at 20. (citing Appellant's Brief at 12, 22-23).

108. *Id.* at 21-23.

109. *See, e.g.*, NEW ORLEANS, LA., VIEUX CARRE ORDINANCE No. 14,538 CCS (1937) which

different issues.

B. *The City of Paris: Not a Landmark*

A case similar to *Penn Central* is currently working its way through the California courts. *Foundation For San Francisco's Architectural Heritage v. City and County of San Francisco*[110] involves a dispute over the destruction of the four-story City of Paris Building in San Francisco and its replacement with a modern, larger store.[111]

In 1970, Neiman-Marcus purchased the City of Paris Building on San Francisco's Union Square.[112] The building's most important architectural features are an interior rotunda lined with columns, and a stained glass dome above the rotunda.[113] From 1967 to 1972 the building remained vacant, and it closed again in 1974. Today, the building is vacant as it has been for most of the time since 1974.[114] Neiman-Marcus claims that its plan was to refurbish the structure and use it for a department store, but that engineering analyses revealed structural weaknesses and prohibitive renovation costs.[115] Neiman-Marcus,

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was upheld as valid regulation in New Orleans v. Impasto, 198 La. 206, 3 So. 2d 559 (1941). *See also* New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953); New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941); Civello v. New Orleans, 154 La. 271, 97 So. 440 (1923). In Maher v. New Orleans, 516 F.2d 1051 (5th Cir. 1975), the preservation of the quaintness of historic buildings and districts was held to be important for the protection of the commercial value of property, to promote tourism, to prevent depreciation of property values in general, or a combination of such reasons.

110. 1 Civil 48599 (Cal. App.).

111. The new structure is designed by the famous architects Philip Johnson and John Burgee. Philip Johnson, who is perhaps most famous for the Glass House he designed, in New Canaan, Connecticut, and the more recent Rothko Chapel in Houston, Texas, won the American Institute of Architecture's gold medal in 1977. He also designed the courtyard of the Museum of Modern Art in New York City, the Munson-Williams-Proctor Institute in Utica, New York, the New York State Theater at Lincoln Center in New York City, and the Seagram Building in New York City together with Mies van der Rohe. John Burgee has received four professional honors and designed numerous major structures. *See* Brief for Respondent (Neiman Marcus, Real Party in Interest) at 8.

112. The City of Paris Building, constructed in 1896 as the Spring Valley Water Company Building, was renamed shortly thereafter. Its original designer was Clinton Day. *See* note 127 *infra* on the building's history.

113. In 1974, when Neiman-Marcus' plans to destroy the building were first published, Citizens To Save The City of Paris was formed and it petitioned the City of San Francisco to designate the building a landmark. That request was denied. In 1975, however, the State of California designated the building a State Landmark, and ten days later it was registered on the National Register of Historic Places. *See* Appellants' Opening Brief (Foundation for San Francisco's Architectural Heritage) at 6-7, 56 n.8; Brief for Respondent at 19-20.

114. Brief for Respondent at 5.

115. A major problem with renovation of the existing structure is its lack of even sufficient seismic bracing to meet the requirements of the City's Building Code. Also, and even more obvious, are the problems of sufficient floor space, escalators and elevators, and climate control facilities for a major department store. *Id.* at 5-6.

therefore, proposed that the building and a neighboring structure be destroyed and replaced by a new, larger building which would retain the rotunda and the dome by incorporating them into the new building.[116]

The dispute is almost exclusively over aesthetics, and, as in *Penn Central*, involves precisely the same sort of public furor over new designs being comingled with old designs. Neiman-Marcus claims that "aesthetically, the new building will be the equal of those it replaces."[117] The case is currently on appeal in the California Court of Appeal, where the stated issues are: the inadequacy of the environmental impact report; the insufficiency of the Superior Court's findings; and whether the destruction of the building is a violation of the Master Plan of the City of San Francisco.[118]

The City of Paris Building is not a San Francisco Landmark. Only that designation would trigger the prohibitions of the city ordinance with respect to destruction and alteration of a building.[119] The registration of the building on the state and federal landmark lists is accompanied by no prohibitions on alteration or demolition.[120] The preservationists, however, seek a decision holding the city's approval of the project to be a violation of San Francisco's Master Plan. The petitioners characterize this plan as "an enforceable blueprint for the physical development of the city."[121] The defendants explain it as a document of inconsistent suggestions, but certainly not a binding ordi-

116. *Id.* at 7-8. In 1975 the City's planning department determined that an environmental impact report would be necessary. Neiman-Marcus hired a private consultant to prepare the report. The City, before granting approval of the project after the final report was submitted, required Neiman-Marcus to modify the design "in order better to conform to various aesthetic goals." *Id.* at 10. These included architectural changes as well as color alterations. Appellants' Opening Brief at 11. When the Neiman-Marcus plan was approved, this lawsuit was filed seeking administrative mandamus which the Superior Court denied. Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco, 749-536 (Cal. Super. Ct. Dec. 26, 1979).

117. Brief for Respondent at 8.

118. The sufficiency of the environmental impact report is being challenged by the preservationists for faulty description and concealment of alternatives, and lack of objective feasibility determinations. Brief for Petitioners at 20-31. The Superior Court made each of its opinions known in two lines. *See* Appellants' Opening Brief at 3. The Master Plan of San Francisco is authorized by SAN FRANCISCO, CALIF. CHARTER, Art. III, ch. 5, § 3.524.

119. *See* Brief for Respondent at 18-21. The ordinance is SAN FRANCISCO, CAL., MUN. CODE, ch. II, art. 10, (1978).

120. Brief for Respondent at 21-23. On the effect of registration of a building on the National Register of Historic Places, see note 5 *supra*. California's preservation legislation, CAL. PUB. RES. CODE §§ 5020-33 (West, 1979), like the federal registration, imposes no restrictions on the owner's use of the property.

121. Appellants' Opening Brief at 53.

nance.[122]

The true issue in the case is the aesthetic, not the historic, significance of the City of Paris Building, particularly its interior which Neiman-Marcus plans to preserve. The preservationists argue that the architects of the proposal regard the exterior as having no architectural significance, but see the interior as being aesthetically valuable.[123] Faulting Johnson's and Burgee's plan as incorporating the rotunda and dome as mere showpieces in the new building, they further criticized the project, stating that "it is not the interested project architects who should determine what is or is not architecturally significant about the building . . . . In the new design, the rotunda and dome comprise a sterile museum piece set off in the glass-enclosed corner of a modern, neolithic box."[124] In response, Neiman-Marcus argues that the preservationists' petition "is an effort to impose upon the entire City the aesthetic values of a dedicated few who have announced their intention to use every procedural device available to halt the project, whatever the merits."[125] The retort from the petitioners is that "Neiman-Marcus is seeking to impress its aesthetic values on the *resisting* people of the city."[126]

The different aesthetic values are, simply, the old style and completeness of the City of Paris Building as it now stands on the one hand, and, on the other, the ultra-modern style of the proposed building preserving the dome and rotunda in a new setting. The new building, incorporating the dome and rotunda, is architecturally eclectic. As Neiman-Marcus argues, however, the City of Paris Building, even as it stands, is comprised of several phases of design and construction, and is the work of several architects.[127] Neiman-Marcus further asserts that "The new building will retain the rotunda and glass dome, which were the unique contribution of Blakewell and Brown to the design of the building. . . . Aesthetically, the new building will be the equal of those

122. Brief for Respondent at 24-28.
123. Appellants' Opening Brief at 57.
124. *Id.*
125. Brief for Respondent at 4.
126. Appellant's Opening Brief at 2.
127. The building was erected in 1896 according to the design of Clinton Day, and rebuilt from 1906-1909 after the fire. The dome and rotunda were designed after the fire by John Blakewell and Arthur Brown, Jr., the architects of San Francisco's City Hall and Veterans War Memorial Building. The exterior of the building is the work of "architects of no particular distinction." Brief for Respondent at 5. The building's design is post-fire on the lower two stories and Clinton Day's design on the upper two. *Id. See also* M. CORBETT, SPLENDID SURVIVORS 127 (1979).

it replaces. It has been designed by two of this country's most prominent architects."[128] Hence, the questions before the court are, fundamentally, whether the style of the whole City of Paris Building, as it appears now, must be preserved and whether a new building of modern design, incorporating the most significant aesthetic features of the building, but in a different setting, should not be built in its place. Perhaps the best example of how far from the litigation issues the public furor lies, but of how much a matter of aesthetics the dispute is, lies in the words of an architectural guidebook author.

> Apart from its great interior space with its superbly detailed columns and stained glass dome, the real importance of the building is in its relationship to Union Square, to Geary and Stockton streets, and to the architecture of the retail district . . . .
>
> . . . [T]he stylistic references of its details, and the colors and textures of its materials all relate to the city around it. The buildings around the City of Paris, all of which were built later, relate to each other not so much out of a conscious effort to do so, but rather out of a shared attitude toward design and toward the urban function of a building on a street. The building is presently threatened by a Philip Johnson design for a new Neiman Marcus store which fails to understand the urban importance of the existing building.[129]

The aesthetic price[130] society must pay for preventing the alteration of the City of Paris building is high. Most fundamentally, the new building is, arguably, at least as "beautiful" an edifice as the current building and, very possibly, more beautiful. Indeed, the aesthetic integrity of the new building may be said to be greater than the style of the current one because Johnson and Burgee are true artists of a style of the post-war twentieth century, whose designs are invariably considered to be original, and beautiful.[131] They are masterpieces in the literal sense of the word.

On a less obvious plane, preventing the alteration of the City of Paris Building stunts a certain and much needed development in archi-

128. Brief for Respondent at 8.

129. M. CORBETT, SPLENDID SURVIVORS 127 (1979).

130. Neiman-Marcus argues the economic price to San Francisco as being quite high, particularly in terms of lost revenue from sales tax on the greater volume of goods which can be sold from the larger store, and from the loss of income from the greater number of employees needed to staff the larger store. *See* Brief for Respondent at 8-9.

131. Just as in *Penn Central*, there is great irony in the fact that the works of the modern architect are themselves, at least arguably, landmark architecture.

tecture, that is, the emergence of an eclectic style of contemporary architecture incorporating into new buildings the prized and essential features of the older buildings[132] which the new buildings replace *or abut*. Practicalities dictate that although many buildings in the United States were built with high quality workmanship and have architectural charm if not great beauty, all of these buildings cannot and will not be preserved by either legislation or litigation. It is essential, therefore, that the scheme of architectural preservation in this country promote voluntary preservation[133] and allow for high quality, aesthetically valuable integration of the new with the old. This is particularly true in urban centers where development of land is the only method of generating sufficient revenues to prevent blight.[134]

In the eyes of some beholders, additions to old buildings and structures adjacent to them should be disguised completely so as to keep entirely the design, scale, and materials of the old building. This type of restriction is most easily understood in historic neighborhoods, comprised of blocks of buildings that are architecturally identical. In the case of a single building, however, the decision of the owner may well become total demolition because the only apparent alternative is absolute preservation. That is, in the absence of an available compromise, the destruction of many beautiful buildings, unprotected by strict ordinances, will be more likely than in a legal setting which offers attractive alternatives.

Among the needed architectural prototypes is just such a building as the Johnson-Burgee design proposed for alteration of the City of

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132. If the addition of a modern structure is extremely offensive *on* the site of a landmark, it should be equally offensive when next door, particularly in a crowded urban center where buildings usually meet. The argument of a preservationist that a modern super-structure on a landmark base, or around a landmark dome and rotunda, does not suit the older portion of the building, aesthetically, may easily be taken to absurd limits in light of the aesthetic eclecticism contained in an average city block. This author is of the opinion that the architectural beauty of many of our nation's cities results, in large part, from this very factor: the variation in scales, styles, materials, and eras.

133. *See* notes 161-64 *infra* and accompanying text.

134. *See generally Zoning For Aesthetics Substantially Reducing Property Values*, Comment, 27 WASH. & LEE L. REV. 303 (1970) on the practical economic effects of land use restrictions based on aesthetics. During the late publication stages of this article, the California Court of Appeal determined that Neiman-Marcus should be permitted to tear down the City of Paris Building. The court reached its decision because "San Francisco planning officials had complied with the procedural and substantive requirements of the California Environmental Quality Act." Los Angeles Daily Journal, June 17, 1980, at 1, col. 2.

The court's decision focused upon the adequacy of the Environmental Quality Report stating that "there was ample opportunity for the input and comment of all persons interested." *Id.* The court further noted that sufficient consideration had been given to the viability of alternatives to the proposed destruction of the City of Paris Building. *Id.* at 23.

Paris Building. The jewel-box effect of the new and clean design embracing the ornate features of the old City of Paris Building is precisely the sort of aesthetic eclecticism which may save the best, and the major part, of our architectural past. Aesthetically, the proposal may even be said to be brilliant in its preservation of the gems of the past within an arguably brighter, stylistically noncompeting structure and in its subtle harmony between the two styles. If these prototypes emerge, they, like many renovation projects such as the Cannery in San Francisco, may hasten the arrival at a compromise between competing tastes with respect to architectural style.

C. *Charleston Center: The Environmental Issue*

In Charleston, South Carolina, citizens opposing the construction of a twelve-story hotel and convention center in the city's historic district have recently filed suit for declaratory and injunctive relief against federal officials and the Mayor of Charleston.[135] The controversy stems in part from the absence of harmony between the architectural style and scale of the proposed modern Charleston Center and the architectural character of historic Charleston. The primary issue, however, involves the project's environmental effects on the historic part of Charleston.[136]

Charleston has applied for a federal grant for the development of a large hotel, convention center, commercial complex, and parking garage in the historic section of the city.[137] The plaintiffs have sued to prevent the release of the federal funds to Charleston until the city fully complies[138] with the National Historic Preservation Act (NHPA),[139] the National Environmental Policy Act (NEPA),[140] and the Housing Com-

135. The plaintiffs are the National Center for Preservation Law, the Preservation Society of Charleston, the Charlestown Neighborhood Association, and the Harleston Village Association. The defendants are the Secretary of the Department of Housing and Urban Development, the Assistant Secretary of Commerce and Administrator of the Economic Development administration, the Chairman and Vice Chairman of the Advisory Council on Historic Preservation, and the Mayor of Charleston. National Center For Preservation Law v. Landrieu, Complaint, 80-0514 (D.D.C., filed Feb. 25, 1980) [hereinafter cited as Complaint].

136. The plaintiffs allege a wide variety of adverse effects upon their neighborhood. *See* notes 148-50 *infra* and accompanying text.

137. The historic section of Charleston is listed on the National Register of Historic Places. Complaint at 2.

138. *Id.* at 2-3. The plaintiffs also seek a declaratory judgment to the effect that the defendants have not fulfilled the requirements of the statutes. *Id.* at 2.

139. 16 U.S.C. § 470-470m (1976). *See also* note 5 *supra.*

140. 42 U.S.C. § 4331 (1976).

munity Development Act (HCDA).[141]

The overlap between NEPA and the NHPA is of key importance in this case, and is likely to increase in significance with the passage of time. Section 101 of NEPA is a broad statement that it is the continuing responsibility of the federal government

> to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources . . .
>
> (2) to assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> . . . [and to]
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice.[142]

Section 102 of NEPA requires that all federal agencies cooperate in this responsibility, and that an environmental impact statement be prepared for any "major Federal action significantly affecting the quality of the human environment."[143] The environmental impact statement must outline alternative plans for any adverse environmental effects it identifies.[144] The plaintiffs in the Charleston Center case allege that the federal grant to finance the Charleston Center is such major federal action significantly affecting the quality of the human environment,[145] and that alternatives to the plan were not adequately considered.

As is NEPA, the NHPA is a policy statement containing general directives with which federal agencies must comply. The NHPA requires the head of any federal agency having "jurisdiction" over a proposed federally assisted project to take into account the effect that that project will have on any district, site, building, structure, or object listed on the National Register of Historic Places.[146] The plaintiffs in the Charleston Center case complain of the failure of the Secretary of Housing and Urban Development and the Administrator for Economic Development "to conduct any studies or compile the information necessary for adequate consideration of modifications or alterations of the proposed project that could avoid, mitigate or minimize any adverse

141. *Id.* § 1321.
142. *Id.* § 4331(b) (1976).
143. *Id.* § 4332(2)(c) (1976).
144. *Id.* § 4332(2)(E) (1976).
145. Complaint at 13.
146. 16 U.S.C. § 470(f) (1976).

effects"[147] on the aesthetic area.

Among the plaintiffs' objections to construction of the Charleston Center is the aesthetic obtrusion they believe it to be. They allege that the Center, "because of its size and architectural design," will have a "serious and negative impact on the visual and aesthetic character" of the historic district of Charleston.[148] The plaintiffs also complain that the Center will "affect the visual and aesthetic character of the District."[149] For purposes of this comment, it is important to note that the Charleston Center plaintiffs are careful to allege the aesthetic offense as one among many others, including the destruction of historic property by the project, and the additional traffic and noise the Center will generate.[150]

The Charleston Center case is readily distinguishable from the Grand Central Terminal and City of Paris cases. First, the dispute in Charleston involves the historic and architectural charm of an entire district as opposed to that of a single building in a large urban center. Second, the government is the developer in the planning, financing, and operating phases. Third, and most important here, the aesthetics issue does not turn on *private* taste by rather on what taste the *government* exhibits in fostering the project. Hence, the importance of NEPA.

Assuming the federal financing to be "major federal action" within the meaning of NEPA,[151] the question of the adequacy of the study of the aesthetic effects on an historic community rises to the fore. The few courts which have faced this issue of NEPA and aesthetic inquiries have, not surprisingly, avoided discussing aesthetic details. For example, the District of Columbia Circuit has held that in relation to NEPA's application to aesthetic matters, the intent of Congress was that a "hard look" or "substantial inquiry" was not necessary.[152] A

147. Complaint at 16. The plaintiffs further allege that the Secretary of the Department of Housing and Urban Development has purported to delegate improperly his authority under the NHPA, to the City of Charleston, pursuant to 24 C.F.R. Part 58, and that the Administrator for Economic Development has done the same. Complaint at 16.

The plaintiffs also complain of the alleged failure of the Advisory Council on Historic Preservation to comply with its own regulations in reviewing the Charleston Center project. *Id.* at 18.

148. *Id.* at 7-8. The hotel is to be 12 stories tall, amidst the three story buildings in the district. The project would occupy almost an entire block in width. *Id.* at 8.

149. *Id.*

150. *Id.* at 29-30.

151. *See* notes 140-45 *supra* and accompanying text. *But see* Kleppe v. Sierra Club, 427 U.S. 390 (1976) (mere contemplation of action is not major federal action).

152. *See* Maryland National Capital Park and Planning Comm'n v. United States Post Office, 487 F.2d 1029 (D.C. Cir 1973), where the court stated:

federal district court, deciding *City of New Haven v. Chandler*,[153] however, has held that the impossibility of quantifying aesthetic values means "at most, that a finding as to the role of aesthetics need not be supported by statistical evidence."[154] In *Scenic Hudson Preservation Conference v. Federal Power Commission*,[155] the Second Circuit was faced with the argument that the Federal Power Commission had erroneously concluded that a storage project of Consolidated Edison Company, proposed for construction at Storm King Mountain near Cornwall, New York, constituted "no real impairment of the environmental and scenic aspects" of the area.[156] In ruling that the Commission's conclusions as to the aesthetic effects of the project were supported by substantial evidence, the court carefully reviewed the evidence on aesthetics. Judge Hays, writing for the majority, said, "This is clearly a policy determination which, whatever may be our personal views, we do not have the power to impose on the Commission."[157]

It is understandable, in light of previous discussions, that courts perceive aesthetics under NEPA to be a hot potato, as evidenced by their deferral to the findings and conclusions on aesthetics made by federal agencies with no expertise in the area.[158] In historic preservation matters such as the Charleston Center case, however, there is a federal body to which the courts can easily look for findings based on knowledge of architectural history. The Advisory Council on Historic Preservation is a federal body which may provide advice to Congress

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> That some, or perhaps all, environmental impacts have an esthetic facet, does not mean that all adverse esthetic impacts affect environment. That is neither good logic nor good law. Some questions of esthetics do not seem to lend themselves to the detailed analysis required under NEPA .... Like psychological factors, they "are not readily translatable into concrete measuring rods. . . ." The difficulty in defining what is beautiful cannot stand in the way of expressions of community choice through zoning regulation.... But the difficulties have a bearing on the intention of Congress, and whether it contemplated, for example, a requirement of a detailed "environmental impact statement," and concomitant investigation, because of the possibility that each new Federal construction would be ugly to some, or even most, beholders on such issues as: Is this proposed building beautiful? Or, what is the esthetic effect of placing the "controversial" Picasso statute [*sic*] in front of the Civic Center building in Chicago? These types of problems lead us to conclude that a "substantial inquiry" or "hard look" was not contemplated, as a matter of reasonable construction of NEPA, where the claim of NEPA application is focused on alleged esthetic impact and the matters at hand pertain essentially to issues of individual and potentially diverse tastes.

Id. at 1038-39 (citations omitted).

153. 446 F. Supp. 925 (D. Conn. 1978).
154. *Id.* at 930.
155. 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).
156. 453 F.2d at 473.
157. *Id.* at 475.
158. *Id.*

and other federal agencies on the effects various federal actions will have on historic sites.[159] The existence of this Council, coupled with the requirement under the NHPA that the Council be consulted about the effects of federally assisted projects on historic sites, should forecast the deferral to the Council's opinion on the aesthetic effects of federal action on historic sites. This Council, however, need not be consulted about property not listed on the National Register.[160]

V. THE AESTHETIC COMPROMISE

All three of these cases foretell deferral in landmarks cases by the courts to the administrative agency charged with aesthetic determinations.[161] In *Penn Central*, the litigants themselves acquiesced in the aesthetic determinations made by the Landmarks Commission. The Charleston Center case, and other NEPA cases, indicate that the Advisory Council on Historic Preservation will be the arbiter of good taste in cases involving the overlap of NEPA and historic preservation. In the City of Paris litigation, unless the court defers to the municipal landmarks commission the decision as to the aesthetic considerations, thereby affirming that body's decision not to designate the City of Paris Building a San Francisco landmark, the court will be required to answer the aesthetic questions posed by the litigants.

The gravest danger of legislation allowing local committees to designate landmarks, and then forbid their modification on aesthetic grounds alone, is the impossibility of reversal of such determinations in light of the fact that scarcely any two people agree on what is aesthetically pleasing. As the New York Court of Appeals noted, these ordinances need improvement.[162] Advocates of absolute preservation of landmark buildings argue that such monuments are irreplaceable. Landmark designation, however, is scarcely a two-way street. Such or-

159. 16 U.S.C. §§ 470(f) and 470(i) (1976).

160. 16 U.S.C. § 470(f) (1976). It is interesting to note that in 1976, Congress amended § 470(a) to permit the Secretary of the Interior "to withold from disclosure to the public, information relating to the location of sites . . . listed on the National Register whenever he determines that the disclosure of specific information would create a risk of destruction or harm to such sites . . . ." 16 U.S.C. § 470a (1976).

161. *See* Goldstone, *Aesthetics in Historic Districts*, 36 LAW & CONTEMP. PROB. 379 (1971) on the daily aesthetic judgments required of the New York City Landmarks Preservation Commission. He states that the "drafters of the Landmarks Preservation Law felt that such a Commission of devoted and experienced non-specialists would be best equipped to reach just decisions on the complex, aesthetic problems it must resolve." *Id.* at 385. This author does not believe any group can necessarily ever resolve such issues, or that one should.

162. *See* note 99 *supra* and accompanying text.

on aesthetic grounds, of the status of landmarks. Inasmuch as the courts are unlikely to take a hard look at aesthetic decisions, buildings designated as landmarks pursuant to ordinances such as that of New York City are effectively sealed.[163]

In both the Grand Central Terminal and the City of Paris Building cases, the owners proposed additions which, at least arguably, would not detract from the aesthetic character of the older portions of those buildings, and which would add high quality modern design to them. In the Grand Central Terminal case, the building has, from its original design, been an elaborate base for a tower which has never been built. The proposal for the new Nieman-Marcus store in San Francisco preserves within it the "landmark" features of the City of Paris Building. Yet, in both cases, the argument that the aesthetic inconsistency between the old and the new is simply unacceptable to the beholder has been made, and in *Penn Central*, victorious. Similarly, the plaintiffs in the Charleston Center case complain of the lack of visual harmony between the proposed new complex and the historic district in which it is to be located. The three cases form a classic trilogy on the impossibility of any group of people agreeing on, much less articulating, what is aesthetically pleasing.

These three cases also illustrate the expense to society of sealing off, in terms of both size and style, old buildings by landmark designation. The increased income and tax revenues the proposed construction could generate is lost by the prohibition. Also, the resale value of designated single building landmarks is severely impaired because of the limited uses to which the building can thereafter be put. The additional cost to society, however, is ultimately higher. If those owners of landmarks who would commission innovative additions to such struc-

163. It is not unimportant that in the *Penn Central* decision the Supreme Court noted that there were 53 designated single building landmarks in New York City between 14th and 59th Streets in 1977 and over 400 throughout the City. 438 U.S. at 132, 134, n.31. According to the New York Times, Feb. 20, 1980, B 1, at col. 2, there are 564 designated single building landmarks in New York City, only three years later. The most recent designation is that of the four-story Isaac L. Rice Mansion on Riverside Drive at 89th Street. The designation was made in response to the owner's plan to sell the building to a developer, and has been vigorously opposed by the owner. The Rice Mansion, however, is one of only two remaining "mansions" on Riverside Drive. (The other is already a designated landmark.) The stated reason of the New York City Landmarks Commission for the designation of the Rice Mansion was the consideration by the Commission that the building evokes a time "when affluent New Yorkers commissioned architects to build elegant free-standing mansions of diverse design for them." *Id.*

tures, modifications designed by architects of the highest caliber and sensitivity to the special features of the old structures, are prohibited from changing their buildings pursuant to such plans, several losses will result. First, the architectural prototypes incorporating the old within the new without obliterating the old will not develop. Second, in the absence of that prototype as a compromise between preservation and total destruction, a visual incentive to preserve old buildings which are not sealed by official designation as landmarks will not exist. The choices will remain the bulldozer or landmark designation. Practicality dictates that the bulldozer will claim more property than landmark commissions. In addition, landmark status will continue to grow as a weapon, not a reward.[164]

VI. CONCLUSION

What is needed to save the architectural past of the urban centers of the United States is an architectural prototype, a compromise which is aesthetically and economically successful so as to satisfy the chief demands of both factions. If, however, the single building landmark designation process remains one whereby preservationists may seal off old buildings from any modification purely on aesthetic grounds, no voluntary preservation of the magnificent features of our architectural past can develop.[165] Indeed, what would exist to preserve now if preservationists one hundred years ago had prevented the construction of the buildings they seek now to "save?"

No one today actually knows whether Phillip Johnson's designs or Marcel Breuer's designs—around or on top of the architectural past—may be more beautiful to our grandchildren than the past on which they rest. For the same reasons that it has always been impossible, or at least extremely difficult, for anyone to determine what is beautiful. Neither legislatures nor courts should make or permit governmental bodies to make those determinations, much less impose them upon private owners of urban property. As one court said in 1925: "Certain legislatures might consider that it was more important to cultivate a taste for jazz than Beethoven, for posters than for Rembrandt and for

164. *Id.*

165. The sole voluntary preservation tool now in existence is the tax incentives. *See* note 5 *supra*. But these benefits are not available for non-registered or designated buildings.

limericks than for Keats.... The world would be at a continual seesaw if aesthetic considerations were permitted to govern the use of police power."[166]

Linda Pinkerton

166. City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. at 661-62, 148 N.E. at 844. *See also* "To Preserve or Not? That is the Question For a Neo-Neon Age," Wall St. Jrnl., March 28, 1980, at 1, col. 4, where the comment is made: "Now, some preservationists... worry about losing some of the architecture that earlier preservationists sought to preserve us from." *Id.* This article is particularly significant in citing the current enthusiasm for commercial neon signs and billboards—the very signs and billboards which legislatures and courts are finally getting around to banning as too ugly for our roadsides. Again, the ironies of the situation emphasize the need to return to the approach forbidding governmental intervention in matters of aesthetics.