Chapter 16
The Legal Landscape: Issues and Trends

INTRODUCTION
This chapter is an effort to put the previous legal discussion in a distinctly nonlegal perspective. Given the evolution of aesthetic value treatment by the legal system, some major philosophical issues and concepts should be mentioned. The theoretical perspectives utilized by the authors will include the “sociology of law” approach (Cutler 1972); the environmental psychology of environmental decision-makers (Craik 1970); and the political science of environmental administration (Caldwell 1970). All of these approaches have potentially valuable contributions to make to environmental aesthetics and the law.

REVIEW OF MAJOR PROGRESSIONS AND TRENDS
We can summarize the evolution of aesthetic value treatment by the legal system into three significant trends:

1. The shift from only a few states supporting use of aesthetics alone as a basis for exercising the police power for land use, architectural, and signage regulation to a majority of states supporting use of aesthetics only.
2. The gradual shift of the courts to facing issues with environmental aesthetic values. The evolution of this shift from (a) not facing aesthetics, to (b) fictionalizing or masking aesthetics under other issues, to (c) facing up to the right to address aesthetic injury to the present human users.
3. Increased legislation and regulation at federal, state, and local levels that address aesthetic value protection with increasing specificity.

The previous trends are dependent upon a highly erratic legal pendulum swinging from conservative to liberal decisions across time. The liberal decisions are always labeled as “maverick” or the exception, but somehow they are also signposts for the overall general trend (see Figure 16.1). The legal system is generally conservative in its treatment of the aesthetic values of society, as most court decisions lag behind overall popular trends. Simultaneously, many legal scholars call upon the court system for leadership in an area they are loath to go into.

WILL THE LIBERAL TRENDS CONTINUE?
The general force behind consideration of aesthetic values in American society is its high level of affluence. Will future fiscal, energy, and food production constraints limit this rising affluence and possibly cause a downward trend in public support for protection of aesthetic values in the landscape? This last possibility may diminish interest in assimilating an “environmental land ethic,” as originally proposed by Aldo Leopold (1949) and endorsed earlier in this book as a useful standard for local aesthetic regulation. An alternative scenario might present a society that has learned to “tighten its belt” by reduction in energy and material consumption and has refocused its attention on maintaining and regenerating environmental quality. In this scenario, educational, recreational, and aesthetic environmental attributes would be “consumed” experientially, with high informational and experiential quality becoming the desirable goal.
Wisconsin Power and Light utilize underground instead of overhead construction. . . .
This determination is not considered to be precedent setting in terms of future transmission line projects, but rather one which reflects the uniqueness and importance of the Cross Plains Unit and the stated, significant public interest considerations involved.7

Regarding the precedent-setting, one commissioner dissented:

My decision is based on a test of balancing these interests (economic vs. environment) in a manner consistent with the overall general public interest which I feel requires undergrounding, considering the uniqueness of the Reserve. There is precedential value in this decision.8

References


7P.S.C.W. 1978. Findings of fact and order, Case 6660-CE-13, Madison, WI.
8Id., p. 15.
LEGAL-PHILOSOPHICAL DILEMMAS

A number of key questions and dilemmas have arisen from the previous discussion: (1) elitism versus the common man, (2) uniform precedent versus contextualism, and (3) administrative management stability versus shifting public value systems.

Elitism versus the Common Man

We have an elite minority dictating, by their value systems, the degree of consideration of environmental aesthetics in legal environmental cases. One can prescribe altruism, but there are natural constraints for most individuals, who may attempt to extend themselves into other people’s value systems. The challenge is to open the process, whether legal or planning, so that more value systems may be represented. The liberalized rules of standing do this for those groups or individuals who have the means to litigate. A more direct and less expensive approach is through agency administrative hearings and workshops. An even better approach is the use of mass surveys, which could tap the “silent” mass publics for their aesthetic values, such as what was done for the Juneau case study in Chapter 10 and the Greene County Nuclear Power Plant case study in Chapter 14. There are major restrictions for federal agencies to do mass surveying, as the Human Subjects Clearance process and Report Reduction Program as administered by the Office of Management and Budget create very few slots for annual or one-time surveys. Without using direct public participation and surveys to ascertain public aesthetic value sets, administrative agencies will be forever rebounding from the legislative bodies to the public and back again.

Uniform Precedent versus Contextualism

National legislation cannot be sensitive enough to deal with local contextual environmental aesthetic issues. That is, unless there is created a separate piece of legislation for every sensitive area of high aesthetic value in the country. This is not far from the present trend, as environmental groups are trying hard to get certain landscapes currently managed by federal agencies as multiple-use environments into more protected status of single- or limited-use environments (e.g., designated wilderness areas). In the local context, the prime example would be specific areas designated for architectural control or historic preservation.

The question is: Should one overload the legal system with specific pieces of legislation to protect separate and specific areas? Is this, in fact, good way of protecting public aesthetic values for specific areas? Another related aspect of this issue is that specific areas, if they have survived highly visible court or administrative hearing battles over their fate, emerge with highly charged symbolic values that may or may not correlate with their physical aesthetic attributes (e.g., Overton Park, Knoxville, Tennessee).

A problem also appears in relation to legal precedents from court cases. Lawyers and judges are forever searching for that one clear precedent that will make sense out of the whole morass. Precedents are useful for clarifying legal procedures but may not be for substantive issues. If we adopt a contextual approach to environmental aesthetics, every place may be seen as qualitatively unique and have an essence of its own. Therefore, precedents dealing with substantive matters may be of little use if we are concerned with the essence or contextual uniqueness of environmental aesthetic values.

Administrative Management Stability versus Shifting Public Value Systems

The preceding situation is further aggravated by shifting public value systems. We know that in some cases the public’s sensitivity to certain landscapes and landscape features has changed drastically in relatively short periods of time (see Glacken 1967; Nash 1967; Pasmore 1971; Ress 1975). This presents a doubly perplexing problem for the administrative agency charged with visual resource or aesthetic management. First, the agency has to anticipate shifting public values so as not to get into a blind; for instance, trade off
or allow development of a landscape of which the public thinks highly. Second, the agency must not appear to be shifting policy rapidly themselves and thereby precipitating uncertainty or anxiety in the public eye. Agencies may find themselves engaging in the perilous adventure of retaining a public image of confidence as to the certainty or consistency of its actions while simultaneously being flexible enough to account for contextual aesthetic values.

IN SEARCH OF CONTEXTUAL HARMONY

In summary, public regulation and control through legislative mandate for the public environment and, recognizing certain constitutional tests, for the private environment seem to be the most hopeful prescription of environmental aesthetics. In assessing the roles of the different actors in environmental aesthetic control, a number of conclusions could be drawn. Judges, legislatures, and administrative agencies need to make better use of existing aesthetic theory and information so that theoretically compatible approaches are developed for environmental aesthetic protection. Many of the legal tests are of a contextual nature, and there is a corresponding contextual theory of aesthetics. They could reinforce each other. Legal professionals need to work with aesthetic analysts, such as landscape architects, planners, and social scientists, and vice versa. There needs to be a better meeting of the minds over environmental aesthetics. If this happens, better theory will be provided for legal test foundations, there will be a more orderly evolution of aesthetics and law, and methodologists will be confronted with more realistic environmental aesthetic questions and dilemmas.

References


