Chapter 6

Architectural Regulation, Preservation, and Design Review

INTRODUCTION

This chapter addresses issues related to architectural regulation, preservation, and design review. Architectural control, as opposed to traditional zoning and land use control, has to do with the preservation or changes related to individual structures or groups of structures in terms of the structures' height, mass, design, materials, color, and other physical architectural attributes (Figure 6.1).

As America became more urban, and as new architectural and building techniques allowed the construction of ever more massive structures, cities and towns increasingly showed concern about retaining their character. Drawing on European precedents, particularly from Germany, local governments began experimenting with zoning and architectural controls. Some of the pioneer cases involved height restrictions. As early as 1888, a New York court approved an 80-foot height limitation on residential structures. In 1904, the city of Baltimore adopted a 70-foot maximum-height regulation to maintain the character of its neighborhoods and commercial areas. The same year, the city of Boston, which had grown sensitive to the need for preservation due to the destruction of many historic buildings in the 1800s, enacted similar legislation that prescribed a lower height for buildings constructed in residential areas than for those in commercial districts. So communities started early with architectural regulation and preservation.

Preservation of historic values is very much bound up with aesthetics values. In a dissent by Judge Jason in a New York Court of Appeals case Lutheran Church in America v. City of New York, he states:

[While economics is perhaps inextricably intertwined with such legislation, in the main the purposes sought to be achieved are aesthetic. Historic preservation promotes aesthetic values by adding the variety, the beauty and the quality of life.]

To preserve the aesthetic character of “quaint” and delightful villages in the face of urban growth, the federal government, all states, and over 2,000 municipalities have enacted historic preservation laws. Federal preservation activities include the Historic American Buildings and Sites Surveys of the 1930s, the consolidation of control over historic property in the National Park Service in 1933, and the Historic Sites Act of 1935, which declared the preservation of historic prop-

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5Id. at 15.
erty a national policy of the United States.\textsuperscript{7} State preservation activities (Wilson and Winkler 1971) have centered on the creation of historic parks and museums and the encouragement of quasi-official state historical societies. The National Trust for Historic Preservation was created to succeed the National Council for Historic Sites and Buildings in 1949.\textsuperscript{8} It is a nationwide organization that coordinates the activities of the diverse state and local preservation organizations.

A key piece of federal legislation regarding the protection of historical aesthetic values is the National Historic Preservation Act of 1966.\textsuperscript{9} Section 106\textsuperscript{10} of the act requires the consideration, prior to the expenditure of federal funds, of the effect of any federal, federally assisted, or federally licensed undertaking on any district, site, building, structure, or object that is listed on the National Register of Historic Places. This provision, in conjunction with the National Environmental Policy Act,\textsuperscript{11} has created problems for urban development and especially federally funded highway projects proposed for historically "rich" urban areas. Section 106 requires a detailed analysis of impacts on historic structures and properties as part of the environmental analysis of such projects, thus causing delays and sometimes even stopping a project.

The National Register of Historic Places lists districts, sites, buildings, structures, or objects that are significant to the history, architecture, archeology, and culture of the United States. Published procedures\textsuperscript{12} set forth the policy of the Advisory Council on Historic Preservation regarding compliance with Section 106 of the National Historic Preservation Act of 1966.\textsuperscript{13}

Other federal acts affecting historical resources include Public Law 92-6362, which allows donation of federally owned historical properties to state or local governments, and the Open Space Act,\textsuperscript{14} which pro-

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\textsuperscript{7} Id.

\textsuperscript{8} 16 U.S.C. ss. 468-68c (1988).


\textsuperscript{10} Id.

\textsuperscript{11} 42 U.S.C. 4321 et seq. (1988).


\textsuperscript{14} 42 U.S.C. s. 1500 a-1.
vides grants for historic preservation administered by the Secretary of Housing and Urban Development.

Much of the action though, in terms of litigation and development of useful tools for historical preservation, has been at the local level and in a predominantly urban context (see Rose 1981; Crumpler 1974; McMillan 1971; Costonis 1985; Poole 1987; Anderson 1960; Loflin 1971; Rankin 1971; and Goldstone 1971). By looking at some of the early roots of legislation for historic preservation one can see basic rationales or themes for preservation.

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15See City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 738 (1953) (upholding the New Orleans ordinance to preserve the Vieux Carré section); Reynolds Metals Co. v. Martin, 269 Ky. 378, 107 S.W.2d 251 (1937) (Use of property tax exemption to encourage private expenditures for restoration purposes); U.S. v. Gettysburg Elec. R. Co., 160 U.S. 668 (1896) (eminent domain power upheld in acquiring historic property); and Vieux Carré Property Owners v. City of New Orleans, 246 La. 788, 167 So.2d 367 (1964) (ordinance which exempts part of the Vieux Carré section of the preservation regulations is unconstitutional).


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**THEMES FOR PRESERVATION**

Rose (1981) suggests three themes, or rationales, for community building preservation: (1) preservation as inspiration, (2) preservation for architectural merit, and (3) preservation for community.

**Preservation as “Inspiration”** (see Figure 6.2)

The inspirational view of preservation was developed in the nineteenth century via inspiration and the no-
tion that civic education was intended to have important political ramifications (Rose 1981). This was true of both public and private preservation efforts. Embodied in private activities was the idea that reminders of the past can link us together in a national community. One of the inspirational view preservation cases of that era, United States v. Gettysburg Electric Railway Company,17 is illustrative (see Figure 6.2). The United States condemned property for the creation of a national battlefield memorial at Gettysburg, and the question arose whether condemnation was for a “public use.” Justice Peck’s opinion in this decision states two key elements of continuing and critical importance:

1. the idea that preservation can in fact have a political purpose of fostering a sense of community;
2. the understanding that a place can convey this sense of community, or more generally, that visual surroundings work a political effect on our consciousness (Rose 1981).

Preservation for Architectural Merit

According to Rose (1981), with the shift in interest to architectural merit, public involvement took the form of architectural controls designed to protect a few well-known old districts, such as Charleston, South Carolina, and New Orleans (see Figure 6.3). Challenges to these architectural controls gave courts an opportunity for reasoned articulation of the purpose of preservation. According to some legal commentators, although judicial opinions have generally upheld architectural controls in such application contexts, analysis (1) has not included anything more than the validity (or invalidity) of aesthetics regulation, and (2) has not distinguished historic preservation from aesthetics. Paramount to some legal critics (see Rose 1981; Costonis 1985; Poole 1987; Crumpler 1974; and McMillan 1971) is the need to build considerations of how and when communities may participate in the basic rationale for, and decisions affecting, historic preservation for architectural merit. Thus, who sets the standards and who are the tastemakers?

Preservation for Community

The third phase of historic preservation builds on elements of the past by expanding the substantive considerations implicit in Gettysburg. It increases the attention paid to procedure and focuses on the contribution of the physical environment to the maintenance of community—not the national community as in Get-

17 160 U.S. 692 (1896).
physical surroundings generally, in a larger perspective of community needs. Finally, it should be recognized that physical surroundings play a critical role in the community. Those surroundings cannot be viewed as the preserve of the aesthetics buffs but must become an issue for a broader constituency.

Thus the motivation for architectural preservation and control has evolved from national historic inspirational preservation, to preservation for architectural merit, to community-motivated preservation.

APPLICATION CONTEXTS FOR ARCHITECTURAL CONTROL

It is instructive to look at how architectural review ordinances have been created and at their intended application. Poole (1987), in a review of architectural appearance regulations, provides a very useful list of application contexts:

1. To prevent the construction of buildings that are excessively different from nearby buildings (Figure 6.5). This is what Costonis (1989) terms protection from "aliens." It is probably the most common form of appearance review ordinance. As revealed by case law and by the nature of communities adopting such ordinances, this form is principally suburban. It is frequently used to protect existing mid- and upper-level income, single-family neighborhoods from the intrusion of radically different architectural designs. However, many communities exclude single-family homes from their review. An example would be the Lake Forest, Illinois, ordinance.

2. To prevent the construction of buildings that are excessively similar, or an anti-lookalike ordinance (Figure 6.6). This form of architectural control is also a suburban concern, originating from the ex-plosive growth of tract housing (such as Levittowns) in the 1950s. The ordinance is aimed principally at preventing the monotony of the same or similar home design in large subdivisions. An example, again, would be the Lake Forest, Illinois, ordinance.
3. To preserve the architectural style and integrity of a historic district (Figure 6.7). This is the type of ordinance enacted to preserve the French Quarter in New Orleans. It is probably the second most common type of architectural appearance review program. Its purpose is to prevent the destruction of historic buildings within a district and to require that new construction therein conform to the district’s historic style. This is generally an urban application, inasmuch as districts imply a concentration of structures.

4. To preserve architectural features of a particular building designated as a landmark (Figure 6.8). The most prominent example of this form of review is the preservation of Grand Central Terminal in New York City. This landmark designation is for a structure in contrast to a historic district. Those programs may occur in urban, suburban, or rural settings, although the most controversial and noted cases are in urban settings. Costonis (1989) calls it protection of “icons.” Whole books have been written about the legal and administrative issues of landmarks preservation programs (Costonis 1974 and 1989).

5. To create an architectural style within a district, such as an alpine village in Colorado. This use of architectural review generally requires an agreement at the earliest stages of community development. It may be both a suburban or central city residential (Figure 6.9) and a central business district concept in application. One of the earliest and most well known is the Coral Gables, Florida, program.

6. To create urban spaces, such as mini-parks and plazas that attract (desirable) users (Figure 6.10). Recent studies have shown that with proper architectural design, urban plazas and mini-parks can be made much more inviting to city residents as lunching, meeting, and recreation places. This “people activity” in turn makes an urban area more interesting and safe. The urban open-space program in New York City, which utilizes bonus points in negotiations with developers, is an example of such a program. Most programs are urban.

7. To create entrance districts along transportation
corridors. This type of appearance review program recognizes that people share familiar visual experiences in approaching cities and seeks to create a favorable impression. In a 1917 ordinance, Philadelphia provided for an art jury review of all works of art and all buildings within 200 feet of the Benjamin Franklin Parkway, a 1.25-mile drive into the city center. This last application will be treated in the following chapter, which focuses on outdoor advertising and visual corridor management.

Two applications, historic districts and historic landmarks, are of a historic preservation nature, but the rest of the architectural control programs are not and address different values or purposes. As we might expect, there have been court challenges to the legal defensibility of such architectural control ordinances, both historic preservation-based and others.

**LEGAL ISSUES AND ARCHITECTURAL CONTROL**

There have been two major constitutional issues related to implementation of architectural review programs and ordinances. These are the conflicts with the Fifth Amendment in terms of the due process and takings clauses, and with the First Amendment guarantee of freedom of expression, specifically, whether architecture is to be protected as a First Amendment right.

One of the most sensitive issues is the use of the police power regulation to restrict uses of a historic property or building without providing compensation.

The U.S. Supreme Court decided that New York City did not violate the Penn Central Transportation Company's Fifth Amendment property rights when it designated Grand Central Terminal as a historic landmark, thus blocking the company's proposal for an office tower above the facility.

In a major decision that has sparked preservation efforts in other cities, the Court recognized that regulations for historic preservation, like zoning and other conventional land use controls, are valid exercises of the police power. During the last 50 years, the Court noted, over 500 cities and states have adopted landmark protection laws "to encourage or require the preservation of buildings and areas with historic or aesthetic importance." As stated in Justice William Brennan's opinion, the Court rejected Penn Central's argument that the landmark designation constituted a "taking" of property for which "just compensation" is required under the Fifth Amendment. The restrictions posed on the terminal site, Brennan said, "are substantially related to the promotion of the general welfare" and "permit reasonable beneficial use of the landmark site," namely, the terminal itself.

In a detailed review of the Penn Central case, Marcus (1979) suggests that the Supreme Court used three criteria for assessing whether there was an unconstitutional taking:

1) A government restriction on real property "not reasonably necessary to the effectuation of a substantial public purpose" may constitute a "taking" (i.e., arbitrariness).
2) A government restriction may have such "an unduly harsh impact on the owner's use of the property" or may so frustrate distinct investment-backed expectations as to amount to a "taking" (i.e., harshness).
3) Government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "taking" (i.e., appropriation).

This case provided a blanket of protection for communities concerned about the taking issue and about individual landmark regulation because of the potentially expensive inverse condemnation consequences. Inverse condemnation in this context happens when a historic preservation ordinance prevents all alternative uses/reuses of a property and the property owner then sues the city for a condemnation award. In finding New York City's legislative judgment contained in its zoning

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18 Architectural Control, Am. Soc. of Planning Officials Information Report no. 6 (1949) at page 5.
20 Id.
21 Id.
and landmark laws consistent with Fifth and Fourteenth Amendment requirements, the Supreme Court signaled to communities across the nation that they may consider awarding transferable development rights to property owners. These land owners are singled out to bear special burdens for public purpose land use reasons, as a valid means to cushion otherwise harsh regulatory impacts and restore an additional measure of real estate investment expectations.

Some interesting possibilities are suggested by the decision. While it emphasizes “historic” preservation, Justice William Brennan’s opinion also stresses the need to protect areas of “aesthetic importance.” That phrase is sufficiently vague to protect communities seeking to block development proposals on specific sites that have no real “historic” significance. Several legal commentators have taken up this issue since they feel this part of the Penn Central case opened the door to communities misusing historic or aesthetics rationales to stop development proposals (see Costonis 1985 and 1989). For further commentary addressing the Fifth Amendment and this case, please see Loflin (1971), Rankin (1971), and Costonis (1985).

There is also the issue of due process. In 1980 a federal district court invalidated the federal National Historic Landmarks program because the program failed to provide due process protections to property owners when it declared a 14,000-acre site as the Green Springs National Historic District and enrolled the district in the National Register of Historic Places. The court held that the designation violated the due process rights of landowners within the district. The court also found that the two government actions, National Historic Landmark designation and National Register of Historic Places enrollment, constituted separate and concurrent interferences with property interests of area landowners. Such interests included targeting property for acquisition via eminent domain, federal restrictions through Section 106 of the National Historic Preservation Act, delay or denial of federal assistance because of Section 106 tie, and the tax status of property owners. Edmundson (1982) outlines these procedural concerns and suggests ways of protecting the due process rights of property owners through development of appropriate notice, hearings, and standards.

Much of the case law related to architectural control ordinances focuses on First Amendment issues, including the often cited cases of Schad, Young, Stoyanoff, Metromedia, and Vincent. One of the key issues throughout these cases is the regulation of protected expression (architecture) based on content (whatever is expressed by the architecture or signage). According to Poole (1987), government regulation of protected expression based on content is prohibited when the sole purpose of the regulation is to take a non-neutral (favorable or unfavorable) position. The example given is that Detroit’s anti-skid row ordinance that regulates adult theaters was upheld not because of the city’s disapproval of content but because centralization of such theaters in one location causes blight or further deterioration of neighborhoods. This is called the sole purpose/viewpoint neutral threshold inquiry and can be applied to all ordinances that propose to control architecture.

A four-part test used by the courts evolved from the O’Brien case. It states that government regulation is sufficiently justified:

1. If it is within the constitutional power of government.
2. If it furthers an important or substantial government interest.
3. If the government interest is unrelated to the suppression of free expression.
4. If the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Costonis, on the other hand, rejects the O’Brien test and advocates the two-part test from Schad:

[when a zoning law infringes upon a protected liberty it (1) must be narrowly drawn, and (2) must further a sufficiently substantial government interest.]

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Poole (1987) doesn’t like either the four-part or the two-part test and proposed a set of four questions that can be used to look at First Amendment issues and architectural control ordinances:

1. What is the purpose of the government regulation? This includes balancing the state’s interest in regulation against individual liberty; in other words, there should be a good reason for such regulation.
2. What is the impact of regulation on protected expression? How much does the regulation limit potential expression? Are there reasonable alternative locations, means, and levels of scrutiny?
3. What is the nature of the protected expression? There can be a hierarchy of expression from obscenity to political or religious freedom, or possibly noncommercial speech could be considered more important than commercial speech.
4. Balancing of public and private interests may include: (a) the strength of the community reason and clarity of the relationship, and (b) the impact of the regulation on protected expression.

If we were to apply Poole’s questions to “no excessive difference” architectural control ordinances, we might find, first, that “no excessive difference” regulations curtail diversity, which is a fundamental content distinction, meaning they would fail Poole’s non-neutral inquiry test mentioned earlier. Second, in terms of interest balancing we have the validity of the review criteria or the standing of the review board or commission versus the architect/owner; this often results in a draw. Third, in terms of the impact on protected expression, there are often no alternatives for an architect/owner to express a particular architectural message, and an alternative location may be problematic or impractical. Fourth, in terms of the nature of protected expression, architecture is valuable in this context under the First Amendment. Fifth, balancing public versus private interests may yield the finding that we don’t like the appearance of that structure in this neighborhood; this may not constitute a community-wide appearance issue. As we can see, there are multiple problems with “excessive difference” regulations unless these legal issues can be resolved.

Landmarks preservation ordinances, on the other hand, first, promote or enhance community diversity, passing the non-neutral inquiry test. Second, historic/heritage/economic and identity reasons for landmark preservation do well on the interest-balancing test. Third, in terms of protected expression with landmarks, there is the issue of who the historic architect was. Fourth, in terms of protected expression, landmarks are often highly visible and well used, although some are not accessible to the public. Fifth, with regard to the balancing of public and private interests, the Supreme Court had no problem in Penn Central with the substantive interest by communities throughout the United States in the New York City landmarks program. Thus, landmark preservation programs do rather well under Poole’s tests.

A First Amendment challenge of “no excessive similarity” regulations making structures look the same is likely to fail, according to Poole (1987), because architectural repetition is not protected expression. Excluding unacceptable architecture from historic districts is likely to be upheld. The question of reasonable alternative locations is difficult, but there is widespread acceptance of historic preservation districts by the courts.

In the example of the Coral Gables, Florida, ordinance that creates a “certain community style,” there is a clear relationship between regulation and purpose. There is discrimination based on the content of the architecture similar to the Cleveland Heights, Ohio, and Lake Forest, Illinois, ordinances. However, overall content of the comprehensive-style plan minimizes the likelihood of problems. The balancing of public and private interests is very difficult and rests on the definition of community and whether these are values shared by the whole community.

In summary, with regard to First Amendment and architectural control: (1) architecture is a form of protected expression; (2) architectural appearance ordinances for most program purposes are burdensome regulations on protected expression; but (3) only “no excessive difference” and “no excessive similarity” regulations are unconstitutional intrusions on protected expression, making the latter type of appearance review difficult to defend from a legal perspective. For further discussion of First Amendment issues, see McMillan (1971), Rose (1981), Poole (1987), and Crumpier (1974).

DESIGN REVIEW

Some 2,000 communities in the United States have enacted local preservation ordinances, many of which place strong controls on new construction in historic areas. Increasing numbers of cities and towns are also imposing government design review on new buildings in their environs in nonhistoric and suburban settings, not just landmark and historic district protection. Thus, there is a need for careful crafting of review standards and administration of these architectural control programs if we are to avoid some of the legal challenges that were previously reviewed. Duerksen (1986) has done an excellent job of outlining design review considerations for both historic and nonhistoric areas, and much of the following material follows his work closely.

Design Review in Historic Areas

Preservation controls raise many legal issues, as we have just seen, but one of the most important involves
the standards an agency uses to review an application for new construction in a historic district. Generally, the failure of an agency to establish in advance coherent written standards and regulations to be applied in all cases amounts to a denial of due process. Costonis (1989) discusses in detail the complexities and subjective nature of such standards; they must be articulated to pass legal muster and give permit applicants advance notice of what is required. Courts have shown great deference to local review bodies, as witnessed by the language of the U.S. Supreme Court in *Penn Central.*

**Demolition, Alteration, and New Construction**

The most controversial power exercised by preservation commissions is reviewing applications for demolition or alteration of a landmark or new construction in a historic area, often referred to collectively as applications for “certificates of appropriateness.” The key, according to Duerksen (1986), in addressing demolition or alteration proposals (Figure 6.11) is to encourage upgrading and continued maintenance of existing landmarks, and to guide the process of change so it is sympathetic to the existing character of the historic area. Thus, the process of setting standards that reflect this character as well as providing sound administrative procedures is critical.

**Setting Review Standards**

Preservationists, traditionally, have been concerned that a demolition “not have an adverse effect on the fabric of the district,” or that new construction not be “incongruous,” but that it should be “in harmony” with the “character,” “significant features,” or “atmosphere” of the area. (See Williams 1975; Weming Lu 1980; and Duerksen 1986.) These criteria are very subjective if not defined or augmented with guidance documents (see Figure 6.12). Some legal professionals have provided physically based review standards, such as those provided by Professor Williams:

- Mass — the height of a building, its bulk, and the nature of its roofline;
- The proportions between the height of a building and its width;
- The nature of the open space around buildings, including the extent of setbacks, the existence of any yards and their size, and the continuity of such spaces along the street;
- The existence of trees and other landscaping, and the extent of paving;
- The nature of the openings in the facade, primarily doors and windows — their location, size, and proportion;
- The type of roof — flat, gabled, hip, gambrel, mansard, etc.
- The nature of projections from the buildings, particularly porches;
- The nature of the architectural details — and in a broader sense, the predominant architectural style;
- The nature of the materials;
- Color;
- Texture;
- The details of ornamentation;
- Signs.

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These physically based criteria can be used to narrow and provide definitions for more broadly based review standards. As noted by Duerksen (1986), promulgating adequate review standards is much less difficult in historic areas because they have distinctive style and character. Thus, in a number of challenges to preservation restrictions, judges have had little trouble upholding the action of the local review body because of the district’s distinctive style.

The application of permit review standards to landmarks or districts that do not exhibit a single, distinctive style has been more troublesome to many legal scholars (Costonis 1985; Poole 1987; Rose 1981) and has been fodder for whole books on the subject (Costonis 1986). In instances in which the ordinance contains relatively vague review standards, the courts have attached great importance to other criteria in the local law or regulations that narrow commission discretion. In other cases, the courts have looked to background studies and surveys that were incorporated by reference. Courts also have relied on procedural protections to uphold broad standards. In still other instances, courts have held that appointing people with special expertise to a commission helps limit what might otherwise have been excessive discretion.

Narrowing Broad Review Standards

A typical preservation ordinance sets forth broad review standards for demolition or development permits, but relates these broad standards to specific criteria. Courts have uniformly approved the broad review standards in such cases. A case from the historic small town of Georgetown, Colorado, is a good example.

In this case, the plaintiff developer alleged that the standard the local commission was to apply in reviewing an application to construct new townhouses was unconstitutionally vague. The six criteria included in this ordinance were:

1. The effect of the proposed change on the general historic and/or architectural character of the structures in the area;
2. The architectural style, arrangement, texture, and materials used on existing and proposed structures, and their relation to other structures in the area;
3. The effects of the proposed work in creating, changing, destroying, or affecting otherwise the exterior architectural features of the structure upon which the work is to be done;
4. The effects of the proposed work upon the protection, enhancement, perpetuation, and use of the structure or area;
5. The use to which the structure or area will be put;
6. The condition of existing improvements and whether or not they are a hazard to public health or safety (Duerksen, 1986).

The Colorado Supreme Court noted that the phrase "historical and/or architectural significance" was defined in the ordinance, and more importantly, the ordinance set forth "six specific criteria that focus the attention of the commission and of potential applicants for certificates of appropriateness on objective and discernible factors." Consequently, it rejected the plaintiff's contention of vagueness.

If a local ordinance does not contain such narrowing criteria, the preservation commission would do well to adopt them by way of regulation or informal review guidelines.

Standards Found in Background Documents

Background documents such as old city plans, historical documents, photographs, and contemporary writings or studies may provide enough substance for approval of a local action, even though these criteria appear in documents outside the preservation ordinance. Such was the case with Mahr v. City of New Orleans. In this case, the court upheld the New Orleans preservation ordinance, even though the city admitted it had not articulated any review standard.

Procedural Safeguards

The application of standards by a uniquely qualified body to avoid the possibility of arbitrary action or abuse is also an important consideration for architectural review boards. Such procedural considerations combined with the existence of comprehensive background studies and the obvious character of most historic areas helps to explain why courts look so favorably on historic preservation controls but are somewhat suspicious of other design controls.

Administering Design Review

There are a number of important steps that can be taken to improve the efficiency of the design process. The following steps are suggested by Duerksen (1986):

1. Preparation of a succinct summary sheet of local preservation requirements. This can be distributed to applicants by building officials.
2. Holding preapplication meetings. Misunderstandings can be avoided if the project proponent is given a chance to meet informally with staff and commission members prior to submitting a formal application.
3. Imposition of time limits. An increasing number of local governments are placing limits on the time a local commission has to consider a project once a completed application is submitted. These time limits usually range from 30 to 60 days.
4. Keeping records. Now that local ordinances have real "teeth," local commissions must improve their record-keeping, particularly minutes and transcripts from hearings dealing with projects that are controversial and may end up in litigation.

Other steps also suggested by Duerksen (1986) that can improve the substance of design review include:

5. Generic approvals of preapproved sign designs. Some commissions have published booklets that contain five or six preapproved sign designs for a historic area. If the applicant adopts a preapproved design, the normal review process can be waived.
6. Using visual design guides. More and more communities are going beyond relying on written design review standards and are adopting visual design guides that graphically depict, for example, what constitutes a compatible design.
7. Avoiding nit-picking. Commissions and preservationists are slowly learning the importance of concentrating their efforts and attention on major cases and avoiding extended review of other items, such as spacing of pickets in a fence, design of wrought-iron gates, and similar considerations.

Design Review Beyond Historic Areas

Increasing dissatisfaction with the appearance of new buildings and their relationship to surrounding structures and neighborhoods has been manifested in the growing number of design review ordinances applied beyond historic districts. No longer content to regulate traditional zoning aspects of development such as bulk and setbacks, communities throughout the United States are specifying height, architectural styles, building orientation, and other aesthetic aspects of new projects.

Initially, this concern over design was most preva-
lent in exclusive suburban communities like Santa Barbara, California, and Fox Point, Wisconsin, which capture a distinctive architectural style or atmosphere. One of the earliest ordinances was passed by West Palm Beach, Florida, in the mid-1940s, followed by a similar ordinance in Santa Barbara in 1949.

By the 1970s many communities that had a variety of architectural styles and character adopted appearance codes. Recently, design review went downtown in places like San Francisco, Seattle, and Boston, where architectural height, style, and view preservation are major issues (see Figures 6.13 and 6.14).

Design review outside historic areas poses many of the same legal and practical challenges that protecting historic structures do. Experience has demonstrated that careful planning and legal draftsmanship, coupled with strong commitment to common-sense implementation and consistent administration, help make design review work.

**FIGURE 6.13** San Francisco skyline. Photo credit: R. C. Smardon

**FIGURE 6.14** Boston skyline. Photo credit: Matheus Potteiger

**Special Legal Issues for Nonhistoric Design Review**

The troublesome aspects of First and Fifth Amendment conflicts mentioned earlier in this chapter hold for these ordinances, especially anti-lookalike and no excessive difference ordinances. In addition, vagueness of review standards is the other major issue that is the focus of court cases in which similarity or anti-lookalike ordinances were challenged.

**Developments**

In response to growing citizen concern plus favorable court review, more communities are enacting design review ordinances. Some of the most far-reaching ordinances can be found in major cities. San Francisco and Seattle offer a sample of recent developments:

San Francisco is still attempting to address impacts from a building boom that has altered its downtown skyline, blocking views of the bay. Stiff public opposition in the 1960s and 1970s led the city to reduce height and bulk limits and to issue an urban design plan (see O’Hern 1973 and Vettel 1985). Results were disappointing, and in 1979 a citizens’ initiative almost succeeded in placing a growth cap on downtown, which spurred further action. After much debate and politicking, the city council enacted a series of design-related ordinances. Among other things, the new ordinances require that:

a. The upper portion of any tall building be tapered and treated in a manner to create a visually distinctive roof or other termination of the building facade,

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thereby avoiding boxy high-rise buildings and a "benching" effect of the skyline;
b. New or expanded structures abutting certain streets avoid penetration of a sun-access plane so that shadows are not cast at certain times of day on sidewalks and city parks and plazas;
c. Buildings be designed so the development will not cause excessive ground-level wind currents in areas of substantial pedestrian use or public seating;
d. The city consider the historical and aesthetic characteristic of the area along with the impact on tourism when issuing a building permit;
e. Building heights downtown be reduced from 700 to 550 feet (from about 56 to 44 stories) (Duerrksen, 1986, Id.).

Seattle has enacted a range of similar, although less detailed restrictions on high-rise construction in its downtown. The requirements limit building heights, establish setbacks to maintain light and air, and ensure designs that reduce wind tunneling and retain views of Elliot Bay. The new laws eliminate density bonuses for projects that displace landmarks; they also provide for glare protection for pedestrians and motorists through restricting use of glare-producing materials and finishes on the lower stories of structures (Erickson 1980).

Implementing Design Review

Past experience with design review procedures and administration in historic areas offers some general guidelines that communities should keep in mind when drafting and implementing design review regulations. It should also be noted that Hamid Shirvani (1981) has written a useful book, Urban Design Review: A Guide for Planners. The following guidelines from Duerrksen (1986) can also improve the design review process:

1. Successful design review efforts are products of community-based efforts to identify what is special, unique, or worthy of conserving in an area.
2. If detailed design review in an area is to take place, it should be administered by a well-qualified board supported by adequate staff and resources.
3. Written design standards should be supplemented with visual aids and guidelines to make clear what the community desires, thus reducing uncertainty for prospective developers.
4. Design guidelines should not concentrate solely or even primarily on detailed design review.
5. Design review should be carefully integrated with other planning goals for the area.

Case Study: Visual Architectural Review in San Francisco

First, let's review some history of San Francisco's early planning efforts. In 1966 the Department of City Planning completed a comprehensive set of zoning studies that set out aesthetic and urban design goals. These studies ultimately became the basis for the zoning ordinances enacted in 1968. Beyond the density restrictions and the retail district's ground-level retail-frontage requirement, however, the zoning ordinances did not require compliance with any of the urban design goals, and as a result, have had limited success in promoting transferable development rights. The TDR provision of the 1968 zoning ordinance was so restrictive that in many cases there was a disincentive for developers to use it. Since a developer could transfer only half of the unused development rights of a small building to an adjacent lot, it often made economic sense to simply demolish the small building. Many architecturally significant buildings that did not fully use the allowable density are now gone for this reason.

Height and Bulk Controls

Although height controls had been imposed on a few scattered areas of San Francisco since the 1920s, before 1972 there was no citywide height control system. In that year, following adoption of an urban design plan, the board of superintendents approved a citywide height and bulk ordinance.

Height Controls

The ordinances for controlling height limits on downtown development contemplated an artificial hill form, though consonant with the city's topography. A seven-block area at the center of the financial district was zoned at 700 feet, with a gradual lowering of heights at the office district's edge. Height limits in the retail district varied from 140 feet, surrounding Union Square, to 400 feet along a one-block stretch of Market Street. Buildings along the waterfront were limited to 84 feet. Existing public space was zoned as open space to preclude future development on those sites.

Bulk Controls

In each height district, a set of bulk controls was also imposed. The bulk controls were measured across three dimensions: (1) the height above which maximum dimensions applied, (2) the maximum facade width, and (3) the maximum diagonal dimension (corner to opposite diagonal corner). The bulk ordinance provided for some flexibility in administration. The planning commission was authorized to grant conditional permits for buildings exceeding the bulk limits.

Critical Analysis

The height and bulk controls have had their greatest urban design impact in residential neighborhoods. New development, although not necessarily compatible stylistically, has at least respected the generally small scale of San Francisco's residential pattern. The height and bulk controls, according to Vettel (1985), have been fairly effective in channeling the construction of major commercial projects to the central downtown area, thus minimizing the disruptive impact such
buildings would have if they were adjacent to residential neighborhoods or along the waterfront.

The height and bulk limits have not adequately protected the central office district environment. Although no building as completely out of scale as the federal building has been constructed since 1972, structures too large to be integrated successfully into the city's fiber have been approved under the ordinance. In addition, while channeling development to the downtown area, the height controls inevitably have contributed to the demolition of many structures of historic value.

The height limits in the retail district also invited disaster because the heights were much greater than those of existing buildings. The many box-shaped buildings that rise to about forty floors, uninterrupted by setbacks or other architectural embellishments that might lessen their apparent size, detract severely from the skyline's diversity, human scale, and interest.

**Landmarks Ordinance**

In 1967 the city enacted a cautious landmarks ordinance. It set up a Landmarks Preservation Advisory Board, which, together with the planning commission, is empowered to recommend the designation of historic districts and landmarks. Designations must receive the approval of the board of supervisors.

Once a landmark has been designated, its demolition or alteration requires a certificate of appropriateness from the planning commission. While the planning commission may refuse to approve alteration of a landmark, it may not prohibit its demolition. Instead, the commission may only delay approval of the certificate of appropriateness for up to 360 days while seeking voluntary public or private means to preserve the landmark.

The alteration or demolition of structures within a historic district also requires a certificate of appropriateness from the planning commission. As with landmarks, the commission is authorized to deny petitions to make alterations to such structures, but it is powerless to prevent demolition. Again, where demolition is sought, the commission may only delay the issuance of a certificate of appropriateness.

The ordinance also authorizes the planning commission to "recognize" structures of historical, architectural, or aesthetic "merit" which are not officially designated landmarks. Following surveys by the Department of City Planning and a private group, the Foundation for San Francisco's Architectural Heritage (Heritage Foundation), the planning commission in 1980 designated 226 downtown buildings as having "merit."

**Critical Analysis**

The 1967 landmarks ordinance, for a number of reasons, has proved to be too weak to guarantee that San Francisco's valuable historic resources will remain intact. First, because the planning commission has no power to prevent the demolition of historic or meritorious structures, the authority that it does have to regulate extensive alterations is markedly circumscribed. A second difficulty with the 1967 ordinance has been the politicizing of the designation process. Landmark designation requires legislative action and is accordingly subject to the traditional political pitfalls of compromise, fiscal pressure, and minimal judicial review. Third, the ordinance also has failed to protect adequately the character of many downtown areas containing groups of early-twentieth-century buildings that give a distinctive flavor but are not individual landmarks. Only Jackson Square was designated as a historic district. Despite the apparent weakness of the landmarks ordinance, many buildings have survived because private owners, hotels, and corporations have voluntarily preserved their buildings and have constructed towers on adjoining lots.

**Environmental Review**

**California Environmental Quality Act**

San Francisco gained a significant means of influencing design of private development when the California legislature enacted the California Environmental Quality Act (CEQA) in 1970. Although the act was initially designed to augment existing planning and review procedures, its effect has been to turn environmental review into a critical step in San Francisco's project approval process. Developers must refer their proposals to the Department of City Planning's Office of Environmental Review (OER) for initial assessment. Following the initial review, OER determines whether any of the project's environmental effects may be "significant." CEQA defines a significant effect as a "substantial, or potentially substantial adverse change in the environment."  

**Critical Analysis**

By requiring a standardized inquiry into potential environmental effects, CEQA provides an objective means of evaluating proposed development. However, CEQA does not address many urban design issues. First, its "significant" effects cause changes in physical conditions, but in practice, subjective design decisions rarely change physical conditions. Second, OER requires an assessment of visual impacts only if a proposal will have a "substantial, demonstrable negative aesthetic effect," using as a standard the principles of San Francisco's master plan, including its urban design element. To date, only clearly discernible impacts such as destruction of significant historic structures and the casting of shadows on public parks have been certified as significant effects.

Another shortcoming of the CEQA-mandated environmental review process has been the Department of City Planning's failure to adequately stress the need to evaluate the cumulative impact of the proposed development when combined with other development in the area. An all-downtown EIR (environmental impact report) published in 1984 analyzed the impacts of continued growth in San Francisco and provided some guidance for assessing cumulative impacts. Despite CEQA's weaknesses, the environmental review process has perceptibly increased the planning commission's power to require improvements in the design of new development (Vettel 1985).

**Discretionary Review**

San Francisco's downtown use, density, height, and bulk controls fail to address the more subtle impacts of urban development, such as the effects a building design might have...
on streetscape character, the harmony of adjoining facades, and the city's skyline. These subtle aspects, however, may well determine a city's character. Rather than leave urban design decisions to private developers and their architects, city planners in San Francisco have tried to fill the regulatory gap by creating a discretionary permitting system, which has three urban design components: (1) an urban design plan, (2) informal Department of City Planning design consultation, and (3) the planning commission's discretionary review power.

Urban Design Plan
San Francisco's urban design plan adopted by the planning commission in 1971 was one of its kind in the nation. Rather than projecting an image of what the city should look like in twenty or thirty years, the plan defines essential needs in an urban environment, proposes public and private objectives to attain those needs, articulates fundamental urban design principles, and sets forth a series of general design policies to guide the discretionary approval process. The four sections of the plan address: (1) preservation and creation of city patterns, (2) conservation of historic and other resources, (3) moderation of new development, and (4) protection of neighborhood environment.

The urban design plan established a set of general policy objectives to guide not only future planning and zoning regulation, but also individual project review. It has worked well for the former, but as a concrete set of policies to guide individual downtown project review, it has been demonstrably inadequate.

Informal Design Consultation
In 1967 the Department of City Planning instituted a voluntary design review procedure to encourage developers to consult with city planners at each stage in the planning of new development. Developers and their architects are advised to inform the department at the outset of their plans and development goals rather than wait until design plans are finalized to seek approval. For its part, the department informs developers of specific public goals, such as the design criteria peculiar to the proposed site, that should be considered in addition to the objective zoning requirements. Ideally, as design plans progress, developers and planners meet often, review plans, negotiate conditions, and eventually agree upon a mutually acceptable design.

The success of informal design consultation, like the success of most negotiation processes, depends ultimately on the political strengths of the negotiating parties. At times, departmental review has been exacting, and the threat of a negative staff recommendation is a powerful inducement for developers to achieve a project design acceptable to the department.

Discretionary Review Power
The planning commission possesses a broad power to review all permits, variances, and conditional-use authorizations, even if the applicant has satisfied every zoning restriction. When used aggressively this “discretionary review” power given teeth to the urban design plan and the department’s informal design review process.

Perhaps, surprisingly, no challenge to the commission’s exercise of discretionary review has reached an appellate court in recent years. Rather, most developers have accepted the conditions imposed by the commission during discretionary review. Even outright disapproval of a proposal will not necessarily prevent the ultimate development of the project. The commission typically informs the developer of the conditions it will require before granting approval. To date, such conditions, particularly those involving project design, have been economically feasible, and it has been advantageous for developers to redesign projects rather than suffer the delay of a court challenge to discretionary review.

Summary: 1967-1972 Plans and Processes
Downtown regulation has been piecemeal, often inconsistent, and generally inadequate according to authorities in the know (Vettel 1985). In the later years, environmental and discretionary review were used aggressively to promote more sensitive building designs and to exact measures to mitigate development impacts. But often the changes and mitigation measures the city required were only marginally effective. Further, efforts to reshape individual projects failed to address cumulative growth effects in a realistic or meaningful way.

The Role of the U.C.-Berkeley Environmental Simulation Laboratory
The Environmental Simulation Laboratory at the University of California at Berkeley has pioneered environmental simulation techniques and applied them to urban design problems and architectural control analysis. (Bosselman 1983a and 1983b). The laboratory has also been used extensively as a testing and communication tool. For the last fifteen years it has illustrated alternatives for downtown growth in San Francisco. Realistic skyline and street-level views of future development have been created that have enriched the discussion on the policies shaping zoning regulations and urban design guidelines (see Figure 6.15).

FIGURE 6.15 Use of an environmental simulator to test alternatives and conditions. Photo Credit: Peter Bosselman, U.C. Berkeley Environmental Simulation Laboratory
Skyline Views

In 1972 Donald Appleyard used a scale model of the city of San Francisco housed in the laboratory to make a film that showed from an eye-level perspective how the skyline of San Francisco had changed in the last forty years. In 1979, during the high-rise controversy, the laboratory produced a second film that showed the effects of a general height limit of 260 feet. This limit, proposed by an alliance of groups under the leadership of San Franciscans for Reasonable Growth, represented an actual reduction of existing heights. The film was shown prior to the city election of 1979 on public television and was followed by a debate between the opponents and proponents of the measure. The referendum failed, as had the two previous ones. Forty-five percent of the votes were in favor—a narrow margin, but the signal was clear: San Franciscans were concerned about the appearance and quality of their downtown.

The Environmental Simulation Laboratory at U.C.-Berkeley has been asked frequently to test the visual impacts of proposed changes to San Francisco's downtown zoning ordinance. An urban design plan in 1971 envisioned a downtown well contained within a small area without spreading into the neighborhoods. This basic and widely acclaimed policy was complemented by height zones that give downtown the shape of a hill, compatible with surrounding natural hills. In 1972 the downtown hill policy was developed in response to the construction of two high-rise office buildings, built in the late 1960s on the periphery of the financial district—the Bank of America building, with its 792-foot-high dark tower, and the 845-foot-high pyramid building housing the Transamerica Corporation. However, even with the hill policy in place, existing development controls have failed to produce the designed hill shape. The highest buildings continued to flank the edges of the financial district, giving the city the shape of an abruptly rising plateau. The sweeping views from a 30- to 40-story office building at the edge of downtown over hills, bay, and bridges are economically valuable. However, the view of downtown from neighborhoods and surrounding communities across the bay, though experienced by more people, cannot compete with this economic incentive.

Years after the urban design plan, it appears that the notion of the downtown hill form is likely to remain a concept. Only a few vanishing points allow an inside view of the downtown hill. Changes to the height zones have tried to force future development to fill in at least the south slope of the hill.

Street-Level Views

In the 1980s discussion of urban design issues focused not on the skyline but on street-level concerns. Like midtown Manhattan, with its new zoning ordinance, San Francisco adopted a downtown plan that includes, among other items, an ordinance that will produce tiered high-rise towers similar to those built in the 1920s and 1930s. Future building may once again bring more light and air into streets.

The model stage at the environmental simulation laboratory was again used to simulate the visual impacts of future high-rise buildings. Models and photography are used to measure the openness of downtown streets to light and sun. As a result, guidelines based on sun-access criteria, which are closely related to street scale and bulk considerations, have been developed and tested. A more detailed presentation of this work can be seen in Bosseman (1987).

The Downtown Plan of 1884–1985

In May 1981 and again in July 1982 the Department of City Planning published preliminary rezoning proposals. Then in May 1983, the downtown EIR consultant's report was released. Finally in August 1983 the Department published its proposed downtown plan for citizen and commission review. The board of supervisors imposed a moratorium on all downtown development proposals while public hearings and environmental assessment of the plan proceeded. A draft downtown EIR analyzing the plan was published by the department in March 1984, and the final EIR was certified on October 18, 1984. On November 29, 1984, after additional hearings, the downtown plan as amended was adopted by the city planning commission. The key features were incorporated into proposed amendments to the planning code, which had to be approved by the board of supervisors for the plan to become law in 1985.

Under the downtown plan, building designs are subject to demanding objective requirements as described previously. Principal features of the plan affecting urban design include: a reduction in allowable density, redirection of office development south of Market Street, lower height limits, “post-modern” bulk controls (requiring slender, sculpted towers), preservation of architecturally significant buildings, mandatory incorporation of open space and public art, retail or public service ground-level uses, and preservation of direct sunlight to sidewalks and open spaces. The downtown plan of 1984 leaves far less room for discretionary decision-making and provides detailed standards for any discretion remaining. Detailed preliminary evaluation and description of the plan's effects are offered by Vettel (1985) but it has not been completely evaluated since 1985.

The images produced at the U.C.-Berkeley Environmental Simulation Laboratory over the last fifteen years have enriched the public discussion over the existing as well as future visual resources of San Francisco. So far, however, the economic forces that have given downtown its shape have proven to be stronger than the rationale developed in visual assessment studies. However, there is reason to be optimistic that the ideas and information generated in the laboratory have helped to establish a constituency in San Francisco that will continue to speak out for quality-of-life issues such as preservation of views, sunlight, and the openness of downtown streets to the sky.

References


