

## **Liberty and Community**

At its best, historic preservation teaches us what we need to know about who we are. Other than “hallowed ground” entrusted to government or foundations, the most powerful force in preserving historical resources is the private sector. Federal tax credits for rehabilitation and restoration of historic buildings have done more for preservation than all the federal, state and local regulatory agencies combined.

The job of an historic commission is to balance individual property rights -- liberty in property -- with community values -- preservation and conservation. Preservation and conservation represent two sides of the same coin: stewardship of the built environment on the one hand and husbandry of the natural environment on the other. As a nation we must decide how to reconcile values of community welfare and individual expression as we shape our future. How do we regulate preservation of historical treasures and conservation of natural resources? What sort of physical environment serves the common good? How do administrative agencies distinguish between culture and *kitsch*?

In all of these attempts to reconcile public and private interests -- community values and independent spirit -- we need to look for a sense of balance and to identify those values that are not only worthy of legislation, but also those values that should be promoted through voluntary actions of citizens acting individually and communally.

## **The Natural and the Built Environment**

Our senses are flooded with information. Technology has brought us far and near: we explore the boundaries of the universe; we examine minute particles of matter. As we tame the last patches of wilderness on earth and plumb the depths of the sea, our planet becomes less wild, more known and the paths of human settlement threaten to create a monoculture habitat suitable for only one species of animal: the human. What have we wrought?

A striking metaphor of the modern dilemma is recalled in a scene in Kyoto, Japan. From a tall building we look out over a landscape bisected by a broad, shallow river. The river appears calm and pleasant. But upon a closer look the bed of the river is made of manufactured, uniform tiles. This is an artificial river (or a river made artificial by the hand of man).

Another scene. In John MacPhee’s book *Coming into the Country*, the explorer Amundsen is returning overland in Northern Alaska to his ship frozen in sea ice at the shore of the Beaufort Sea. He sees “a solitary speck on the distant snow.” A Hudson Bay Company man, carrying mail from the Arctic Ocean, has crossed the mountains on foot because heavy snowfall on the North Slope made passage by dogs impossible. Amundsen wrote:

Here was a man, hundreds of miles from the nearest human

being, with not a soul to aid him in case of illness or accident, cheerfully trudging through the Arctic winter across an unblazed wilderness, and thinking nothing at all of his exploit. I was lost in admiration.

Id. at 365.

These anecdotes illustrate a paradox. Humankind has a heroic place in the vanishing wilderness. Nature as a man-made construct is a frightening, virtual reality, where the human element seems out of place.

Preservation of bricks and mortar -- as conservation of fields, forests and rivers -- has no virtue without values. If we understand the values behind the icons of the built environment -- beyond mere aesthetics -- we may come to terms with the limitations on liberty implied in the exercise of the police power.

### **Theories of Regulation: A Pennsylvania Perspective**

Historic preservation and land conservation laws are land-use laws. Certain principles are implicit in every aspect of land-use analysis. In each regulation, no matter how slight or subtle, is a potential abridgement of property rights, See Appeal of White, 134 A. 409 (Pa. 1926); in each legislative encumbrance, the possibility of a taking, See United Artists v. Philadelphia Historical Comm'n, 595 A.2d 6 (Pa. 1991) modified 635 A.2d 612 (Pa. 1993). Simply put, land-use regulations are expressions of the exercise of the police power. They serve the public health, safety and welfare. They are lawful only when consistent with comprehensive planning principles or some other rational nexus. They are in derogation of the common law and are to be strictly construed. Accordingly, where there is ambiguity, land-use regulations are to be construed in favor of permitting the proposed use and against the restriction. See 53 Pa. Cons. Stat. § 603.1.

The first two hundred years of Pennsylvania's history passed without the need for zoning laws. Unlike building codes, fire codes and other life-safety regulations, historical preservation, like zoning, is fundamentally once removed from the police power and primarily lies in the realm of a subjective value system. Moreover, the principle that the exercise of the police power in land-use legislation is subject to a strong presumption of regularity (and the corollary that one challenging such regulation has a heavy burden) covers a multitude of sins. There are many features of land-use legislation, moreover, including historic preservation, that engage concerns of aesthetics as opposed to public health, welfare and safety, and express social values that do not always survive close judicial scrutiny.

In large measure the earlier Pennsylvania cases arise in the context of an ongoing conflict between a traditional, "libertarian" approach to property rights and an equally strong tendency to defer to the legislative actions of the governing body, which may be termed "conservative" or "statist." In the later, exclusionary zoning cases, a third approach takes shape (which may be called inclusionary or "liberal"), which gives expression to the social and economic consequences of

local zoning actions.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), which ultimately justified land-use regulation on the basis of the nuisance analogy, is the starting point. While several generations have grown up assuming zoning as the norm, it is sobering to remember that Euclid was a turning point (which was decided differently on reargument). Central to the decision was the mindset revealed in the rhetoric, of Justice Sutherland that the apartment house is “a mere parasite constructed in order to take advantage of . . . open spaces and attractive surroundings.” Id. at 394 reprinted in Charles M. Haar, “Reflections on Euclid: Social Contract and Private Purpose,” Zoning and the American Dream, 337 (Charles M. Haar & Jerold S. Kayden eds. 1989).

But Justice Sutherland’s opinion was hardly a ringing endorsement of zoning.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. [citations omitted]

272 U.S. at 395. This “clearly arbitrary and unreasonable” and “having no substantial relation” standard is damning with faint praise. Compare Dolan v. Tigard, 114 S. Ct 2309 (1994) which, on a different standard, exposes zoning to more vigorous review and requires “rough proportionality” in regard to private burdens and exactions in the public interest.

In the very year that Euclid was decided, the Pennsylvania Supreme Court, in Appeal of White, 134 A. 409 (Pa. 1926), was proceeding with its own view of zoning. The Court struck down a set-back requirement in Pittsburgh’s zoning ordinance that had been violated by the enclosure of a front porch on the grounds that aesthetics and other subjective notions of general welfare could not be permitted to restrict the right of free use and enjoyment of real property.

The Pennsylvania cases, especially the two United Artists decisions, demonstrate an abiding struggle between the conflicting values of liberty, as expressed in property, and the broad power of the legislative branch to regulate land use under the rubric of public health, welfare and safety. These decisions are largely subjective, but the principles have endured, although not always applied consistently.

In White the Court acknowledged the primacy of the police power, but warned that the exercise of the police power may not be motivated by purely aesthetic considerations. The right to private property, said the Court, derives from natural law that predates the Constitution:

To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origins to constitutions. It existed before them. It is a part of the citizen's natural liberty — an expression of his freedom — guaranteed as inviolate by every American Bill of Rights.

Id. at 412. (quoting Spann v. Dallas, 225 S.W. 513, 111 Tex. 350 (1921)).

The Court found that the ordinance had no relation to the police power:

The particular part of the ordinance have challenged is referable to none of the authorizing purposes the police power is intended to promote. On what theory can this setback line be justified as an effort to promote the general welfare? The ordinary use permits the owner to place his house where he will; but this general welfare is not based on artistic taste, or repugnancy to the desires of a few. All grants of power are to be interpreted in light of the maxims of Magna Charta and the common law as transmuted into the Bill of Rights; and those things which these maxims forbid cannot be regarded as within any grant of authority made by the people to their agents. (quoting Cooley, Const. Lim. 209)

Id. at 412. Simply put, if presented to the current Pennsylvania Supreme Court, White Appeal would probably go the other way. The statist approach has succeeded in Pennsylvania.

In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the United Supreme Court interpreted the police power broadly and rejected a constitutional challenge to an ordinance that limited residential occupancy to families and stated:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one . . . the police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 8-9.

### **The Dilemma**

And yet, how does one distinguish between legitimate police power concerns (even as amplified in Article I, Section 27 of the Pennsylvania Constitution) from efforts to legislate particularized notions of taste. In his book *Icons and Aliens* (1989), John Costonis wrestles with this issue in the context of his concern that aesthetics controls may infringe upon First Amendment rights. Id. at

95 et seq.

Costonis believes that “substituting stability for beauty” helps us to comprehend better the trade-offs forced by aesthetics regulation and advances a rationale for legal aesthetics that he believes is more in keeping with “the law”. To Costonis, a constitutional nexus for preservation laws may be founded on a sense of “psychological stability and reassurance in the face of environmental changes we perceive as threats to these values.” Id. at xv. What is to be preserved? To Costonis: portions of the symbolic environment that we (i.e., the community) value -- that express “our love of the familiar and our fear of the unknown.” Id. at xvi.

As Costonis recognizes, *community* values are implicit in preservation.

If there is a case to be made for legal aesthetics, it must be centered in legal aesthetics’ role as a regulator of change in the symbolic environment. Legal aesthetics does for the social system what homeostatic agents do for the human body. Physical health requires the maintenance of key biological constancies within the body. When they go out of balance, biological indicators signal the danger and homeostatic agents swing into action to re-establish equilibrium. Individuals and groups, too, must cope with the threats to their personal and social identity that icon-menacing aliens present. They expect that aesthetics measures will function in a socially homeostatic fashion by precluding, or at least minimizing, the shock of the alien.

Id. at 19. And yet, while conceding for the sake of argument health and welfare aspects of aesthetics, and recognizing community values in preservation, how do we find standards that may be rationally applied in the context of real issues? Are we really legislating nostalgia?

In the February 1998 issue of Architecture, the editors of the magazine warn that “the mainstream preservation movement is in danger of becoming a reactionary caucus, or worse, another branch of paleontology, fascinated with the past for its own sake rather than as a font of wisdom for future generations.” Id. at 15. And further,

serious preservationists should be wary of historicist hacks overstepping their territory for the sake of nostalgia, damaging the movement’s credibility in the process. Because nostalgia, as French actress Simone Signoret once mused, is not what it used to be.

Id.

In a City so dynamic as Philadelphia, as elsewhere, there needs to be an accommodation between preservation and new design. The built environment should not be frozen in time. We are not a museum. Robert Venturi treats this

question in his article “The Preservation Game at Penn: An Emotional Response” in *Iconography and Electronics Upon a Generic Architecture* (1996). In his discussion of the bitter conflict concerning Smith Hall at the University of Pennsylvania, Venturi passionately wrote the following:

The only thing amazing about this undistinguished academic building is its identicalness to what was originally a commercial dental supply building up the street by the same architects-- and its retardataire banality as a post-Ruskinian, post-Furnessian, post-Richardsonian, German neo-Classical [expletive deleted] whose style is c. 1830 - although it was designed c. 1890! So it is a retardataire bore with a manufactured history - the historically significant things that are claimed to have happened inside are largely disputed by objective historians; if you try hard enough you can find that something important happened in any old row house in West Philly -- how about the first Italo-Polish marriage celebrated on Regent Street in the ethnic history of our area? Why not fight to save the Dunes Hotel and sign in Las Vegas -- whose significance, historical and aesthetic, surpasses that of Smith Hall by a long shot!

In drafting legislation and administering historic preservation ordinances, the search for standards will continue. How does one write standards in the ordinance? How does one administer standards under governing law? The conflict between liberty in property, on the one hand, and preservation interests on the other, remains.

For a regulator of change, the challenge is to make choices that make sense. Decisions untethered to principle and policy are unavoidably arbitrary. Presentation zealots accept little less than absolutes; developers and their consultants frequently deprecate important historic fabric, especially in the details. But most importantly, communities must grow and flourish.

History is about change. Magnificent buildings did not come into being out of thin air. Ancient cities were built upon more ancient ruins. Venerable buildings were demolished to make room for structures that have taken a place in the inventory of world treasures. Forests were cut (and swamps drained) to clear sites for great cities. The history of civilization rests on building, demolition and rebuilding. To freeze history is to deny history.

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January 31, 2005