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PRACTICE DESIGN REVIEW



Regulating the Architectural Character of a Community

By James R. Brindell

The physical and aesthetic character of a community is the sum of thousands of decisions made over time by public and private property owners in the development and redevelopment of parcels of land and the structures on those parcels.

Some communities also employ architectural review processes to develop and maintain community character. This article evaluates the problems with typical standards used in architectural review and offers suggestions to improve those standards.

Architectural review programs represent significant intrusions by the government into the preferences of property owners in the way their homes or buildings look. The practical issues involve the types and specificity of those standards and their application by citizen boards. This article will use, for the purposes of discussion, the ordinance criteria of one South Florida community with a well-educated, highly successful population with a strong commitment to architectural controls. That community conducts some 100 architectural reviews per year.

For these programs to work effectively and fairly, the community needs to have a clear view of the objectives. Standards that place too great a range of interpretation in the hands of the implementing boards are not reasonable and undermine the confidence of property owners in the programs. Architectural review criteria should provide clear guidance to property owners and to their architects. Those criteria should allow for a wide range of architectural solutions. Otherwise, a community will achieve a level of sameness over time instead of a richness of character and expression.

Architectural review decisions are considered quasi-judicial actions by the courts. This requires that such decisions be supported by competent substantial evidence. A finding that merely recites the words of a review criterion is a conclusion that, by itself, is not competent substantial evidence. There must be an articu-

lation of the evidence presented at the hearing that establishes each of the required elements of the criterion. “Competent substantial evidence” has been defined by the courts to mean evidence that is sufficiently relevant and material that a reasonable mind might accept as adequate to support the conclusion reached. It must do more than create a suspicion of the existence of the fact to be established, and it cannot be solely based on hearsay.

The review criteria themselves are also subject to legal challenges for not being reasonably related to a potential detriment to public health, safety, and general welfare; for allowing so much discretion that they invite unequal application to those regulated; or because they are so vague and lacking in ob-

jective elements, or factors, that those affected are not reasonably on notice as to the operation and effect of the ordinance.

The boards that administer architectural standards often receive no training about the nature of their roles in quasi-judicial hearings and how they should approach the application of those standards to individual properties. The members of such boards are in effect judges who make findings of fact and conclusions of law. Understanding one’s preferences and prejudices and then being able to disassociate them from the examination of the facts presented and the application of the review criteria is the fundamental skill of a judge. It is often difficult for the members of these boards, when applying program standards, to suspend



The arched brick windows of this McDonald’s in Brookline, Massachusetts, were a response to the town’s review process. The resulting design relates to the arched windows and doorways of the historic S.S. Pierce Building.



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About the Author

James R. Brindell has nearly 40 years of experience with land-use and environmental issues. He is a former chair of the Environmental and Land Use Section of the Florida Bar, and currently serves on the Southeast Florida/Caribbean District Council of the Urban Land Institute.

their passion for the objectives of the programs they have been appointed to implement. Ironically, they are often appointed because they have demonstrated a passion for those program objectives. This human factor is all the more reason that the criteria applied by these boards should be precise and clear and that the members be diligent in requiring that competent and substantial facts be presented to support each element of the criteria.

THE ROLE OF ARCHITECTURAL REVIEW

What is the legitimate role of an architectural review process? It should not be to determine the acceptable style of architecture on a case-by-case basis. Architecture is a form of visual art and is an expression of a property owner. Some designs challenge or even offend us, as they should. If a community desires to limit the acceptable architectural styles and materials or establish a minimum quality for materials, then they need to do that in a comprehensive manner by adopting those requirements in a public process. Otherwise, the focus should be on features that could have a negative impact on adjacent houses, such as paint color so bright that it would distract drivers or bike riders, lighting that spills over into adjacent properties, physical elements that allow for the undue invasion of the privacy of adjacent properties, and exterior materials that tend to disintegrate or show wear easily. The cost of land and the sale prices of other homes in a neighborhood will have, in most instances, a direct relationship to the quality and style of a new or renovated house in that neighborhood.

Issues of building mass, setbacks from adjacent properties or streets, and minimum amounts of landscaping are the subjects of lot, area, and bulk regulations established in the zoning code. Property owners have a right to rely on these uniform standards, and architectural boards should not revisit them on a case-by-case basis.

STANDARDS, ISSUES, AND SUGGESTIONS

The following standards present problems with respect to discernability and challenges with respect to providing competent substantial evidence.

(1) The plan for the proposed building or structure is in conformity with good taste and design and in general contributes to the image of the town as a place of beauty, spaciousness, balance, taste, fitness, charm, and high quality.

Comment: What constitutes good taste and design or beauty, spaciousness, balance, taste, fitness, charm, and high quality? Legally, it cannot be the personal opinions of the members of the architectural review commission. What does it mean to contribute to the community’s image? It suggests adding to the image, but a building may neither contribute nor detract from that image. How would such a contribution be determined objectively? It would require some objective and officially articulated description of



➡ In California, the City of Roseville’s design guidelines contain many examples of acceptable styles, elements, materials, massing, detailing, landscaping, and site relationships. The city uses these images to highlight how architectural detail should be used to soften building edges and to emphasize pedestrian scale.



the elements of the town's image, and an explanation of how the proposed structure contributes to that image. Otherwise, these are highly subjective criteria that can easily lead to inconsistent and unfair results.

Alternative language: "The proposed building and landscape plans are consistent with the catalogue examples of acceptable styles, elements, materials, massing, detailing, landscaping, and relationships to street frontages and abutting properties and does not include the unacceptable examples in the catalogue."

(2) The plan for the proposed building or structure indicates the manner in which the structures are reasonably protected against external and internal noise, vibrations, and other factors that may tend to make the environment less desirable.

Comment: Noise and vibrations can be determined with engineering data, but "other factors" is open-ended. What or whose environment is made less desirable with respect to what and to whom? What is the standard of a less desirable environment?

Alternative language: "The design of the proposed building or structures includes structural features that will prevent vibrations or noise from sources internal to the structure from being detected at the property lines in violation of town code standards."

(3) The proposed building or structure is not, in its exterior design and appearance, of inferior quality such as to cause the nature of the local environment to materially depreciate in appearance and value.

Comment: The criterion requires a definition of "local environment" and baseline data that establish the "appearance" and "the value" of that local environment. Evidence must be presented of how the proposed structure would materially depreciate the baseline appearance and value. This requires design and market value expertise.

Alternative language: "The proposed building facade materials are not of such inferior quality that they would be expected under normal weather conditions to go into a state of disrepair substantially sooner than the facade materials on the majority of the other buildings in the same block of the street on which they front."

(4) The proposed building or structure is in harmony with the proposed developments

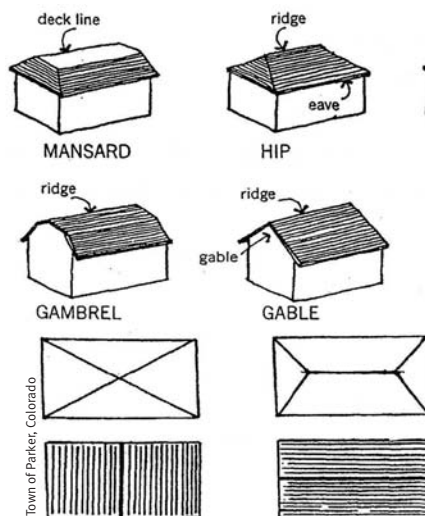
on land in the general area, with the comprehensive plan for the town, and with any precise plans adopted pursuant to the comprehensive plan.

Comment: What does "in harmony" mean, and what are the elements of harmony or disharmony? This is a highly subjective criterion.

Alternative language: "The proposed building is consistent with any area or neighborhood plans adopted as part of the Comprehensive Plan or Zoning Code."

(5) The proposed building or structure is not excessively similar to any other structure existing or for which a permit has been issued or to any other structure included in the same permit application within 200 feet of the proposed site in respect to one or more of the following features of exterior design and appearance:

- a. Apparently visibly identical front or side elevations
- b. Substantially identical size and arrangement of either doors, windows, porticos, or other openings or breaks in the elevation facing the street, including reverse arrangement or



c. Other significant identical features of design such as, but not limited to, material, roof line, and height of other design elements

Comment: The specified features are discernable, but the standard for "excessively" is totally lacking. Subsection c would allow a structure to be denied because it uses stucco if its neighbor does, or if it has the same height to the peak of the roof as a structure located two or three lots away.

Alternative language: If a catalogue of acceptable and unacceptable styles, elements, materials, massing, detailing, landscaping, and relationships to street frontages and abutting properties is adopted, then criterion (6) below regarding dissimilarity is not necessary. However, concerns for too much similarity could still be valid; if so, criterion (5) could be recast to read as follows: "The proposed building is not identical with any other building in the block of the street on which it fronts with regard to mass, the arrangement, including the reverse arrangement, of massing elements, the size, style, and arrangement of windows or doors, or the height and length of roof elements facing the front street."

(6) The proposed building or structure is not excessively dissimilar in relation to any other structure existing or for which a permit has been issued or to any other structure included in the same permit application within 200 feet of the proposed site in respect to one or more of the following features:

- a. Height of building or height of roof
- b. Other significant design features including, but not limited to, materials or quality of architectural design

➡ Parker, Colorado, uses simple line drawings to communicate ideas about building mass, form, and variation. The drawings pictured here illustrate variation in roof type.



➡ The Town of Parker, Colorado, developed residential design standards to control monotony in new homes. The town's criteria for determining whether buildings are considered similar focuses on building mass and form and building variation.

- c. Architectural compatibility
- d. Arrangement of the components of the structure
- e. Appearance of mass from the street or from any perspective visible to the public or adjoining property owners
- f. Diversity of design that is complementary with size and massing of adjacent properties
- g. Design features that will avoid the appearance of mass through improper proportions
- h. Design elements that protect the privacy of neighboring property

Comment: If a design passes the tests under (5) and (6), then criterion (7) would be satisfied also. There must be some objective description of the established character of the immediate area or neighboring areas, and there must be objective standards to determine what renders a proposed structure “appropriate.” These factors invite subjective determinations based on the personal preferences of board members.

Alternative language: This criterion is unnecessary with the revised criteria (1), (3), and (6).

Comment: Presumably this refers to various other standards regarding such aspects as lot coverage, setbacks, building height, drainage, etc., all items that can be calculated for compliance.

Alternative language: This criterion is acceptable as written.

(9) The project’s location and design adequately protect unique site characteristics such as those related to scenic views, rock outcroppings, natural vistas, waterways, and similar features.

Comment: What is the standard for determining “unique”? Whose interests in these unique characteristics are to be protected? If it is the public’s, then the implementation in a given instance with site development limitations might result in a regulatory taking.

Alternative language: This criterion should be deleted and addressed by other ordinances or regulations as part of a comprehensive policy, not on an ad hoc basis.

CONCLUSIONS

The architectural review process is more effective if a photographic catalogue illustrates styles, elements, materials, massing, detailing, landscaping, and relationships to street frontages and abutting properties that the community considers acceptable, along with a written narrative explaining what makes them acceptable. The photographs respond to the “I’ll know it when I see it” inclination that we all possess.



➡ The City of Clearwater, Florida, uses dozens of photographs and illustrations in its Downtown Design Guidelines to show appropriate and inappropriate examples of architecture and site design. This illustration shows an example of inappropriate infill that does not match existing buildings.

Comment: While some of the factors can be determined, others are very subjective, such as “quality of architectural design” and “architectural compatibility.” What does “excessively dissimilar” mean in relation to another structure with regard to “diversity of design that is complementary with size and massing of adjacent properties”? There must be a clearer way to express whatever is intended by this criterion.

Alternative language: If a catalogue of acceptable and unacceptable styles, elements, materials, massing, detailing, landscaping, and relationships to street frontages and abutting properties is adopted, then criterion (6) is not necessary. However, concerns for too much similarity could still be valid. In that regard, criterion (5) could be recast to read as suggested above.

(7) The proposed building or structure is appropriate in relation to the established character of other structures in the immediate area or neighboring areas in respect to significant design features such as material or quality or architectural design as viewed from any public or private way (except alleys).

(8) The proposed development is in conformity with the standards of this Code and other applicable ordinances insofar as the location and appearance of the buildings and structures are involved.



➡ New town houses (inset) mix well with the older residences in this Washington, D.C., neighborhood. Height, proportion, and architectural details are all elements that boards and commissions must look at to make sure that new development is compatible with a neighborhood’s existing character.

There must be some objective description of the established character of the immediate area or neighboring areas, and there must be objective standards to determine what renders a proposed structure “appropriate.”

The written narrative serves as a check on the fallibility of that inclination. The exercise of putting the visual acceptability into words also serves to clarify the focus of that acceptability.

The catalogue should also have sections of photographs and narratives illustrating styles, elements, materials, massing, detailing, and relationships to street frontages and abutting properties that the community finds *unacceptable*. The photographs and written narratives should be tested by asking architects who practice in the community to meet with the architectural review board to critique, challenge, and clarify the catalogue. The exercise of compiling the catalog could help the community refine its desired vision for the community and its review standards.

The boards and commissions that implement architectural review regulations need formal instruction with regard to their roles as judges in the quasi-judicial process, the elements of the regulatory criteria to which proof must be directed, and the types of proof that constitute competent substantial evidence. Approaching these programs in this manner will enhance the lawfulness of the regulations and their application to property owners and, consequently, the integrity of the programs.



NEWS BRIEF

TREES WIN BIG IN NEW JERSEY

By Lora A. Lucero, AICP

Trees stand tall and silent in most communities, often overlooked and neglected. In New Jersey, they got their day in court. In May, in *New Jersey Shore Builders Association v. Township of Jackson* (Supreme Court of New Jersey, Decided May 13, 2009, 2009 WL 1310781), that state's highest court issued a resounding endorsement of the regulations enacted by the Township of Jackson requiring property owners to replace any tree that is removed or pay into a fund dedicated to planting trees and shrubs on public property.

In 2003, the township specifically declared it was enacting the tree removal ordinance under the police power statute (N.J.S.A. 40:48-2), not under the Municipal Land Use Law (MLUL) (N.J.S.A. 40:55D-1 to -163), which was the basis of its earlier tree ordinance, declared invalid in 2001. In April 2004, the New Jersey Shore Builders Association (NJSBA) challenged the new ordinance, arguing that the ordinance is governed by the MLUL; that replanting a tree off-site from where the original tree is removed fails to remediate the effects of tree removal; and that the replacement fee is an unauthorized tax.

Expert planning witnesses testified on opposite sides during a two-day trial. One stated the tree removal ordinance was “outside of what is typically considered land-use controls” and is “inconsistent, overly vague, and imprecise.” He also believed the ordinance unfairly distinguished between residential and commercial lots.

The other expert witness was the drafter of the ordinance, and he said he relied on the state's “no net loss” policy (N.J.S.A. 13:1L-14.2) as a model. The state requires that trees removed from state property be replenished on state, county, or municipal property via a hierarchy of options. Tree replacement doesn't have to occur on the same property from which it is removed, he noted, because “biomass and . . . the beneficial effects of the tree [are] not related to the location from which a tree was taken as much as [they are] related to the entire Township that it's going to be located in. . . . [T]he replacement on the same site would be more of an aesthetic value rather than an environmental benefit.”

The township lost—at least at the trial stage and in the court of appeals, which declared the ordinance was not a valid exercise of police power. The township had not met its burden of explaining how paying a fee or replanting trees on public land would ameliorate the negative effects of removing trees on

private property. On appeal, the Supreme Court of New Jersey reversed.

The tree removal ordinance touches on the use of land, but it is not a zoning and planning initiative that implicates the MLUL; rather it is a “generic environmental regulation” that the court concluded was properly enacted based on the police power.

The lower courts construed the goals of the ordinance too narrowly, the court decided, because it was designed to also “serve general environmental goals, including the maintenance of the biomass of the municipality with its concomitant ecological benefits of habitat, tree canopy, and oxygen production.” The correct test for reviewing an ordinance adopted pursuant to the police power is the “rational basis test,” which begins with an understanding that the ordinance is presumed valid. The lower courts incorrectly put the burden on the township, when it was the challenger's burden to overcome that presumption of validity.

The court dismissed NJSBA's argument that large trees cannot be replaced by smaller trees and shrubs to accomplish the same biomass goals stated in the ordinance. “The ordinance need not be perfect in order to pass muster,” the court said, and “with time and proper care, many of the smaller trees will eventually serve to replace the lost canopy. . . . [R]eplanting on public property plainly contributes to oxygen production, habitat, and the biomass as a whole . . . and is rational.” At one point the court added, “At the risk of oversimplifying this case, it seems to us that NJSBA cannot see the forest for the trees.”

Although conceding that the \$10 application fee and the \$25 tree removal fee were legitimate, NJSBA argued that the replacement fees, ranging from \$200 for smaller trees up to \$800, were an invalid tax. The state's highest court disagreed, stating that “so long as the replacement fees do not exceed the municipality's costs for administration and replacement, they are legitimate elements of the regulatory scheme.”

TEXAS CITIES CAN PRESERVE TREES IN THE EXTRATERRITORIAL JURISDICTION

By Lora A. Lucero, AICP

On May 27, the Texas Court of Appeals declared that the City of San Antonio's Tree Preservation Ordinance and Streetscape Tree Planting

Standards is enforceable within the city's five-mile extraterritorial jurisdiction (ETJ) in *Milestone Potranco Development, Ltd. v. City of San Antonio* (2009 WL 1471881).

In Texas, municipalities may regulate subdivisions but not the use of property within the ETJ. Milestone, the developer, argued that the city did not have the statutory authority to regulate trees in the ETJ because the tree ordinance is not a "rule governing plats and subdivisions of land" but a "purely aesthetic regulatory scheme," not pertaining to "basic infrastructure." Milestone also maintained that the ordinance was overly broad in its application.

- to encourage the preservation of trees for the enjoyment of future generations
- to provide health benefits by cleansing and cooling the air
- to add value to property and reduce energy costs
- to reduce the amount of pollutants entering streams
- to provide incentives to encourage the maximum preservation of trees
- to create an urban environment that is aesthetically pleasing and promote economic development through an enhanced quality of life

that it was intended to be "more than simply an aesthetic regulation," the court said, and thus qualifies as a rule "governing plats and subdivision of land." The court also concluded that the tree ordinance requires only those developers who are filing a major or minor plat application to provide a tree affidavit or tree permit application, and that it is not overly broad.

A shorter abstract of this case was included in *PEL's* new RSS feed on May 20, 2009. See www.planning.org/pel.

Lora Lucero, AICP, is editor of *Planning & Environmental Law*.

Developer: San Antonio did not have the statutory authority to regulate trees in the extraterritorial jurisdiction because the tree ordinance is not a "rule governing plats and subdivisions of land" but a "purely aesthetic regulatory scheme."

John Tedesco, a local writer, noted that some of the "fastest growing areas of San Antonio have been in the ETJ, where the city can enforce some, but not all, of its ordinances. The city's tree rules mandate that developers preserve some trees and pay mitigation costs for trees they bulldoze."

The tree ordinance spelled out its purposes:

- to preserve trees as an important public resource

Without using the phrase "police power," the court's decision ultimately rested on the municipality's police power in Texas Local Government Code § 212.002 to adopt rules that "promote the health, safety, morals, or general welfare . . . and the safe, orderly, and healthful development of the municipality." The seven stated purposes or objectives of the tree ordinance indicated



ZONING REVIEWS

SMART GROWTH POLICIES: AN EVALUATION OF PROGRAMS AND OUTCOMES

Gregory K. Ingram, Armando Carbonell, Yu-Hung Hong, and Anthony Flint (2009; *Lincoln Institute of Land Policy*; 288 pp.; \$35)

How effective is smart growth? As with many things involving broad policy and urban design initiatives, the answer has often proven elusive. The Lincoln Institute set out in 2006 to examine the efficacy of state policies over time in states with strong smart growth programs and others with various land management approaches. By and large, most states succeeded in some areas and not in others; the bottom-line lesson is that they need to maintain a focused effort with regard to their policy goals.

Cover photo: The landmark Wrigley Building alongside a modern skyscraper, Chicago.
© iStockphoto.com/Laura Eisenberg.
Design concept by Lisa Barton.

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