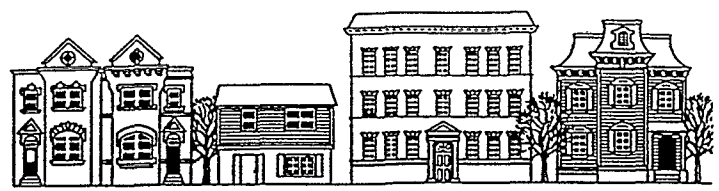


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# Aesthetic Regulations



## Design Review: A Thumbnail Primer

by Mark L. Hinshaw, AIA AICP

There is a lot of talk about design review and considerable confusion about exactly what it is. First, let's say what it is *not*. Design review is *not* the imposition of one person's or one committee's personal tastes upon developers or upon the community as a whole. It is *not* something that concerns superficial, frivolous aspects of a building's appearance. It is *not* a way of enforcing a "theme" along a street or within a business district. Design review does *not* necessarily add significant costs to development projects.

Design review is a tool that can do what conventional zoning, by itself, cannot do: produce quality in new development or redevelopment. Design review can allow higher density development to be placed into neighborhoods without radically altering their character. Design review can encourage new development to respect historic attributes of a community. Design review can give residents a greater sense of pride in their community.

Design review is legally defensible, that is, depending upon how you do it. Fortunately, we have had a recent decision from the Washington State Court of Appeals (*Anderson v. Issaquah*) that gives cities and counties some guidance. First, the Court established that design review is a legitimate extension of zoning authority. While some jurisdictions may have felt uneasy using design review for fear that they would be out on a limb, legally, this issue is now resolved.

However, the Court also said that, in order to be constitutionally valid, a design review process must follow certain principles, principles that are necessary for the administration of any piece of local legislation. It cannot involve arbitrary decision-making, it must be fair and open, and it must be consistent in application.

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## Aesthetic Regulation—Legal Issues

by Bob Meinig, MRSC Legal Consultant

There is no question that a city may consider aesthetics in regulating the use of land. The state court of appeals recently affirmed this by stating that "aesthetic standards are an appropriate component of land use governance." *Anderson v. Issaquah*, 70 Wn. App. 64, 82 (1993). The question remains, however, as to how far a city may go in regulating on the basis of aesthetics. May aesthetic issues be the sole basis of a city's exercise of its "police power" (e.g. zoning) authority? For example, may a city deny a building permit for an otherwise permitted use only on the basis of the structure's proposed design or color scheme? May it require yards to be maintained even where the failure to maintain does not result in a fire hazard or other type of health or safety issue? The court of appeals in *Anderson v. Issaquah* avoided these types of issues, noting merely that it is "far from 'settled' in Washington case law."

Aesthetic regulation may come in various forms. It may come in the form of design review regulations, such as in the *Anderson v. Issaquah* case, as discussed in the accompanying article by Mark Hinshaw. It may be a component of nuisance regulations, such as in those dealing with the accumulation of junk and debris in yards or with the height of grass and weeds in yards. Billboard and sign regulation also clearly has a strong aesthetic component.

Aesthetic regulation may also be a part of environmental controls imposed under the authority of the State Environmental Policy Act (SEPA) and the Shoreline Management Act (SMA). For example, SEPA identifies one of its purposes as being to assure "for all people of Washington safe, healthful, productive, and *aesthetically* and culturally pleasing surroundings." RCW 43.21C.020(2)(b) (emphasis added). A city is entitled to consider the aesthetic impact of a project, along with other identified adverse

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## Design Review... *(Continued from page 3)*

A city or a county cannot just appoint a design review board and let the board decide what to allow. This is one thing that the Court of Appeals clearly found unacceptable. (Incidentally, other state courts are beginning to make similar findings, as with a recent case in Illinois.) Some design commissions have reviewed projects on a case-by-case basis, with the belief that "we can't tell you what we like, but we'll know it when we see it." This way of making decisions is not defensible and will not survive a court appeal. Local jurisdictions, through their decision-makers, cannot just "wing it," making things up as they go along. The Court insists upon seeing a fair, a deliberative process that uses *standards* by which to review projects.

Standards need not be rigid, inflexible formulas, with numbers and excessive detail. However, they must have certain attributes. First, they should be written down and preferably illustrated with examples. Second, they should be formally adopted, published, and made available to all interested parties. Standards must be clear, explicit, and sufficiently specific to provide direction to developers and designers. They should avoid vague terms like "harmony," "compatibility," and "interesting." In fact if terms are used, they should be defined so that people are using the same meanings.

Standards used in a design review process are often called "design guidelines." Unlike zoning codes, which are prescriptive and specific, design guidelines are more descriptive and suggestive. They seek to encourage creativity, rather than conformity. They are meant to inspire people to create development that fits the desired character of the community. The City of Bellevue and the City of Kirkland have each adopted detailed design guidelines for their downtown areas. Bellevue also has guidelines for "transition" areas between single family and multiple family residential zones. The City of Seattle is currently adopting guidelines for multifamily and commercial development. But, once guidelines have been established, decision-makers cannot set them aside and substitute their own personal opinions.

Ideally guidelines make the development process operate more smoothly by making the expectations known to all parties involved. This does not mean that guidelines need to cover absolutely

all possible circumstances. Judgment will still need to be exercised by a design review board but based on a foundation of clear criteria.

Developing a fair and open process with explicit standards is not an easy task. One thing that will probably not be considered acceptable by the courts is borrowing guidelines directly from other communities. Like any matter of locally-oriented public policy, it is necessary to determine the needs of your own community and to develop design guidelines that suit your situation. This takes time and it takes some work. Similar to any planning process, the public must be given an opportunity to participate.

Using the basic concepts described above, communities can embark on the development of a design review program. Preparing an appropriate, defensible design review process requires an unusual combination of skills. Knowledge of land use law and environmental law is extremely important. Design review is also an exercise of applying design principles to a legal framework. Thus, expertise in urban design is necessary as well. So, doing design review correctly requires using specialists in both law and design.

Communities can use design review effectively and fairly, but only if they take the time and energy to determine exactly what they want. In such a way, design review can be a powerful tool in implementing growth management plans. ■

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aesthetic...

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environmental impacts, in requiring mitigating conditions.

View protection is another form of aesthetic-based regulation, one that, at least in the context of shorelines, is given statutory recognition. The Shoreline Management Act, in addition to expressing policies for protection of aesthetic values and for preserving scenic vistas, expressly prohibits the issuance of a shoreline substantial development permit for any structure over 35 feet in height that will obstruct the view of a substantial number of residences. RCW 90.58.320.

No matter what the form, to be legally more secure, aesthetic regulation should be tied to other legitimate public purposes. Thus, design guidelines can be linked to the maintenance of property and other economic values or to the preservation of the historic character of a community (which, of course, does have economic consequences). Similarly, view protection has a clear property value basis, but could also be justified on general public health and welfare grounds and as contributing to the overall quality of life in a community.

Aesthetic regulation in the context of nuisance regulation can generally be justified on public safety grounds. An accumulation of junk and debris, for instance, may present a danger to those people who must enter the property or who travel along the right-of-way abutting the property. Some cities have enacted ordinances relating to nuisances that regulate "unsightly" conditions or areas by prohibiting the accumulation, collection, or "untidy storage" of things such as scrap iron, vehicle parts, old appliances, and junk vehicles, where such material is clearly visible from a public place such as a sidewalk or street. Since such unsightly conditions may exist regardless of any potential health or safety concern, enforcement of these types of ordinances may in some instances be based solely on aesthetics.

The regulation of vegetation on private property also has an aesthetic component, although this type of regulation may be nuisance-based. Tall grass and weeds, if dead and dry, may pose a fire hazard. However, if such vegetation is overgrown but is green and does not present a fire hazard, its regulation would seem to be based solely on aesthetics. Nevertheless, a public health and safety justification may exist in that such vegetation could

harbor harmful rodents.

Our state supreme court may eventually directly confront the question of whether aesthetic considerations alone justify exercise of a city's police power authority. In a number of other states, the highest courts have confronted this issue and have allowed regulation based exclusively on aesthetics.

Regardless of whether aesthetic regulations will be justified in this state on that basis alone, they must provide specific and understandable guidance to decisionmakers, enforcement authorities, and to property owners. The Anderson v. Issaquah case provides a noteworthy example of a court finding that a city failed to provide that guidance, resulting in a violation of a property owner's constitutional due process rights.

A city should also be aware of other potential legal issues. Some aesthetic regulations may need to be balanced against the burdens they impose on private property owners. In some instances, such as billboard and sign regulation, aesthetic controls implicate constitutional free speech issues. Because of these and other legal considerations, it is advisable for the city attorney to review any regulations with a strong aesthetic component. ■

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## Selected List of MRSC Library Holdings on Design Review and Guidelines

*Compiled by Carol Tobin, MRSC Intern*

The following publications on design review and design guidelines are available from the MRSC Library. The library has many additional holdings on these subjects.

- City of Olympia urban design guidelines for downtown, prepared by Olympia Design Review Task Force. Olympia, Wash.: Planning Department, 1988. Contents: building design, site design, landscaping, linkages, signs and street graphics. [PL 5.2220 O46 C57 1988]
- Communities of place: design principles, Anton Nelessen Associates. Princeton, N.J.: A. Nelessen Associates, c1991. [PL 10.0000 C611 1991]

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## Selected List...

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- Community design guidelines manual, Fort Drum Land Use Team. Watertown, N.Y.: Fort Drum Land Use Team, 1989. Prepared for upstate New York, practical model for any rural area. [PL 10.0000 C6 1989]
- Design review: tool introduction; ordinance, compiled by Jim Davis; University of Washington Growth Management Planning and Research Clearinghouse. Seattle: Growth Mgmt. Plan & Res. Clearinghouse, 1991. Included in Tools that Work series: Tool no. 6. [PL 8.6200 T645 1991 no.6]
- Design for mountain communities: a landscape and architectural guide, by Sherry Dorward. New York: Van Nostrand Reinhold, c1990. Includes design guidelines for planners to use in mountain area projects. [PL 10.4000 D454 1990]
- Housing as if people mattered: site design guidelines for medium-density family housing, by Clare Cooper Marcus and Wendy Sarkissian with Sheena Wilson and Donald Perlgut. Berkeley, Calif.: University of California Press, c1986. [HO 7.0000 H655 1986]
- Kirkland downtown design guidelines, prepared by MAKERS for the City of Kirkland. Kirkland, Wash.: City of Kirkland, Spring 1991. [PL 5.2210 K55 1991]
- Multifamily design review, Kent Planning Department. Kent, Wash.: Kent, 1991. [HO 7.0000 M86 1991]
- Residential development handbook for Snohomish County communities: techniques to increase liveability, affordability and community viability, prepared for Snohomish County Tomorrow by MAKERS Architecture and Urban Design with Mark Hinshaw. Everett, Wash.: Snohomish County, May 1992. [HO 7.0000 R489 1992]
- "Setting standards for community design and appearance," by Wendelyn Martz, ICMA. Washington, D.C.: International City Management Assoc., Nov. 1991. 10 p. (MIS report, International City Management Association (ICMA)). [PL 10.0000 MIS23:11]
- "Survey of design review practices," by Brenda Case Lightner. Chicago: APA, Jan 1993. 4 p. (PAS Memo, APA). [PL 0.0000 A6pm 1/93]



## Resource Sharing

### The Washington Cities' Information Partnership

*Copies of the following items are available from MRSC's library. Should your city or town have a publication, new service, or procedure that can be shared with other municipalities, please provide information to MRSC for inclusion in the next issue of the newsletter.*

- From Anacortes—City of Anacortes Comprehensive Land Use Plan, 1993. [PL 6.4000 A5 1993]
- From Bellingham—Narrative report of Bellingham Farmers' Market Project and Financial assistance agreement between the city and the Bellingham Farmers' Market Association [LR 73.0000].
- From Carnation—Personnel Policies City of Carnation, June 1993. [PE 6.0500 C35 P45 1993\*]; City of Carnation Comprehensive Plan, 1992. [PL 6.4000 C35 1992]
- From Mercer Island—Information Master Plan, August 5, 1993. 9 p.
- From Redmond—Visions for Redmond, May 1993. [PL 1.4000 R42 V555 1993]
- From Renton—City of Renton Interim Land Use Element of the Comprehensive Plan, June 1993. [PL 6.4000 R43 L35 1993]; City of Renton Interim Zoning Code, June 1993. [PL 8.7000 R43 I5 1993]
- From Skykomish—Town of Skykomish Comprehensive Plan, February 1993. [PL 6.4000 S56 1993]
- From Walla Walla—City of Walla Walla, Washington Personnel Procedures Manual, June 1993. [PE 6.0500 W33 C555 1993]; Long Range Management Plan, May 1993. [G 9.2000 W331 L655 1993]
- From Woodinville—City of Woodinville Citizen Information Reference Guide. 20 p. [PR 3.2000]; Compensation and Classification Analysis, City of Woodinville, by Dodge & Associates, May 1993. [PE 12.0000 W6 C65 1993]