

Aesthetic Theory and Landscape Protection: The Many Meanings of Beauty and Their Implications For the Design, Control and Protection of Vermont's Landscape.

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Instead of the usual caveat, that in the interest of ease and tradition the pronoun "he" will be used in the inclusive sense to also mean "she", this article was written under the guidelines for non-sexist writing published in the *Handbook of Non-Sexist Writing for Writers, Editors, and Speakers* by Casey Miller and Kate Swift.

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I. INTRODUCTION

A new approach to the preservation of landscape beauty is

needed in the United States.¹ The present system of landscape controls fails to protect our nation's environmental beauty.² Without a coherent rationale the system cannot implement its goals.³

Any approach to the protection of the landscape must recognize and accommodate the economic and ecological forces which continually change our landscape—forces over which we may have little control. The recognition and accommodation of necessary change in the landscape should seek to direct these changes so that present landscape amenity can be preserved, to manage the aesthetics of the transition and to ensure the recognition and protection of new forms of landscape beauty emerging from the change.⁴ That task extends well beyond land use regulatory controls, which is the subject of this article. We focus on the question of securing an adequate rationale and procedure for regulatory controls.

A philosophy of beauty underlies any effort at landscape regulation. Answers to all of the primary aesthetic questions—What is beauty? How do we know it? How do we resolve disputes about it? Are there aesthetic experts? Is landscape beauty any different from historic preservation beauty?—dictate the preservation standards, and the manner of their implementation.⁵ Unfortunately, some of

1. There are a myriad of laws and discussion of those laws in the urban design field. See N. ANDERSON *AMERICAN LAW OF ZONING*, § 9.72-9.75 (1977). JOINT COMMITTEE ON DESIGN, NEW YORK CHAPTER, AMERICAN INSTITUTE OF ARCHITECTS, PLANNING AND COMMUNITY APPEARANCE (1958). "Beauty Controls" can include, "aesthetic nuisance" sign ordinances, screening requirements, architectural design controls, historic preservation designations and districts. Aesthetic purpose, however, is one of the rationales for all zoning.

What is not often realized is that concern for beauty underlies many environmental statutes and has played an important role in the development of an ecological perspective (On this latter point, see D. WORSTER, *NATURE'S ECONOMY* (1977)).

2. See, e.g., R. HEALY & J. SHORT, *THE MARKET FOR RURAL LAND — TRENDS, ISSUES, POLICIES* (1981). Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize "Aesthetic Regulation"* 48 *UMKC L. REV.* 125 (1980) traces the law in all jurisdictions.

3. All of the arguments against regulation in general can apply to beauty controls in particular. Such controls may reflect one group's aesthetic bias, curtail freedom, and impose costs upon the regulated.

4. Aesthetic controls should be regarded as guiding change over time, not merely "freezing" or preserving given law, see P. NONET & R. SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD REPONSIVE LAW* (1978).

5. As Norman Williams, Jr. bluntly puts it:

The problem of how to define good taste, long debated among philosophers, has a special significance in a legal context; for when legal sanctions are involved, it is essential to define rather precisely what is permitted and what is not. Because of the obvious difficulty of drawing the line in such cases the courts have long been reluctant to recognize the aesthetic factor as an appropriate basis for land use controls . . . Nevertheless . . . the courts have gradually swung in line with the strong pressure to

the theoretical answers given in the past to these questions have had detrimental consequences for aesthetic protection.

The two most current and fashionable philosophies of beauty are the extreme subjective and the objective cognitive approaches.⁶ These philosophies implicitly reduce the power of citizens to legitimately protect their landscape. The extreme subjective approach reduces this control by denigrating aesthetic experience. This approach claims beauty is merely a matter of personal taste. It discourages citizens from carefully examining the grounds and value of such an experience and from taking public measures to protect it. The objective cognitive approach hands the entire process over to "experts," who purport to determine by scientific methods the common elements of beauty. Neither the extreme subjective nor the objective cognitive philosophies of beauty is completely wrong. The extreme subjective view of beauty recognizes the fact that individual tastes differ, while the objective cognitive approach recognizes that there are some common determinable factual elements which affect each viewer's judgment. Neither view by itself offers a satisfactory account of the entire aesthetic judgment involved in aesthetic controls.

There are, however, other philosophies of beauty which aid an understanding of aesthetic experience and yield a basis for aesthetic control. Moderate relativism encourages the seeking of a community consensus on beauty of the landscape. Appropriate citizen participation methods allow the search for this consensus.

A second basis for a philosophy of beauty is the emotional, moral, and natural objectivist position called "moral objectivism". According to this position, the common experiences arising from the cultural history, social life and ethical interaction with nature can offer objective content for standards of beauty even if these common experiences derive from subjective emotional reactions and moral judgments. Defining important parts of our cultural traditions, documenting the physical expressions of our social and ethical ideals, and revealing how nature itself may reflect our purposes lay the basis for developing appropriate landscape standards.

In this article, we advocate an approach in which all philosophies

provide some protection for an attractive environment and have therefore approved a wide variety of controls. [However] this change of basic attitude has not affected the real problem, for the question of the definition of adequate standards remains.

1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 11.02 (1974 & Supp. 1983).

6. See Merriell, *On the Idea of Beauty*, in *GREAT IDEAS TODAY* 185 (1979).

of beauty are built into systems of landscape control to assure philosophically comprehensive design controls of the landscape.

II.

THE THREATENED DECLINE OF THE RURAL LANDSCAPE

The Vermont rural landscape, for those who know it, needs no argument on behalf of its scenic beauty. The summer-green mountains, dirt roads winding through leaf tunnels, alternately cool green or blazing orange, red, purple and yellow; the picturesque farms and villages, and the panoramic views of forested mountains and stone-walled farm valley fields of timothy, clover and corn embody its beauty. Appreciation of Vermont's rural beauty extends through the history of rural painting of pristine streams, lakes and waterfalls, rambling farms, fall hunting seasons and majestic mountains.⁷

Yet the Vermont landscape, and rural landscapes across the country, are experiencing a slow, almost imperceptible decline in quality. Over the last twenty-five years, conflicts between human desires to use land for many purposes and the need to protect the landscape for its scenic and intrinsic ecological value have multiplied. The pace and degree of decline are not catastrophic, but insidiously slow and sporadic. An ugly sign erected, a hill carved up for development, a new tower placed on a mountain, a dirt road paved, the careless design of a new post office ill-suited for the town common, the extension of power lines, the scarring of hillsides for excavation of minerals, sand and gravel, illustrate a few of the abuses.⁸

Some of the problems affecting the rural landscape are occasionally offset. Anyone who has seen pictures of Vermont at the turn of the century or earlier has seen an often unkempt rural landscape.⁹ Today, however, soil erosion is reduced as previously tilled fields revert to forest. Air quality improves as recessions close factory gates. Litter problems diminish with the enactment of container deposit laws across the region.¹⁰ The federal government has acted

7. See, e.g., VERMONT LANDSCAPE IMAGES 1776-1976 (Lipke & Grime eds. 1976); STILGOE, COMMON LANDSCAPES OF AMERICA 1580-1845 (1982); Slayton, *Vermont Landscapes — The State of the Art*, VERMONT SUNDAY MAGAZINE, April 8, 1984 at 5.

8. These minor abuses are all too common, as a drive on Vermont Route 14 from White River Junction to the South Royalton common and Route 110 from South Royalton through Tunbridge, North Tunbridge, and Chelsea, will illustrate.

9. Slayton, *supra* note 7, at 5.

10. Vermont, Maine, Massachusetts, and New York now require deposits on most beverage containers sold within their borders. VT. STAT. ANN. §§ 1521-1527 (1984);

in recognition of the scenic beauty of the rural landscape and the threat to that beauty. It has set aside wilderness areas, established hiking trails,¹¹ and national parklands,¹² provided funding for acquisition of open spaces¹³ and offered a variety of inducements for historic preservation.¹⁴ States have also taken a variety of steps to preserve and enhance scenic beauty.¹⁵

Vermont is one New England state which has made a special effort to protect the beauty of its landscape.¹⁶ In seeking to preserve the beauty of the entire state, it has established a scenery preservation council,¹⁷ passed a statewide bottle and can deposit law,¹⁸ placed limits on mountaintop developments,¹⁹ undertaken a backroads restoration and preservation program²⁰ and established selected highway sign prohibitions.²¹ At a more site-specific level, Vermont acquired the power to review major developments under "Act 250,"²² to set aside land under a natural areas system,²³ to protect farmland and open space through tax stabilization contracts²⁴ and other land use tax methods,²⁵ to preserve forest and farmland. Vermont also encourages local historic preservation programs,²⁶ conservation commissions²⁷ and local adoption of planning controls which promote the beauty of local communities and other shorelands.²⁸

Yet despite the varied legal protections, the pressures of population growth, consequent piecemeal development and declines in ag-

ME. REV. STAT. ANN. tit. 32, § 1863 (1978); 1983 MASS. ADV. LEGIS. SERV. 96 § 103 (Law. Coop.); N.Y. ENV'T'L CONSERV. LAW § 27-1001-1019 (McKinney 1984)

11. 16 U.S.C. § 1131 (1982); 16 U.S.C. §§ 1242-49 (1982).

12. 16 U.S.C. § 1 (1982).

13. 42 U.S.C. § 1500 (1961) omitted in 1975 by 42 U.S.C. § 5316 (1982)

14. 16 U.S.C. § 1 (1982).

15. See N. WILLIAMS, *supra* note 5.

16. VT. STAT. ANN. tit. 10, §§ 421-425 (1984).

17. VT. STAT. ANN. tit. 10, §§ 1521-1527 (1984).

18. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984).

19. See C. ZULICK, THE VERMONT BACKROAD MAINTENANCE HANDBOOK, Vermont Agency of Environmental Conservation (n.d.).

20. VT. STAT. ANN. tit. 9, §§ 3621-3688 (1984); VT. STAT. ANN. tit. 10, §§ 481-505 (1984).

21. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984).

22. VT. STAT. ANN. tit. 10, §§ 6551-6555 (1984).

23. VT. STAT. ANN. tit. 32, § 3846 (1981 & 1984 Supp.).

24. VT. STAT. ANN. tit. 32, §§ 3751-3760 (1984).

25. VT. STAT. ANN. tit. 22, §§ 741-743 (as amended 1975 & Supp. 1984)

26. VT. STAT. ANN. tit. 24, § 4501 (1975 & Supp. 1984).

27. VT. STAT. ANN. tit. 24, § 4411 (as amended 1975 & Supp. 1984).

28. U.S. SOIL CONSERVATION SERVICE, PRIMARY AGRICULTURAL SOILS AND VERMONT AGRICULTURE, 16, 24 (1982) (pamphlet available in Vermont Law School Library).

riculture, the increases in industrial tourism²⁹ with their consequent improvements in transportation and associated facilities, have thus far outstripped the capacity of current protective schemes. Subtle changes in the operation of the laws³⁰ can be observed; along with pressure to repeal or modify the laws and regulations designed to protect scenic beauty.³¹

In Vermont, for example, an alpine slide is not stopped but is "tinted green" to blend into the environment.³² Aesthetic considerations are deemed irrelevant in the permitting process of a proposed shopping center,³³ without regard to the aesthetic impact upon a sparsely settled rural area an airport is permitted to expand with a ritual nod to careful attention to its growth impacts.³⁴ National highways are permitted to split farmlands³⁵ and new power lines continue to be strung across the rolling farmland and forests.³⁶

III.

THE BASIC FORCES BEHIND LANDSCAPE DETERIORATION

Before leaping to the barricades to protect the rural landscape, one needs a better understanding of the basic causes of landscape deterioration. The pressure on rural lands from increasing urban populations is immense. In 1790 the total farm and rural population in the United States was 3.7 million while the total urban population in the United States was only 200,000.³⁷ By 1950 the rural population had risen to 54.5 million.³⁸ Thirty years later, in 1980,

29. See E. ABBEY, *DESERT SOLITAIRE* (1968) and *DOWN THE RIVER* (1982). See also J. SAX, *MOUNTAINS WITHOUT HANDRAILS* (1980).

30. One example is the recent effort of the Vermont Water Resources Board to loosen the classification system of Vermont waters in order to allow degradation of some "pristine" streams.

31. Recent efforts in the Vermont legislature have been made to eliminate tax breaks for forest and farm lands and to reduce regulatory protections for farm land.

32. Big Bromley, Inc., Application No. 8B0083-4, slip adjudication at 3 (Vt. Dist. Envtl. Comm'n V Oct. 3, 1975).

33. Pyramid Co., Application No. 4C0281, slip. adjudication at 27-29 (Vt. Dist. Envtl. Comm'n IV Oct. 12, 1978).

34. Citizens for Responsible Area Growth (CRAG) v. Adams, 477 F. Supp. 994, 1003-1005 (D.N.H. 1979), vacated 680 F.2d 835 (1st Cir. 1982).

35. See VERMONT NATURAL RESOURCES COUNCIL ANNUAL REPORT, (1980). See also, MacDonald, *Everything In Its Path — 193 Marches Into Vermont*, 1 VT. ENVT'L REP. 25 (1980).

36. Vermont Electric Power Co. v. Bandel, 135 Vt. 141, 375 A.2d 975 (1977). See also VT. ENVT'L REP. 1 (July/August 1982).

37. R. HEALY & J. SHORT, *supra* note 2, at 4, (citing statistics from U.S. DEPT. OF AGRICULTURE (1980)).

38. *Id.*

the rural population had increased 5 million to 59.5 million while the urban population had ballooned to 167.0 million.³⁹

In recent years, however, rural land population growth has increased at a higher rate than the growth of urban areas. This is reflected in several ways:

Between 1940 and 1970, rural population fell by 3.6 million people, the result of an exodus from farms to city and suburban employment. But during the 1970's, rural areas made up this loss and more, gaining 5.6 million residents. Even more impressive is the change in the number of rural housing units. Between 1960 and 1970, the number of urban housing units grew by 23 percent, while rural units grew by only 6 percent. Then came a very dramatic reversal. Between 1970 and 1977, while urban housing units grew by 14 percent, those in rural areas grew by 35 percent. Demographic studies have indicated that the rural population revival has touched all regions of the United States and rural places of all sizes.⁴⁰

The change in growth emphasis from urban areas to rural raises the spectre of increasing conflicts over the aesthetic quality of rural lands.

Not only the population increase, but the particular manner of that increase affects the landscape. In their book, *The Market for Rural Land*, Robert G. Healy and James L. Short have noted three important long-term trends in the rural land market: rising prices, smaller parcels, and changes in the identity of rural landowners.⁴¹ These factors are major contributors to the deterioration of the visual quality of the landscape. As population pressures increase, more roads are built, forests cut into, and houses erected. Prices of adjacent parcels rise to reflect neighboring development, encouraging the subdivision of previously agricultural or forest lands.⁴²

Along with the rise in permanent population and the increasing "urbanization" of the forest, there is a parallel increase in the transient, seasonal use of the landscape by tourists. Vermont's Green Mountain Club conservatively estimated that over 100,000 hikers used the Green Mountains in 1982. In neighboring New Hampshire, the second most trafficked mountain in the world, Mt. Monadnock, alone suffers over 100,000 hikers annually while the state

39. *Id.* at 4 (quoting U.S. BUREAU OF THE 1980 CENSUS OF THE POPULATION)

40. *Id.* at 16 (quoting BUREAU OF THE CENSUS ANNUAL HOUSING SURVEY 11-150-77 (various issues) and U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, 1980 PRESIDENT'S NATIONAL URBAN POLICY REPORT (1980))

41. *Id.* at 8.

42. The number of rural residents who live on farms fell from 23 million in 1950 to 6.1 million in 1980. *Id.* at 4.

as a whole hosts somewhere in excess of a million hikers each year.⁴³

Current environmental laws have not withstood the massive pressures of the changing market in rural land. Yet the failure of protective environmental laws does not fully explain the decline of the rural landscape. Underlying the rural beauty is a natural economy, or, as Mark Lapping has called it, "a working landscape."⁴⁴ This economy consists of working farms which preserve and use the open space and mountains. Landholders managing small scale forest woodlots help to preserve the countryside. The costs of maintaining roads and ploughing snow act to keep towns clustered. Even the ski areas used to keep the mountainsides clear of buildings, and encouraged clustering of tourist facilities. The strains of increased population and piecemeal development weaken the traditional economy's tendency to preserve the landscape.⁴⁵

Certain problems can be remedied only through control of large-scale forces such as the agricultural economy. Farmland and farm families are affected most directly by the prices they receive for their crops. These prices are set by many factors, including government subsidies and world-wide production and demand, resulting in local pressures of parcelization, pollution and erosion. Control of the aesthetic problems accompanying the loss of farmland is probably impossible without major structural changes in the farm economy. Other large-scale forces, especially tourism, may be easier to regulate successfully.⁴⁶

The changes in values which lead to major transitions in population from urban to rural lifestyles may have a positive aspect. The environment and, indeed, general well-being, may be better in the long run if individuals, by living in a rural environment, gain more respect for the land and move toward adopting an ecological ethic. But there is mixed evidence as to whether the return to the land brings with it an environment-respecting lifestyle. For example, the arrival of the new urban affluent population brings problems in the form of increased transportation and consumption.⁴⁷

43. Figures supplied in telephone conversations with the Green Mountain Club, Montpelier, Vermont, and the Forest Supervisor's Office, White Mountain National Forest, Laconia, NH.

44. Lapping, *Toward a Working Rural Landscape*, in *NEW ENGLAND PROSPECTS: CRITICAL CHOICES IN A TIME OF CHANGE* (C. H. Reidel ed. 1982).

45. See, e.g., Brown, *The Coloradofication of Vermont*, VT. ENT'L REP. 9 (Summer 1984).

46. See F. BOSSELMAN, *IN THE WAKE OF THE TOURIST* (1978).

47. A perennial argument in Vermont town meetings often starts between "newcom-

Nevertheless, despite the large scale economic forces affecting rural land use, some problems related to aesthetic preservation of the rural landscape can be mitigated by land-use regulations. The most effective are likely to concern relatively local, scattered, smaller land uses and abuses. Many recent land-use and environmental laws aim at protecting or enhancing the beauty of nature and urban development. These "beauty controls" include both environmental protection and urban design regulations. Although design controls and other urban aesthetic controls have received considerable discussion,⁴⁸ only recently have environmental controls aimed at preserving or attaining natural beauty received attention.⁴⁹

These laws include at the federal level, The Wild and Scenic Rivers Act,⁵⁰ the National Environmental Policy Act,⁵¹ the visibility protections under the Clean Air Act,⁵² and a myriad of public land scenic protection laws.⁵³ A similar array of laws exists in each of the states.⁵⁴ One spectacularly successful state law is Vermont's anti-billboard law,⁵⁵ which, as part of a number of scenic protection laws in the state, contributes to the beauty of Vermont by keeping the highways free of billboard blight.⁵⁶ Despite the spectre of such determinations of beauty being frozen in unbending regulation, the institutionalization of beauty controls over the past decade is an appropriate development.

The purpose of these laws can be best understood in the context of understanding the broader functions of law itself. Law offers an arena to settle disputes over everything, including beauty.⁵⁷ It establishes predictable rules to guide those who otherwise might un-

ers" in a town, who want to fix up roads damaged by increased use, and "natives" who want to let them deteriorate in order to discourage new development which requires, in turn, better road maintenance, larger schools, and higher property taxes

48. See *supra* note 1.

49. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982); Bufford, *supra* note 2.

50. Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271-1287 (1982)

51. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1982)

52. Clean Air Act, 42 U.S.C. § 7401 (1982).

53. Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1450 (1973).

54. Bufford, *supra* note 2.

55. VT. STAT. ANN. tit. 10, §§ 481-505 (1984).

56. There are some significant limits to the federal and Vermont laws seeking to protect scenic highways.

57. An alternative way of approaching this field might be to explore the extent to which alternative forms of dispute resolution such as mediation, voting, bargaining, arbitration, and "politics" are appropriate in this field. Of course, not all of these other techniques are a-legal.

consciously offend the community's taste and aids private investors or developers in satisfying established aesthetic determinations.⁵⁸

Land use law also offers a mechanism for enforcing aesthetic judgments by protecting aesthetic investments where the unregulated market cannot. For example, it may be impossible to organize a market for landscape beauty, if it is impossible to exclude potential free viewers.⁵⁹ In addition, it may be difficult to control unaesthetic "spillovers" by relying upon the market.⁶⁰ The legalization of beauty is useful in another way. Aesthetic laws may be designed to avoid the abuse of excessive or unfair government power by restricting the abuse of power by a small coterie holding its own narrow view of the beautiful.⁶¹

IV

THE PROBLEMS WITH LANDSCAPE AESTHETIC REGULATION

Despite the contributions which the law in general can make to landscape protection, there remain some general problems with these aesthetic regulations. First, is their general weakness when confronted with a larger geographical area or with problems fueled by rapid economic change. Many land use problems defy solution by the official land use system unless the underlying structural economic problems are addressed. As a consequence of these structural problems, broadly based land use laws tend to be rife with "loopholes" drawn from political compromise. For example, Vermont's statewide land planning "Act 250" was well-known for its "10-acre loophole" exception which exempted subdivisions larger than 10 acres from the permitting process. This loophole has only

58. Aesthetic controls are usefully reviewed as aimed at "economic public goods" which are difficult to control by market means because of free rider problems and the need for large scale joint action.

59. See *supra* note 58 and accompanying text.

60. The majority of state courts and the federal courts uphold aesthetic purposes as sole justification. But as Stephen Williams suggests, one is advised also to cite historical considerations or property value protection. Williams, *Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977). See Bullford, *supra* note 2. See also 4 R. ANDERSON, *A Model Preservation District Ordinance*, AMERICAN LAW OF ZONING 30.861 (2d ed. Supp. 1984).

61. We do not think in terms of an individual's "right to beauty" being interfered with by the majority or government. Such is the bias of our constitutional scheme State constitutional rights to a decent environment come close to recognizing such a common right to a beautiful natural environment. See SHOULD VERMONT HAVE A RIGHT TO A DECENT ENVIRONMENT?, Vermont Law School Environmental Law Center Publication Series, Vol. 1, Issue 2 (R. Brooks ed. 1980).

recently been closed.⁶² Both implementation and enforcement of the laws are also problems with most land use laws; often it is politically more expedient to vote for controls than it is to provide adequate funds to carry them out.

Although aesthetic controls suffer from these generic problems of land use regulation, they also bring their own special problems. The legalization of beauty may be cited as an example *par excellence* of rampant legalism in our society, a legalism which seeks to reduce all our problems to matters of publicly established rules and legally defined rights.⁶³ Efforts to protect landscape beauty may encourage litigation. A myriad of recent "landscape beauty cases" illustrates this truism.⁶⁴ These contests have arisen despite the fact that courts, in growing numbers, have approved aesthetic considerations as acceptable purposes of government activity.⁶⁵

Although part of the opposition to aesthetic regulation lies in doubting the competence of governments in matters of aesthetics,⁶⁶ a significant part of the opposition to aesthetic controls lies in a fundamental and widely shared doubt that any clear rules are achievable in this realm.⁶⁷

The main problem is one of defining acceptable aesthetic standards. Even advocates for aesthetic protectors have expressed serious doubts about the adequacy of current aesthetic standards. John Costonis, in his recent article on "Law and Aesthetics,"⁶⁸ argues that aesthetic regulation cannot satisfy the Vagueness-Due Process

62. After years of debate, the Vermont legislature eliminated the "10-acre loophole" during the 1984 session. "Act 250" required major developments and subdivisions to acquire a state land use permit based on ten environmental criteria, VT. STAT. ANN. tit. 10, § 6086 (1984). But, subdivision lots of more than 10 acres were exempt from the permitting process from the original passage of "Act 250" in 1969 until the legislature's action in 1984, VT. STAT. ANN. tit. 10, § 6001(11) (1970, as amended 1983)

63. See Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 VAND. L. REV. 603 (1981)

64. See *infra* notes 124-127 and accompanying text.

65. N. WILLIAMS *supra* note 5; Bufford, *supra* note 2, at 131-144.

66. Williams, *supra* note 60, at 6-21.

67. This is the central issue of most cases involving standards of beauty. The virtue of Stephen Williams's article, see *supra* note 60, is that he identifies the 'polycentric' character of aesthetic issues: (1) the multiplicity of outcomes; (2) the interdependency of relevant factors; (3) the multiplicity of factors. This suggests that both courts and legislatures may have difficulty articulating standards. Williams, *supra* note 60 at 6-21. Williams seeks to identify the factors a court should look at in balancing values in expression cases: (1) the purpose of the ordinance; (2) the extent to which the ordinance is directed at specific messages; (3) the extent to which the ordinance may enhance expression. Williams also cites the need to identify the extent to which the value is clarified and judicially recognized.

68. Costonis, *supra* note 49.

requirement of intelligible standards if those standards rely on the rationales or definitions of "beauty" or "ugliness."⁶⁹ Costonis argues that the Vagueness-Due Process challenge is rebuttable only if the standards meet "a threshold of intelligibility" so that the regulated class can identify and evaluate the relevant factors.⁷⁰ Furthermore aesthetic standards cannot meet the threshold of intelligibility absent a reasonably precise sense of both the social interest that the standards intend to safeguard, and the harm that threatens the interest. Defining these interests forces a choice among the many kinds of values which aesthetic standards can serve.⁷¹

The need for carefully crafted aesthetic standards is especially great when beauty standards clash with constitutionally protected interests, e.g. freedom of speech. Again, Costonis argues that a freedom of expression challenge is overcome "only by a showing that the initiative is 'narrowly drawn and . . . further[s] a sufficiently substantial *quid pro quo* governmental interest. . . . The *quid pro quo* for aesthetically based infringements on expression is the state's obligation to demonstrate a plausible nexus between offensiveness and a threat to some independent 'sufficiently substantial governmental interest.' "⁷²

Beyond these constitutional requirements specific problems also arise where aesthetic standards are applied to nature. Aesthetic standards may not reach their goals when ecological areas and political jurisdictions are not coextensive. Another problem inheres in changing perceptions of natural beauty. Some natural ecological areas, e.g. wetlands, may lack an identifiable aesthetic tradition which would help to define standards for the protection of their beauty. Schemes for the technical application of aesthetic standards through, for example, geologically oriented landscape appraisal systems require the observer to make basic assumptions and value judgements about natural processes, even though the basis for appraisal of landscape lies in the observer's evaluation of landforms and the nature of geomorphological processes.⁷³ Landscape appraisal requires subjectivity on the part of the evaluator regardless

69. *Id.* at 410 (citing *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) and others).

70. *Id.* at 377.

71. *Id.* at 378-9.

72. *Id.* at 378 (citing *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), and others).

73. For example, see the discussion of the schemes of Luna Leopold, David Linton, K. D. Fines, and Marie Morisawa, *infra* notes 77-120 and accompanying text.

of the claims of quantitative objectivity.⁷⁴

All of the problems mentioned above revolve around one central question: *Is there an adequate definition and exposition of the rationale and values underlying landscape aesthetic standards, and, if not, can such a definition be constructed?*

V. THE UNDERLYING PHILOSOPHIES OF BEAUTY

The actual philosophies of beauty, like beauty itself, are varied. They are not easily classified into a simple dichotomy of objective and subjective. Donald Merriell offers one sophisticated classification of the theories of beauty.⁷⁵ The *extreme relativism* subjective theory of beauty holds that every individual determines beauty differently. For example, the philosopher Spinoza claimed that beauty is but a projection of our pleasure into the world. As such, beauty was no real significance, for one person finds pleasure in a thing that arouses another's distaste.⁷⁶ The Supreme Court explicitly adopted the subjective philosophy of beauty:

Such aesthetic judgements are necessarily subjective, defying objective evaluation, and for that reason, must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose.⁷⁷

The Court ignored alternative aesthetic philosophies which might provide standards for anti-billboard ordinances. One such philosophy, *moderate relativism*, suggests that, even if humans are the measure of beauty, there are important cultural, class, community, or other similarities of views among groups of persons which permit them to agree on what is beautiful. For example, the anthropologist George Boas concludes that:

Standards emerge out of the confusion of appetites and acquire authority; they are neither omnipresent nor omnipotent. Their compulsive force is achieved by historical accident. . . .⁷⁸

74. Reliability tests do not remove the possibility of subjective judgment, since there may be shared biases introducing knowledge of the functions of a given ecosystem, e.g. "Natural." A wetlands classification can easily lead one to assume that all those classified functions of water storage, purification, and food production, among others, should be performed by that wetland. Such a judgment may be a tacit subjective judgement leading to favorable aesthetic appreciation of wetlands whose functions remain undisturbed.

75. Merriell, *supra* note 6.

76. Merriell, *supra* note 6 at 190 discussing Spinoza, *Ethics* Part I, Appendix GRI AT BOOKS OF THE WESTERN WORLD at 370 and DUCASSE, *THE PHILOSOPHY OF ART* at 8 (1929).

77. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981).

78. G. Boas, *Cultural Relativism and Standards*, in *VISION AND ACTION: ESSAYS*

Most of the recent cases upholding aesthetic controls in architectural design appear to assume a community consensus on certain elements of beauty.⁷⁹ Those cases which rely upon an appeal to protection of property values for public validation and justification tacitly appeal to such a community consensus—a consensus which is reflected in the market place.⁸⁰ Certain empirical studies have sought to show that there can be substantial consensus regarding the beauty of natural scenes. The Vermont anti-billboard ordinance could reflect such a consensus of opinion in Vermont. The basic judgment, implicit in the statute, is that the spread of off-premise signs would “uglify” the landscape.⁸¹

A third category of ideas of beauty is *moral objectivism*. This position holds that although our perceptions of beauty may consist of emotional feelings or moral perceptions, these reactions are proper to all people, because of either a common human nature or human experience, or a common perception of the objects producing the reactions. In the words of Edmund Burke these are:

Natural objects which affect us, by the law of that communion which Providence has established between certain motions and configurations of bodies and certain consequent feelings in our minds.⁸²

Or, in the words of Ruskin, the perception of beauty

is altogether moral, an instinctive love and clinging to the lines of light. . .⁸³

This theory of beauty contradicts our commonly held beliefs, since one associates the emotional basis of aesthetic judgements with a subjective position. But if emotional and moral reactions are the result of an appropriate human response to the object in question, the standards of beauty can be objective, and only if the human nature to which they are appropriate can be known.

The emotionally objective idea of beauty may be the one most appropriate to those environmentalists committed to seeking an ob-

IN HONOR OF HORACE M. KALLON ON HIS 70TH BIRTHDAY (Ratner ed. 1953), *quoted in* Merriell, *supra* note 6, at 195.

79. See WILLIAMS, *supra* note 5.

80. Another arena in which the consensus standard may be operating is in the control of obscenity, in which the definition of obscenity is left to be formulated and enforced by local governments. See *Miller v. California*, 413 U.S. 15, 36 (1973).

81. See *supra* note 55 and accompanying text.

82. E. BURKE, A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL 311 (London 1759) *quoted in* Merriell, *supra* note 6, at 203.

83. 2 J. RUSKIN, MODERN PAINTERS, 8-9 (1891), *quoted in* Merriell, *supra* note 6, at 205.

jective standard of beauty without attributing to humans any unique intellectual faculties. Thus in Shepard's *Man in the Landscape*,⁸⁴ reaction to the beauty of the landscape is traced in part to an evolutionary inherited "sense of place". Similarly, Iredell Jenkins has offered a theory of aesthetics in which human knowledge of the art object is viewed as the product of an evolutionary process.⁸⁵ From this point of view, the favorable emotional reaction of Vermonters to the Vermont landscape may rest upon a shared fundamental evolutionary and historically inherited reaction to the landscape.

A fourth idea of beauty is *cognitive objectivism*, a position by which the perception of beauty is a form of knowledge. In Merriell's words:

Some of the objectivists, among them Arthur Shopenhauer and Benedetto Croce, identify aesthetic experience with a special mode of cognition that differs from the normal modes of cognition, by which we are aware of the world. A second approach is exemplified by the theories of Frances Hutcheson, Guy Sircello and C.F. Lewis, who claim that aesthetic experience is the normal mode of cognition of certain qualities of things. Finally, some objectivists hold that aesthetic experience is essential by the highest level of operation of the normal modes of cognition. Among those who have equated aesthetic experience with a perfected state of cognition are Aquinas, Plotinus and Aristotle.⁸⁶

Examples of the cognitive objectivism approach are found in those cases where historic preservation standards are examined and upheld through appeal to specific elements of those standards. These elements allegedly can provide an "objective" cognitive basis for the regulation.

In pursuit of the cognitive approach, a series of empirical studies have sought to identify those characteristics of an art work or natural scene which are associated with the judgment of the beautiful. These studies are not without arguable methodologies. More important, the studies do not define the facts that make something beautiful, but rather the factors which make the group interviewed *believe* it is beautiful. These theories do not offer a way of overcoming the objection that simply because the interviewee believes certain qualities make something beautiful, it does not follow that the

84. P. SHEPARD, *MAN IN THE LANDSCAPE, A HISTORIC VIEW OF THE ESTHETICS OF NATURE*, at 29 (1967).

85. I. JENKINS, *ART AND HUMAN ENTERPRISE* 5-8 (1958)

86. Merriell, *supra* note 6, at 207.

object necessarily *is* beautiful. Nevertheless these factors, once identified, can be explicitly adopted as standards for determining beauty. In adopting such standards, empirical demonstration can offer at least some weak justification for their adoption. At least two approaches may be taken to methods for determining "objective cognitive" standards. This article reviews these approaches in two sections below.⁸⁷

VI.

COGNITIVE OBJECTIVISM APPROACH NUMBER ONE: LITERARY AND PLANNING STUDIES OF THE "CONTENT" OF THE LANDSCAPE

Perceptions of landscape may be inextricably intertwined with a literary tradition which expresses our most basic feelings about the landscape. Leo Marx, in *The Machine in the Garden*, seeks to show how our vision of pastoral life becomes, in part, a cultural symbol of escape from the forces of urban industrialization.⁸⁸ Similarly, Roderick Nash in *Wilderness and the American Mind* traces the changes in our view of the wilderness from a frightening, dark, unknown place to a locus of solitude and beauty.⁸⁹ Other writers trace how New England landscape painters portrayed the White Mountains immune from the ravages of tourism and urbanization.⁹⁰ At the more popular level, *Vermont Life* magazine illustrates the farms and fields, small towns, farmers, shepherds, gardeners, and craft workers of Vermont, but not the smokestacks, commercial strips, dumps, trailers, or tarpaper shacks. These pictures are colored with the fiction which describes them and tinged with their failure to recognize the forces which often threaten the landscape.

A more naturalistic theme is also suggested in literature. Betty Thompson's *The Changing Face of New England*⁹¹ and John Burk and Marjorie Holland's *Stone Walls and Sugar Maples*⁹² help us to see the New England landscape—its rivers, lakes, wetlands, mountains, shores — as artifacts of natural history, products of both natural and human succession, interpreted in ecological terms. For example, an understanding of the apparently meaningless succes-

87. See *infra* notes 88-121 and accompanying text.

88. L. MARX, *THE MACHINE IN THE GARDEN* (1964).

89. R. NASH, *WILDERNESS AND THE AMERICAN MIND* (rev. ed. 1979).

90. *THE WHITE MOUNTAINS: PLACE AND PERCEPTIONS* (D. Keyes, Exhibition Curator 1980).

91. B. THOMPSON, *THE CHANGING FACE OF NEW ENGLAND* (1958).

92. J. BURK & M. HOLLAND, *STONE WALLS AND SUGAR MAPLES — AN ECOLOGY FOR NORTHEASTERNS* (1979).

sion of stone fences reaching seaward over a salt marsh reveals both the original importance of salt bay in the Northeast where grasslands were scarce, and the continuing use of salt bay for packing and mulching. Many theorists propose that a person's sense of beauty develops with the increased understanding of nature, and that this sense of beauty derives from a perception of the fit to be found in the workings of the ecosystem.⁹³

Another "objective" approach relies upon a definition of the content of standards. It finds that content in the context of social values underlying our perception of the landscape or the city-scape. As such, this objective approach moves aesthetic judgement away from explicit concern about beauty. Costonis finds these social values in cultural stability and individual group and community identity. For Costonis: "The cultural stability hypothesis raises controversies about beauty as surrogates for disagreements about environmental change itself."⁹⁴

Consequently, this approach illustrated that the impact of a development upon cultural stability and individual and group identity becomes the important effect to measure. Another sentient theorist of the city, the late Kevin Lynch, finds at least five basic dimensions for the spatial form of the city, and by extension the landscape. These criteria are:

- a) *Vitality*: the degree to which the form of the settlement supports vital functions, the biological requirements and capabilities of human beings.
- b) *Sense*: the degree to which the settlement can be clearly perceived and mentally differentiated and structured in time and space of its residents and the degree to which that mental structure connects with their values and concepts.
- c) *Fit*: the degree to which the form and capacity of spaces, channels and equipment in a settlement match the pattern and quantity of actions that people customarily engage in or want to engage in.
- d) *Access*: the ability to reach other persons, resources, information, or places.
- e) *Control*: the degree to which the use and access to spaces and activities and their creation, repair, modification and management are controlled by those who use, work and reside in them.⁹⁵

Both Costonis and Lynch reject a narrow aesthetic viewpoint, and the values or dimensions to which they appeal require careful

93. See, e.g., A. LEOPOLD, *A SAND COUNTY ALMANAC* (1949). See also, I. MCHARG, *DESIGN WITH NATURE* (1971).

94. Costonis, *supra* note 49, at 419.

95. K. LYNCH, *A THEORY OF GOOD CITY FORM* (1981).

study of the people who live in and use the environment.⁹⁶

A certain philosophical ambiguity inheres in this approach to the formulation of aesthetic standards. It is unclear whether the content—the pastoral theme, the perception of ecological history, the recognition of Lynch's dimensions—is merely shared feelings ("moderate subjectivism"), or in some sense objective characteristics which can be "perceived" by outside observers.

Despite this ambiguity, the importance of these approaches to aesthetic judgement is that they permit the development of a coherent rationale from articulated "aesthetic" standards. For example, a given landscape might be protected as illustrative of the "field-near-the town" pastoral theme. This site might reflect a specific history of clearance and preservation against the encroaching woodlands. Its protection might contribute to the vitality of nearby residents' lives, by creating both accessible and expanded views of the clustered town.

On the other hand, a legitimate dispute arises as to whether such considerations are essential to the notion of beauty. This dispute necessarily reopens the definitional questions of aesthetic philosophy. It is here, that law and philosophy again diverge. It may be possible for citizens, and for the law, to accept the relationship between the characteristics identified in literary and planning studies, and judgments of beauty, irrespective of the unanswered questions of aesthetic philosophy.

VII.

COGNITIVE OBJECTIVISM APPROACH NUMBER TWO: LANDSCAPE APPRAISAL AND AESTHETIC EVALUATION

Many planners, geologists, and ecologists have made alternative proposals for systems of landscape appraisal over the last twenty years. An assessment of these systems is important because of both the continuing effort expended upon them and their use within legal

96. Lynch argues that rather than beauty, designers should be concerned with "sense"—". . . the clarity with which [the settlement] can be perceived and identified and the ease with which its elements can be linked with other events and places in a coherent mental representation of time and space and that representation can be connected with non-spatial concepts and values" *Id.* at 131. Identity, congruence, transparency, legibility, and unfoldingness are all elements in Lynch's well articulated concept of sense.

It may be asked, however, whether Lynch's analysis is not just another way of approaching beauty, and, if not, what its relationship to beauty is. But Lynch opens up another way in which design controls can be rationalized.

regulations. We have selected a few of the "classic" kinds of studies completed to give a flavor of the kind of work done in this field.

The geologists' approach seeks to evaluate landforms in terms of the relevant geomorphological processes. Landscape evaluation methods seek to interpret physical constituents of the landscape aesthetically. In the words of one evaluator, aesthetic values must be expressed "precisely, if not quantitatively . . . In spite of difficulties, the attribution of value to natural process is a necessary precondition for applied ecology, as a basis for determining non-intervention, intervention, and the nature, scale and location of such intervention."⁹⁷

K.D. Fines did a landscape evaluation of a 773 square-mile area of East Sussex based upon a national study of the nature of the landscape, and presented an evaluation in terms of a graded hierarchy of categories.⁹⁸ The basic study was not analytical in the sense of concerning itself with the elements of which landscapes are composed. Rather, it considered the landscape (including villages) in its totality, as seen from particular viewpoints. Fieldwork in Fine's study involved a comparison in which real views were assigned a numerical value in comparison to a test scale. The scale was established when twenty landscape views from many parts of the world were evaluated by a small panel of expert observers and arranged into six graded categories:

0-1	unsightly
1-2	undistinguished
2-4	pleasant
4-8	distinguished
8-16	superb
16-32	spectacular

The rating criterion was the overall beauty of the view. The final step was to convert view values into land-surface values using "the value of a particular tract of land to the totality of views in which it features."⁹⁹ His map of the area shows boundary lines, corresponding to the numerical values that separate the six categories. In making the view ratings, personal preferences and the effects of sentiment, interest and surprise were "to be disregarded" in order to distinguish between aesthetic evaluation based on the test scale and

97. Linton, *The Assessment of Scenery as a Natural Resource*. SCOTTISH GEOGRAPHICAL MAG. 219, (1968).

98. Fines, *Landscape Evaluation: A Research Project in East Sussex*. 2 REGIONAL STUD. 41 (1968).

99. *Id.* at 55.

personal preference.¹⁰⁰

There are several problems with this method. One critic proffers that more extensive experimentation would be needed to validate the accuracy of the test scale. Further there doesn't seem to be any logical basis for the partly geometric scale. Fine's plan does not set many guidelines for selection of viewpoints; he leaves it largely to the good judgement of the surveyor. Fine's method is also labor-intensive, because of its dependence on field evaluation and therefore expensive. In response to these weaknesses geomorphologist David Linton designed a method that substitutes map analysis for field reconnaissance.¹⁰¹

Linton's study of Scottish landscape developed a procedure to identify the features that contribute most fundamentally to landscape quality. His method assigns weights to these attributes according to their perceived importance, combines scores for each location, and maps the results. The procedure produces a quantitative cartographic inventory of the scenic resources of an area. A detailed assessment of Linton's method reveals the issues and assumptions involved in such an approach.

Linton's operative phrase is "scenery is a natural resource." He states "[s]cenery that charms, thrills or inspires is a potential asset to the land in which it is found . . . a potential asset that becomes actual only when valued and exploited by a society that has reached a particular cultural and economic level."¹⁰² Linton determined that there "are two truly basic elements in the scenic resources of any area." The first is landform character; the second is land use type. The key attribute of land form character is relative relief. The characters divide as follows:

1. Lowland is land below five hundred feet, with lack of relative relief and surrounding hills.
2. Hill Country is less than one thousand feet, includes valleys, and has a "variety of pattern and balance."
3. Bold Hills have "steeper slopes and stronger relative relief." The hills are roughened through erosion by ice. (Linton believes this landscape is more "picturesque" than Hill Country).
4. Mountains have relative relief of over two thousand feet. They have the characteristics of "separateness." They possess "steepness of slope" and "sheer bulk."
5. Plateau Uplands.

100. *Id.* at 71.

101. Linton, *supra* note 97 at 206.

102. *Id.* at 219.

6. Low Uplands incorporate land below one thousand feet. Many low uplands were once lowlands, but erosion has cut adjacent land to lower levels.¹⁰³

Linton regards mountain forms as the most impressive and he identifies hills and mountains as "interesting to highly exciting." Lowlands themselves offer no scenic interest, although their water features or views of the sunrise or sunset have scenic appeal. Plateau uplands and low uplands offer pleasant vistas from their margins, views are "open and extensive." Linton notes that individual forms should also be considered in landscape appraisal — the effect of glacial erosion of mountains should be appreciated and coastlines should be appraised. In evaluating landscapes numerically, Linton suggests awarding bonus points for lowlands with lakes, mountain chains containing "long ribbon lakes" and water features.¹⁰⁴

Linton also defines landscapes according to how much humans use them; his land-use landscapes. He considers uncivilized land "wild, lonely and desolate." Urbanized and industrialized land is considered "ugly, dull, and depressing." Linton suggests that a farm may add to the value of a landscape because it incorporates "variety and harmony." Contrast exists between the field and wood or between the patterns of a field and its surroundings. Variety adds "liveliness" to the effect. He prizes wilderness landscapes as well as the "peace and harmony of farming landscapes."¹⁰⁵

Linton rates landscapes in Scotland from least desirable to most desirable as follows:

1. Urbanized and Industrialized Landscapes influence areas outside their boundaries. Buildings detract from the view. Linton gives these landscapes negative points.
2. Continuous Forests diminish the scenic effects of relief. Continuous Forests receive negative points.
3. Treeless Farmland is characterized by poor soil, poor drainage, and exposure to the wind. Linton gives Treeless Farmland one point.
4. Moorland offers extensive views. Variations in slope and form are clearly seen. This landscape is rated three points.
5. Varied Forest and Moorland landscapes get four points. The mixed landscapes provide a variety, with open moorland and groups of conifers. The landscape has little color.
6. Richly Varied Farming landscapes demonstrate the "most attrac-

103. *Id.* at 228.

104. *Id.* at 230.

105. *Id.* at 235.

tive achievement of man in the landscape." Linton gives them five points.

7. Wild landscapes are too wild for man to invade. Wild landscapes receive a six-point rating.¹⁰⁶

By combining the two sets of scores through simple summation and mapping them, Linton constructs an overlay map of landform landscapes and landuse landscapes entitled "Scotland—Scenic Resources, A Composite Assessment." He regards the map as a "first step in applied geography" and as a "pre-requisite for resource assessments."¹⁰⁷

Several studies using Linton's method have produced useful results at the local and national levels. The method has three basic limitations however. First, it does not define the distance over which the view extends. Second, it ignores the differing quality of urban landscapes; all urban landscapes are unattractive by this inflexible method. Third, relief is too important a factor in the method — a result of Linton's experience in the mountains of Scotland. Linton's technique leads to the production of a map suitable for defining regional areas of landscape quality, but it cannot be refined into a planning tool for day-to-day management decisions.

One of the best known and oft-cited landscape appraisal studies is that of Luna Leopold. Leopold used a method of site evaluation to assess scenery.¹⁰⁸ His intention was to qualify the assumptions that "unchanged" landscapes benefit humans and that a unique landscape is more valuable than a common one. Physical, biological, and human use and interest factors form the aesthetic appeal of a site. By ranking sites in terms of these three factors, Leopold conceded that odor, illumination, and weather are important in certain situations but recommended a separate evaluation of these as situations warrant. The object of the method was to separate "facts from emotions in relation to the environment" and to provide "a means of qualifying arguments: using numbers to talk about the landscape."¹⁰⁹

Leopold identified a total of 46 factors. The value of each factor at any one site is determined on a scale of 1 to 5: in some cases, the evaluation number is based on precise measurement (e.g. stream width), in others on quantitative assessment (e.g. water condi-

106. *Id.* at 237.

107. *Id.* at 245.

108. Leopold, *Landscape Esthetics*, NATURAL HISTORY (Oct. 1969).

109. *Id.* at 6.

tion).¹¹⁰ The basic problem with these criteria, is that the variables are all treated equally and are not weighted in any measure of importance.

Leopold defines uniqueness as "the reciprocal of the number of sites sharing a particular evaluation number for a factor."¹¹¹ An example of Leopold's method can be seen in his determination of valley character. Valley character is based on landscape scale, availability of distant views, and degree of urbanization.¹¹² As stated above, Leopold's method is quantitative; he assumed all aspects of the landscape which are interpreted on his list to be of equal significance.

Although Leopold's method was developed and tested on riverscapes specifically to determine the uniqueness of the Snake River Hell's Canyon area, its relevance is not limited to riverscape evaluation. Marie Morisawa further refines the site-evaluation method.¹¹³ In response to the demands of the Wild and Scenic Rivers Act¹¹⁴ for judgments on the wise use of waterways, she tries to establish criteria for aesthetic standards of natural beauty of riverscapes. In her study she uses two approaches to determine aesthetic standards for riverscapes: first, an "expert's" evaluation of vista, color, vegetation, spaciousness, serenity, naturalness, riffles, turbidity and pollution; and second, analysis of ratings by viewers of riverscape slides.¹¹⁵

Morisawa applied Leopold's method of factor analysis more systematically, basing the selection of factors on principles of aesthetic appreciation of art objects and then transplanting those abstract principles into the physical characteristics of streams and valleys. She analyzed from an "expert viewpoint" why natural scenery looked beautiful, "that is, what factors were important to *us* in viewing the river."¹¹⁶ The study method used a list of factors in the field evaluation of the riverscape. She added the subjective evaluation of the beauty of the scene looking upstream and down to the list of features to be rated. The ratings were designed to be objective (except for ranking the beauty of the view), since all were in

110. *Id.* at 10.

111. *Id.* at 12.

112. *Id.* at 16.

113. Morisawa, *Evaluating Riverscapes*, in *ENVIRONMENTAL GEOMORPHOLOGY* (D. Coates ed. 1971).

114. 16 U.S.C. §§ 1271-1287 (1982).

115. Morisawa, *supra* note 113 at 55.

116. *Id.* at 60.

scales intended for use by any evaluator.¹¹⁷ "Objective" meant that ratings were defined in such a way as to minimize operator variance. For example, in ranking *naturalness*, the following criteria for values were used:

1. No evidence of human interference.
2. Some slight evidence of human interference—a bridge in the distance, a road not far off.
3. Definite human interference—straightening the channel, a bridge nearby, a ford.
4. Several evidences of interference—a home on the bank, cars in the channel.
5. Several homes, a town, or a factory on the banks.¹¹⁸

Observer preferences were tentatively examined and the measured physical properties of rivers correlated with the preferences. A set of forty-five Kodachrome slides of various river scenes was assembled to test the ratings. Different people were asked to rate the beauty of each scene according to a 6-point scale. Viewers were also asked for their age, sex and academic background in order to provide a basis for a breakdown of the results. The study indicated that ratings of viewers and experts were similar, preferences were general across all backgrounds, and that evidence of human interference lowers the beauty value. These indications were tentative, however, because of the small number of people tested.¹¹⁹

Many recent studies have sought to assess wetland, river and coastal views, and other kinds of landscapes.¹²⁰ These studies have become increasingly sophisticated in defining the landscape elements and the viewer's relationship to these elements by adopting more careful scientific procedures for assessing the reliability, validity and generality of the findings. Despite all of the work, there remain differences among the experts as to the factors relevant to making a landscape beautiful. In many of the studies, the correlation between the factors selected as relevant and the respondent's aesthetic rating of the landscape is not high.¹²¹ Thus, although such studies are used as a partial basis for regulating landscapes, they do not offer sufficient grounds for certain aesthetic judgements. Moreover, opponents of a regulation are certainly free to ask whether, simply because the given study groups in question found

117. *Id.* at 65.

118. *Id.* at 99.

119. *Id.*

120. See, e.g., *THE FUTURE OF WESTLANDS ASSESSING VISUAL CULTURAL VALUES* (R. Smardon ed. 1983) (hereinafter cited as R. Smardon).

121. *Id.* at 170-204.

certain aspects of landscape scenes attractive, such findings are generalizable to the citizens subject to the proposed regulation.

VIII.

IMPLICATIONS OF THE MANY MEANINGS OF BEAUTY FOR THE LAW

The philosophic theories of beauty shed light on the various court responses to challenges of aesthetic standards.¹²² When aesthetic standards have come into question, courts have often upheld these standards on the grounds that (1) people affected by these standards may be protected by procedural due process,¹²³ (2) the court refuses to substitute its judgment for the administrative board in question,¹²⁴ (3) the general notion of beauty is deemed to be sufficient¹²⁵ or (4) the standards are not vague when applied in a comparative manner by the decision maker.¹²⁶ Each of these rationales can be given new meaning in light of our review of aesthetic philosophies.

The appeal to procedural due process assumes that if appropriate notice and public hearing are held, any harm to the plaintiff due to the vagueness and subjectivity of the standards will be removed.¹²⁷ The underlying assumption may be that in the course of this process, either an aesthetic consensus will be developed, the subjective preferences of citizens will be registered or the expressive or cognitive basis for the control will be articulated.

The court's refusal to substitute its judgment for the administrative board, although a standard administrative law shibboleth,¹²⁸ may be justified if a board has established an evidentiary record which documents the expressive or cognitive basis of its aesthetic judgment.¹²⁹

The claim that a general notion of the aesthetic objection in question provides a sufficient public purpose rationale for a statute may

122. It is important to emphasize that philosophic theories do not offer ready made answers to the resolution of specific controversies. See *infra* notes 123-207 and accompanying text.

123. *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W. 2d 206 (1968).

124. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 519-20, 346 A.2d 645, 652-653 (1975).

125. *Horizon Adirondack Corp. v. State*, 88 Misc. 2d 406, 388 N.Y.S. 2d 235 (1976).

126. *Vermont Elec. Power Co. v. Bandel*, 135 Vt. 141, 375 A.2d 975 (1977).

127. K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 2.09, at 46-51 (1972).

128. *Id.* § 19.01 at 373.

129. *Id.*

be based upon the tacit appeal to an existing community consensus around the objective in question.

An aesthetic determination may be upheld when an administrative agency compares the alternative aesthetic impacts of policy alternatives.¹³⁰ Such a holding implies an appeal to the modern cognitive approach to aesthetic judgments which is often implemented by having the subjects evaluate alternative views of the landscape or development in question.¹³¹

Cases in which public aesthetic controls have been rejected are revealing as well. In *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,¹³² Pennsylvania sought to enjoin the National Park Service from issuing a permit for the construction of an observation tower near Gettysburg Battlefield. The state relied on the Pennsylvania Constitution which establishes "the . . . right to . . . the preservation of the natural, *scenic*, historic and aesthetic values of the environment. . . ." (emphasis added).¹³³ Despite substantial evidence of the detrimental aesthetic impact of development,¹³⁴ the Pennsylvania Supreme Court upheld the lower court's denial of an injunction. It found that the constitutional clause expanded the government's powers and hence required legislation to "execute" the clause in question.¹³⁵ The court expressed a special concern about the aesthetic provision and the uncertainty about property values that would result from case by case applications by the court.¹³⁶

From the point of view of our philosophies of beauty, this decision, although unfortunate in the case in question, was wise. The constitutional clause on its face offered no basic philosophic rationale for its application. Without legislative action there was no way in any given case for the court to either sum up the subjective preferences for beauty or to determine the consensus on aesthetics. Although expert witnesses could and did offer cognitive or expressive evidence of the aesthetic impact, such ad hoc evidence was necessarily not systematically studied as a consequence of legislatively authorized administrative action.

130. *Vermont Elec. Power Co. v. Bandel*, 135 Vt. 141, 375 A.2d 975 (1977).

131. See R. Smardon, *supra* note 120.

132. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973).

133. *Id.* at 197, 311 A.2d at 591.

134. *Id.* at 211, 311 A.2d at 597 (Jones, C.J., dissenting).

135. *Id.* at 203-05, 311 A.2d at 594.

136. *Id.* at 205, 311 A.2d at 595.

In the more recent *Historic Green Springs, Inc. v. Bergland*,¹³⁷ the district court invalidated the Secretary of Interior's designation of 14,000 acres of the Virginia Historic Green Springs District as a national historic landmark because there were no substantive standards for national historic significance and no rule of procedure to govern the designation process. The absence of substantive standards in this case may be interpreted as a lack of an historic or aesthetic rationale for the designation. The Interior Department presented no evidence of any substantive standard or investigatory procedure which could lead to a reasoned decision about the area in question. Thus, whether there was a consensus on the beauty or historical significance of the area or whether there was an adequate cognitive or expressive basis for the designation of the acres was impossible to determine from the record.

What these cases suggest is not that the courts favor any one philosophy of beauty, but that the procedures or legislative or administrative standards of the agencies making aesthetic determinations should reflect some theory or combination of theories of aesthetics, which offer a rationale for the determination.

The need for a specific aesthetic theory is also revealed in first amendment cases in which the court must carefully weigh possible first amendment infringements resulting from aesthetic controls.¹³⁸ In *Southern New Jersey Newspapers, Inc. v. New Jersey Dept. of Transportation*,¹³⁹ newspapers successfully sought to prevent the New Jersey Department of Transportation from applying a statute prohibiting erection or maintenance of roadside signs. The injunction prohibited the removal of newspaper honor boxes from state highway rights-of-way. The court approached the case as one analogous to the evaluation of "content-neutral" statutory prohibitions which infringe incidentally upon first amendment rights. To be upheld, other requirements of the statute must be narrowly drawn to avoid unnecessary intrusion on freedom of expression. In evaluating the regulation in question, the court reviewed the photographic evidence offered in support of the ban. It concluded that the evidence was insufficient to show that the ban in question furthered scenic protection. The court stated:

Aside from merely introducing the photographs, defendants have made no effort to demonstrate or explain how the statute and its application to honor boxes furthers these worthwhile aims. Admittedly,

137. *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980).

138. See Williams, *supra* note 60.

139. *S. N. J. Newspapers v. State*, 542 F. Supp. 173 (D.N.J. 1982)

aesthetics has a higher subjective component than safety; however, the court does not believe that simply uttering the words aesthetics [sic], or appearance [sic] should magically alleviate any need for evidence connecting the regulation to the state interest, particularly where fully protected First Amendment interests are at stake.¹⁴⁰

This case and other analogous first amendment cases¹⁴¹ suggest that future aesthetics regulations must be more systematic about the evidence they gather to support their regulation of speech related intrusions into the scenic environment. This article maintains that philosophies of beauty discussed *supra* and *infra* can guide the collection of such evidence.

Institutionalizing Philosophies of Beauty

The philosopher may seek to reconcile or choose among various measures of beauty through extensive philosophic analysis. Judges and legal scholars may be tempted to do likewise. This would be a mistake since judges and legal scholars often lack the ability and education, and almost always lack the time for such philosophic analysis. More importantly, the differences in aesthetic theories are not easily reconciled. There is, of course, a massive literature on aesthetics which seeks to resolve these issues.

Another approach for lawyers and legal scholars is to inquire what the implications of each theory of beauty are for beauty control laws. These implications may not be directly deducible but they may nevertheless be suggested by the theory in question. By starting with a consideration of the institutional implications of the various theories of beauty *before* trying to resolve the conflict among the various views, one may avoid the conflict. For if the views do not conflict in their institutional embodiment, then they may be eclectically implemented without forcing a choice among the various theories.

Radical subjectivism, for instance, can be applied in various ways. Even if one holds the extreme subjectivist position of Spinoza or Ducasse—that beauty is a matter of individual taste—the subjective value may still be protected. Legal mechanisms can be adopted to implement that subjectivism. The legal arrangements could seek to give each person an equal voice in the definition of beauty. At the extreme, for example, a law requiring a referendum for approval of each permit given under a design-control ordinance, or for a de-

140. *Id.* at 186.

141. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Members of City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118 (1984).

velopment affecting the natural beauty of the area, would best implement the extreme subjectivist position. Despite the seeming infeasibility, modern two-way electronic communication or traditional opinion polls may make such referenda possible. Legal scholars have suggested such opinion polls as a basis for securing individual opinions in land use matters.¹⁴² Many design control ordinances and environmental-control ordinances contain an "elective" element, either in the election of officials who appoint the administrators of the ordinance or in the direct election of the administrators.¹⁴³ At least one theory of representation would argue that the elected representative could thus "represent" the aesthetic whims of the voters since the voters could hold them accountable.¹⁴⁴

Another approach to the institutionalization of the subjectivist theory where differences on aesthetic standards arise among individuals or groups would be the mediation of differences over aesthetic tastes. Mediation would be possible where the method of resolution does not require that the reasons for conflicting positions be given.¹⁴⁵ Many zoning disputes over aesthetic issues, specifically the conflicts over zoning regulation requirements which inadvertently deter the promotion of "ugly" solar energy, result in a "principle-less" process of negotiation.¹⁴⁶ Those who believe that aesthetic preferences are individual expressions of pleasure are also likely to believe that all moral judgements are expressions of individual preference. If so, to the extent that they support any legislative implementations of collective moral preferences, they should accept the legal enforcement of aesthetic standards.

A final way of institutionalizing the subjective approach is to rely upon substitute market measures. Some courts appear to rely on the demonstrated impact upon property value in determining whether an aesthetic regulation serves a public purpose.¹⁴⁷ But, as

142. See Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1442-43 (1973).

143. See R. ANDERSON, *supra* note 60.

144. For the complexities of representation, see REPRESENTATION (H. Pitkin ed. 1969).

145. Relevant here are discussions of mediation, negotiation and compromise as alternative dispute settlement devices. See, e.g., COMPROMISE IN ETHICS, LAW AND POLITICS (J.R. Pennock & J. W. Chapman eds. 1979). See also H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982).

146. See Entwisle, Meeker, & Nakamori, *Overcoming Aesthetic Restrictions on Residential Solar Owners: A Guidebook for Lawyers and Homeowners*, 11 ELR 50019 (1981).

147. See R. ANDERSON, *supra* note 60, at 94.

indicated above, reliance on market forces for the full expression of aesthetic subjectivism can cause serious problems.

Unlike the radical subjectivist, the moderate subjectivist in aesthetics would seek ways to identify and implement shared perceptions of beauty. One technique would be a law that permits groups of people to petition for designation of a district or a landmark or unique environmental area or species and thereby encourage the expression of common group perceptions. The moderate subjectivist would also support a beauty law in which a common group, e.g., a neighborhood, would control the administration of the law when it governs only the group or its district.¹⁴⁸ In this way, moderate subjectivism offers a rationale for neighborhood-administered and neighborhood-controlled aesthetic ordinances.

The emotional or moral objectivist in aesthetics would require a demonstrated relationship between the beauty aimed at by the ordinance and either a common human nature or the aesthetic object itself. For example, Croce's theory of beauty as expression of an artistic vision suggests itself here.¹⁴⁹ According to Croce, to determine whether artistic expression is successful we must first step into the artist's shoes and reproduce his state of imagination. The effort requires careful research into the outlook and attitude of the artist. Thus, an ordinance requiring such research or containing standards based upon such research would be a "Crocean" approach.¹⁵⁰ Such an approach is taken in the historic-preservation field. Historical research can underlie historic preservation ordinances, part of the stated objectives of a beauty-control law, the evidence relied on in an administrative determination, or a required rationale in an administrative decision. Although more difficult, this expressionist approach can be applied to protecting natural beauty. The landscape itself may reflect a history of human influences or natural processes.¹⁵¹ The areas to be protected, exhibited, and used can be selected; their boundaries defined and their use guided with attention to this history, as if this history were an equivalent to an artist's purpose.

The cognitive objectivist position underlies the effort to state spe-

148. Such a law, however, would raise serious questions regarding unconstitutional delegation. The conflict here is between legal control by a delegated group in accordance with their own standards and the constitutional requirement that all laws be "defined" and aimed toward the common good by representatives of the entire community.

149. Merriell, *supra* note 6, at 208-09.

150. B. CROCE, AESTHETICS (1722).

151. See W. CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983).

cific standards for aesthetic protection. It requires either specific education of the people on the board to certify that they have the cognitive knowledge or a scientific methodology for determining what is beautiful.¹⁵² A parallel exists between the cognitive philosophies of beauty which appeal to "uniformity amidst variety,"¹⁵³ "balance of qualities of high degree,"¹⁵⁴ "due proportion,"¹⁵⁵ "integrity,"¹⁵⁶ or "radiance,"¹⁵⁷ and the legal standards, which appeal to the same terms often found in beauty control and historic preservation ordinances. However, the more recent scientific approaches seek to identify more specific terms, e.g., "legibility," which can be used in legal standards. Unfortunately, these cognitive aesthetic theories and the parallel legal standards often fall short in indicating the precise meaning of the standards or the precise operations by which one can determine whether the standards are realized.

One may choose from different kinds of cognitive rationales. Some approaches seek to find the essence of their value in the very perceptual aspect of landscapes. Others find values in the very content of our perceptions of the landscape—a content defined by a literary tradition; a knowledge of the landscape's natural history and ecosystem functioning; or by our shared knowledge of the social values and history embedded in the landscape. All of these approaches can offer a rationale and a procedure for designing and implementing aesthetic regulations.

IX.

IMPLEMENTING THE DIFFERENT APPROACHES TO THE PROBLEM: SELECTED EXAMPLES

Landscape preservation includes the preservation of aesthetic values implicit in the landscape. Legal regulation of landscapes requires rationally articulated standards for preservation. Given these premises, it is logical to ask whether the manner of defining the values in the standard to be used can also determine the kinds of

152. The kind of education required relates to the content of the object to be judged. How specifically the discipline need relate to the content is debatable.

153. F. HUTCHESON, AN INQUIRY INTO THE ORIGINS OF OUR IDEAS OF BEAUTY AND VIRTUE in *AESTHETIC THEORIES: STUDIES IN THE PHILOSOPHY OF ARTS* 97 (K. Aschenbrenner & Isenberg eds. 1965), *quoted in* Merriell, *supra* note 6, at 209.

154. G. SIRCELLO, A NEW THEORY OF BEAUTY (1975), *quoted in* Merriell, *supra* note 6, at 209-210.

155. Aquinas, *SUMMA THEOLOGIA* I, 5, 4, ad. 1; 19 *GREAT BOOKS OF THE WESTERN WORLD*, at 26, discussed in Merriell.

156. *Id. supra* note 6 at 211-212.

157. *Id.*

institutions established to protect aesthetic values. The traditional basis for aesthetic appraisal of landscape lies in evaluation of land-forms yet lacks a consistent theoretical or conceptual framework.

A geographical district, a preferred or prohibited use, and an impact assessment are the three approaches being adopted for most landscape preservation. A geographically oriented approach to institutionalizing aesthetic standards would designate a specifically delineated district. One type of delineated district could be defined as a specific eco-subsystem such as a desert or wetland. Under this approach the definition of the designated area incorporates the standards to be used. It is an inherently restrictive standard. In the wetlands situation, for example, any proposed use would have to blend with the aesthetic characteristics of the area. Water could not be drained, spongy grasses covered, or dead trees removed.

Other possible designations of "districts" include "social system" districts, area political subdivisions irrespective of local ecosystems, and "design districts" such as agricultural districts. The geographical approach also might include larger areas: states or possibly whole regions, like the Colorado Plateau or Northern New England. The smaller geographical areas, such as riverscapes, selected mountain areas, or wetlands may be more workable. Such a geographical approach is probably most suited to the cognitive objective or the moral objectivist rationales. A small geographic area permits the identification of specific common features that create the beauty of the area. Alternatively the area can be viewed as evoking a common response on the part of its beholders.

These geographically-oriented, site-specific laws seek to develop a more objective approach to the definition of beauty. One such example is Vermont's Scenic Highway Act.¹⁵⁸ Under this law, the governor appoints most of the members of a Scenery Preservation Council to plan and advise on the designation of scenic roads, corridors and sites. Upon recommendation of the Scenery Preservation Council the Transportation Board may designate a state highway as "scenic". Upon recommendation of local planning commissions, the local selectmen, after public hearing, may also designate a town highway as "scenic".

If a road is designated as "scenic," the road construction, surface treatment, signs, scenic overlooks, roadside grading, and preservation of "intimate roadside environments" can be controlled with

158. VT. STAT. ANN. tit. 10, § 425.

reference to certain criteria.¹⁵⁹ The Scenic Preservation Council has promulgated a scenic road designation and inventory form which identifies a series of positive and negative criteria and a method for applying these criteria.¹⁶⁰

From a philosophic perspective, the scenic-roads legislation seeks to join both a moderate subjectivist and a cognitive objectivist aesthetic theory of beauty. On the one hand, through public hearings on the criteria and the designations of scenic roads, as well as volunteer testing of the inventory tool, the law provides a way for reaching a consensus as to whether the road in question is scenic. On the other hand, the inventory criteria themselves aim at a cognitively objective definition of scenic roads.¹⁶¹

The second approach to standards is "use-oriented." The designated standard would either favor or negate a specific use. Certain laws which contain broad prohibitions, such as billboard control¹⁶² laws and bottle-deposit laws,¹⁶³ reflect geographically encompassing legislative judgment as to specific threats to beauty. These judgments are not justified as an appeal to objective ideas about beauty, but rather they are based upon a "moderate subjectivism" — the shared consciousness that certain things such as billboards and litter are ugly. The building, articulating and maintaining of this consciousness are matters of aesthetic politics based upon direct appeals to the shared aesthetic tastes of the populace and its representatives, rather than through an intellectual articulation of any more specific cognitive standards.

The third approach is the impact approach used by The National Environmental Policy Act (NEPA), Vermont's Act 250, and others.¹⁶⁴ This approach involves taking a proposed use or development "in the whole" and judging its impact on the area it involves. NEPA typifies this approach with its now famous mandate in section 102(c), requiring an environmental impact statement (EIS) for "major federal actions significantly affecting the quality of the

159. VT. STAT. ANN. tit. 10, § 425(c) (1984).

160. VT. STAT. ANN. tit. 10, § 425(b)(5), (1984). The checklist is available in handbook form from the Scenery Preservation Council.

161. VT. STAT. ANN. tit. 10, § 425(b)(5) (1984).

162. For example, see the Vermont billboard control law entitled "Tourist Information Services," VT. STAT. ANN. tit. 10, §§ 481-505 (1984).

163. See *supra* note 10.

164. NEPA, 42 U.S.C. §§ 4321-4370 (1982); "Act 250," VT. STAT. ANN. tit. 10, § 6001 (1973 & Supp. 1983); and, for example, the Oregon Land Conservation and Development Act, (1973).

human environment.”¹⁶⁵ One critic maintains that the history of the implementation of NEPA has done little to ensure the protection of aesthetic values,¹⁶⁶ especially in regard to the Coastal Zone Management Act.¹⁶⁷ “[T]his results from the peculiar characteristics of aesthetic values, the vagueness of the congressional directives, and the fact that these directives were given to all agencies without regard to their expertise in aesthetic matters.”¹⁶⁸ Nevertheless the impact approach may be the most useful if the criteria for judgement of the impact are clear and specific. In one sense the scope of impact analysis is narrow—it is applied only to the particular proposal. But it can also be broad and encompassing—interrelating and balancing aesthetic, social, ecologic, and economic values, amalgamating more than one approach.

Vermont’s Act 250 offers an excellent example of the problems of controlling developments having aesthetic impacts.¹⁶⁹ The District Environmental Commissions, as part of their duties under criterion eight of Act 250, are to review each application and decide whether the project will have an undue adverse impact on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas. The law places the burden of proof upon the opponent to the project since as the legislative history reveals, the legislators were uncertain as to the appropriate standard to be selected.¹⁷⁰ Problems remain in defining what “aesthetics” mean in the context of criterion eight and how a commission, even with the guidance of rules or administrative policies, may make a determination as to whether a project will have an undue impact on aesthetics.

Many of the District Commissions and their Coordinators have attempted to add an element of objectivity to their determinations by compiling a checklist, or reference guide, of criterion eight considerations.

The underlying presumption of the checklist seems to be that aesthetic considerations are closely linked to a concept similar to legal nuisance. If a certain type of exterior lighting or a garbage collection area would be likely to offend someone’s sensibilities, then

165. 42 U.S.C. § 4332(2)(c) (1982).

166. Note, *The NEPA Model for the Protection of Coastal Aesthetics*, 28 BUFFALO L. REV. 817 (1979).

167. *Id.* at 819.

168. *Id.* at 818-19.

169. VT. STAT. ANN. tit. 10, § 6001 (1973 & Supp. 1983).

170. Note, *Leaving The Scene: Aesthetic Considerations In Act 250*, 4 VT. L. REV. 163, 164-170 (1970).

there is an impact. The implicit philosophic standard here is one of moral relativism—a tacit appeal to a community consensus on what is offensive. The question of whether the impact is “undue” can then be determined by examining the facts of a particular case.

The linking of aesthetics to nuisance is a productive administrative policy in the vast majority of cases. Both the commission and the parties apparently feel comfortable with the nuisance/aesthetic formula. The applicant can anticipate, at least to some extent, commission reaction. Opponents can formulate objections within a recognized framework. The commission, as it has done in case after case, can impose conditions and mediate disputes with a definite purpose in mind.

However, there are certain kinds of cases for which the formula either is not applied or cannot be applied. Two kinds of cases not easily handled through the nuisance approach are those where no parties object and those in which a large scale project would have significant off-site aesthetic effects. An example of the first case arose at a recent commission hearing, *Imported Cars of Rutland, Inc.*¹⁷¹ There, a car dealership sought an amendment of a land-use permit to allow the installation of three large, internally lighted, plastic signs. The only criterion in dispute was aesthetic.¹⁷² The commission determined that since the area around the dealership was primarily rural in character, the signs should be smaller in size and constructed of wood. The applicant’s position was that the size and construction of the signs was appropriate for the area.

In response to petitioner’s charges of arbitrariness the commission chairman responded that:

the whole environmental issue . . . is a matter of choice of the people . . . we try to represent the majority of the people and we choose what we think is publicly pleasing or not.¹⁷³

In this case the subjectivity of the Commission’s aesthetic judgment was forcefully advocated to the applicant, since no party was opposing the application. The Commission, acting under Environmental Board Rule 20(c) undertook an independent inquiry to make affirmative findings.¹⁷⁴ The Commission’s decision was not

171. *Imported Cars of Rutland, Inc.*, Application No. 1R0156-2, slip adjudication (Vt. Dist. Env’tl. Comm’n I July 20, 1982).

172. VT. STAT. ANN. tit. 10, § 6086(a)(8) (1984) “The subdivision or development will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.”

173. *Imported Cars*, Hearing Transcript p. 10, July 1, 1982.

174. The Commission made a site visit and received testimony at the public hearing.

“supported” by the presence of a party opposing the development, such as an adjoining landowner presenting evidence against the permit.

An interesting aspect of this case is that under Section 6088(b) of the Act, the burden was on the party opposing the application on the basis of criterion eight. If the Commission could not be considered a party then technically no one had standing to meet the burden of proof. However on appeal to the Environmental Board, it found in Section 6086 of the Act a requirement that evidence sufficient to make an affirmative finding on each criteria be made available to the District Environmental Commissions. As a result, the burden of producing evidence is always on the applicant.¹⁷⁵

Where there are well-defined parties opposing an application, the Commissions can often effectively mediate a consensus as to what is “publicly pleasing.” Agreement may be difficult to reach, in a second category of cases, if the project’s scale is itself perceived to be unaesthetic.

In *Woodstock Heritage Ltd.*¹⁷⁶ the applicant sought a permit for thirty-five condominium units in a small residential neighborhood. A group of neighborhood residents opposed the project because of the unusual impact the project would have on the entire area.

The Commission found that with strict permit conditions the impact of the project could be minimized. They imposed conditions such as screening of parking areas, retention of existing trees on the site and reduction of exterior lighting. Perhaps recognizing that these conditions did not adequately address the major issue, the scale of the project in relation to the character of the area, the Commission took a further step. It asked the architect for the applicant and the architect for the town to arrive at a mutually acceptable agreement with respect to all exterior features. If no agreement could be reached within a specified times, the Commission stated that it would make a final determination.

In the “Little River” case¹⁷⁷ the ski resort applied for various

175. For a time, the applicants were appealing to the Vermont Supreme Court on the sole issue of whether criterion eight is unconstitutionally vague. Although the appeal was later withdrawn because of a change in the development plan, there is at least one Vermont lawyer who is anxious to bring the same challenge in an appropriate situation.

176. *Woodstock Heritage, Ltd.*, Application No. 3W0373, slip adjudication (Vt. Dist. Env'tl. Comm'n III Sept. 2, 1981).

177. *Mansfield-Luce Hill Co.*, Application No. 5L0729, slip adjudication (Vt. Dist. Env'tl. Comm'n V July 1, 1983).

permits¹⁷⁸ including the Act 250 land use and development permit, for construction of a private sewage treatment plant, which would discharge treated effluent into the Little (Waterbury) River. In July, 1983 the local environmental commission issued its ruling denying the Act 250 permit on several grounds¹⁷⁹ including criterion eight.¹⁸⁰

It is hard to imagine any place in Vermont where one could find a more advantageous combination of isolation, unspoiled nature, rural character and visual beauty while still being located within a short distance of municipal and recreational facilities The proposed project contains many elements that would alter the character of this location Landscaping measures extensive enough to completely shield the plant from view were rejected by the applicants on the grounds that such measures would themselves have an undue adverse visual effect on the site.¹⁸¹

In pursuit of its mediation function within the course of the development permitting process, the Commission stated:

The Commission believes that the applicants have sincerely, and at considerable expense, tried to design a sewage treatment plant that will greatly minimize negative aesthetic and environmental impacts. . . . [I]n spite of this, the Commission is forced to conclude that this project creates an undue risk of damage, both permanent and continuing, to the scenic and natural beauty and aesthetics of the area in which it is located.¹⁸²

As it continued, the Commission offered proof of the subjectivity in consensus seeking by stating:

The Commission feels that this plant may not be judged under Criterion 8 by the same standards that would be applied to a sewage treatment plant in an area more compatible with its function and operation.¹⁸³

Although it was over the certain degradation of the Little River by the release of treated effluent that the Commission made its strongest rulings, it left no doubt about its jurisdiction to regulate

178. In addition to the Act 250 development permit, the Mansfield-Luce Hill Co needed a ruling by the Vermont Water Resources Board as to the classification of the Little River, and a discharge permit from the Vermont Water Resources Department

179. Mansfield-Luce Hill Co. at 23: "[t]he project will cause or result in a detriment to public health, safety or general welfare under criteria 1, 1(B), 8 and 9(K) described in 10 VSA, § 6086(a) and pursuant to that section and 10 VSA 6087(a), a permit is therefore denied."

180. *Id.* at 14.

181. *Id.* at 14-15.

182. *Id.* at 15.

183. *Id.*

the aesthetic character of a development. At the end of the discussion of criterion eight the Commission reiterated that even if it had issued a permit for the development "it would have retained continuing jurisdiction . . . during the life of the project with the power to import additional conditions . . . in the areas of landscaping, lights, visual impact, and the abatement of odor and sound."¹⁸⁴

In these Act 250 cases, the commission appeared to be acting on the assumption that perception of beauty is subjective, but that the commission could mediate subjective differences or could represent a subjectively shared perception. This was not the situation in the *Hawk Mountain* case.¹⁸⁵ There the applicant filed for a permit to create a two hundred and sixty-two (262) lot residential subdivision on five hundred and eighty-five (585) acres of land. District Commission III found that over five miles of roads and about 100 homes would be visible from Route 100 adjacent to the site. Route 100 had been identified as a scenic highway in the State Comprehensive Outdoor Recreation Plan.

The portion of the proposed project adjacent to Route 100 and in fact, the whole mountainside, were undeveloped and wooded. The trees on the site were primarily deciduous. The Commission found that the intensity of the proposed development would "significantly change the visual characteristics of this forest land."¹⁸⁶

The Commission reinforced their judgment of the project's visual impact in an unusual manner. The Commission used a "Visual Quality Objectives" classification system developed by the U.S. Forest Service.¹⁸⁷ The system has six levels of visual impact: Preservation, Retention, Partial Retention, Modification, Maximum Modification, and Unacceptable Modification. The system, applied to the Hawk Mountain site proposal, would result in "Maximum Modification".

The Commission recognized that it would be inappropriate for them to use the National Forest System as "the sole means of finding the impact of a proposal on private land." The Commission stated, however, "that it is reasonable and appropriate for us to consider this system as an example of how an expert public body would classify visual impact."¹⁸⁸ Thus, the Commission appeared to be

184. *Id.* at 15-16.

185. *Hawk Mountain Corp.*, Application No. 3W0246, slip adjudication (Vt. Dist. Envtl. Comm'n III Nov. 16, 1978).

186. *Id.* at 13.

187. *Id.* at 14.

188. *Id.*

leaning towards a more objectivist theory.

However, in another case, the District Commission IV appeared to retreat from an objectivist approach. In the case of *Spear Street Association*,¹⁸⁹ the applicant sought a permit for construction of seventy-nine condominium units and a subdivision of fifty-five house lots on a fifty-acre site. Several adjoining property owners objected under criterion eight that the project would obstruct the scenic view of Lake Champlain.

An expert witness on site planning testified at the Commission hearing that the subdivision could have been designed in a manner which better suited the site. The expert defined aesthetics as follows:

I think the scenery and the aesthetics are obviously very closely-related, and I also feel that there's a relationship between function, really, and aesthetics. That's one principle of aesthetics which might be applied here. In other words, if a design or plan is functional in its nature, it's also apt to be pleasing . . . I think it's good if you look at the characteristics of this particular site and determine whether the plan that has been presented responds to the limitations and the capabilities of the site in a functional manner.¹⁹⁰

In discussion of their findings, the commission was intrigued by the alternative plans for the project that would keep open a significant amount of land along Spear Street and provide better views of the lake. It decided, however, that it was not reasonable to require the applicant to redesign the project for aesthetic criteria alone. It noted that the original plan was acceptable and that conditions would ensure the preservation of some view of the lake. According to the commission, the applicants had taken reasonable steps in the plan and design to preserve the aesthetics of the area. While the opponents had shown some impact on aesthetics, they apparently had not met their burden of showing sufficient undue adverse impacts.

Act 250 is essentially a pro-development statute, one which requires only that the district commissions, the state environmental board, or the courts find that a proposed development will not result in undue or adverse effects on the environment. Act 250 does not have, at its base, the intent to stop development.¹⁹¹ Implementation of the Act has not even led to the called for statewide land

189. *Spear St. Assocs.*, Application No. 4C0489, slip adjudication (Vt. Dist. Envtl. Comm'n III Nov. 16, 1978).

190. Transcript of *Spear St.* public hearing March 28, 1981

191. See R. REIS, VERMONT'S ACT 250: REFLECTIONS ON THE FIRST DECADE

use plan¹⁹² because of strong political support of development interests. It is clear that the various decisions under the aesthetic criterion have used two seemingly opposing standards, moderate subjectivism or relativism and moral objectivism, to stop or limit developments because of adverse and undue aesthetic impact. Most jurisdictions, however, do not have even the limited and contradictory aesthetic protection offered by Act 250.

X.

CONCLUSION

Designing satisfactory aesthetic controls requires a theory of beauty to guide regulators in their development and applications of the aesthetic rules in specific cases. This article has identified four such theories: extreme relativism, moderate relativism, moral objectivism, and cognitive objectivism.

The extreme relativist, who believes that beauty is merely a matter of individual taste, makes aesthetic regulation difficult. For the extreme relativist, the general rule would probably be impossible to formulate given individual tastes. Even if such a rule could be formulated, who would legitimately claim to apply it in the myriad of specific situations to which aesthetic controls apply? Only if individuals could somehow express preference when regulating each project could the extreme relativists' demands be met.

The adoption of any scheme of voting for a general aesthetic rule on its applicability in a specific situation leads logically to adopting the moderate relativist position in which aesthetic general rules are based upon a consensus of the relevant community. Such a community consensus can provide the rationale for general aesthetic rules but cannot offer an automatic way of designating the application of these aesthetic rules in specific situations.

If one adheres to the moral objectivist's position, one believes that judgments of beauty reflect emotions, ethical principles, or natural reactions common to all. Even if community members can identify their common emotions, ethical principles or natural reactions, these are likely to be identified only at such a general level of formulation as to be helpful, if at all, in the formulation of general rules and not in their applicability in specific cases.

AND RECOMMENDATIONS FOR THE SECOND, Vermont Law School Environmental Law Center Publication Series (1980).

192. VT. STAT. ANN. tit. 10, § 6043 (1970). This section of Act 250 was deleted by the legislature in 1983 at the same time it closed the "10 acre loophole." *See supra* note 62.

It is the modern cognitive objectivist who seeks to develop a rule based upon knowledge and an objective procedure to guide the applicability of the general rule in specific cases. As we have indicated above, the effort to develop a cognitive objectivist approach fails to exclude subjective judgments, both in the formulation of the aesthetic rule and in its applicability.¹⁹³

This philosophical portrait of an aesthetic law reveals that any aesthetic theory may offer a basis for a reasonably specific general rule, but it will not necessarily yield a convincing rationale for its automatic applicability in any one situation. As a consequence, challenges to aesthetic rules in specific cases will arise not because of the impossibility of achieving a general rule, but rather because that rule cannot be unambiguously justified.¹⁹⁴

Even in the absence of a procedure for the application of a general theory to specific cases, the specific aesthetic judgments of decision makers, made under general aesthetic regulation and applied to specific cases, need not be arbitrary and capricious. With an awareness of the different aesthetic theories, a review system which provides for the application of more than one of those theories and does not require them to be exclusive is possible. Public hearings can help to determine whether a consensus or only a diffuse community dissension exists. An open door decision making system which recognizes the inevitable role of individual taste in specific applications can facilitate a public examination of specific aesthetic judgments derived from the general rules guiding the decision makers.

Similarly, the decision maker should be expected to justify a decision by demonstrating an arguable relationship between the specific decision and the general rule. If the general rule is based upon a consensus of community taste, the decision maker should demonstrate that the opponent's position does not constitute a failure of consensus on the general rule, or evidence that the specific judgment is irrelevant to the general rule.

If the general rule reflects a moral, objectivist position, to the extent possible, the decision maker should demonstrate how the spe-

193. It seems to be self-defeating to "quantify" beauty, like conceding a crucial advantage to the developers and mine owners before the fights begin. For example, by quantifying the beauty of, say, the Grand Canyon, it could subsequently be treated as equivalent to X tons of coal, or Y barrels of oil. In other words, there is the implicit assumption that everything has its price and that given proper economic justification, we could mess up *anything*.

194. In such cases the justification is usually an ecological land ethic — land should be treated with love and respect by balancing strictly human needs with the need to preserve the natural beauty and the self-renewing capacity of the land.

cific decision reflects the substance of these rules by identifying the cognitive factors which may be relevant if not conclusive in making the judgment.

What might an aesthetic protection statute — one which is eclectic and cognizant of the pluralism of aesthetic philosophies — include? To permit the expression of extreme relativism, community members and decision makers should be given an opportunity to see the landscape at issue. In the case of impact controls legislation, community members should have the opportunity to assess the impact of the proposed development on the landscape.¹⁹⁵ Procedures for site visits, and guidelines for detailed renderings of sites and projects would provide increased opportunities to make judgments.¹⁹⁶ Public hearings, including solicitation of advisory votes may be the most feasible way of adding up preferences.¹⁹⁷ However, advisory referenda could provide, especially on major projects, a more decisive judgment.¹⁹⁸

Moderate relativism, or the search for a community consensus, can be included in several ways. The regulation in question could apply to appropriate sub-areas of the jurisdiction.¹⁹⁹ A consensus of those residents could be sought through a local public hearing.²⁰⁰ A survey of neighborhood residents could be undertaken to determine the standard of beauty, and its application in the specific case.²⁰¹ To separate aesthetic judgment from concerns about the tax consequences, or the taking issues posed in any regulation, a two-step decision making process is necessary. Economic issues could be considered after evaluation of the beauty of the landscape was complete.

195. In one author's experience with local planning and zoning boards, renderings and visual evidence are poorly prepared.

196. Site visits, preferably guided by a naturalist, are absolutely necessary to appreciate a site. If a proposed development is involved, someone knowledgeable about the proposal should participate.

197. Public hearings need not be inaccurate indices of community opinion but see Checkoway, *The Politics of Public Hearings*, 17 J. APPLIED BEHAVIORAL SCIENCE 56 (Oct. 1981).

198. For a broad discussion of referenda in environmental issues, see D. NELKIN, *TECHNOLOGICAL DECISIONS & DEMOCRACY—EUROPEAN EXPERIMENTS IN PUBLIC PARTICIPATION* (1977).

199. Obviously, there must be a rationale for choosing a sub-area to avoid constitutional and municipal law objections.

200. The residents cannot be established as a "veto group". *Thomas Cusak Co. v. City of Chicago*, 242 U.S. 526 (1917); *Eubank v. City of Richmond*, 226 U.S. 137 (1912).

201. See Milbrath, *Citizen Surveys as Citizen Participation*, 17 J. APPLIED BEHAVIORAL SCIENCE 478 (Oct. 1981).

Inclusion of moral objectivism in a statute requires a careful study of the history and functions of the areas in question. Such studies should be prepared by planning staff and shared fully with the community at public hearings. Communication about natural beauty allows the public to reflect on whether an account accurately portrays the role and importance of a landscape in their lives.²⁰²

Finally the quest for cognitive objectivism requires an effort to measure either the attributes of the area in question or the kind of areas to be protected. Certainly, the quantitative studies cited above, when relevant, can and should be used.

All four kinds of information — the individual opinions of residents, the measure of the presence of consensus, the report on the meaning of the natural area and public response to it, and “scientific” efforts to measure the elements of beauty in the area should be submitted to the decision making board.²⁰³ Such an elaborate procedure suggests that its full application be reserved for designation of major areas or projects.

This eclectic approach accepts philosophic diversity and builds it into the legal controls. At the most practical level, since we may not know which theory of beauty a judge, or city council, or neighborhood might adhere to, these controls are more likely to be adopted and supported if many theories of beauty are appealed to. This is a common strategy in the face of uncertainty and it is not to say that other precautions should not also be taken.²⁰⁴ By establishing sometimes overlapping or conflicting theories of beauty and law, we can at least test their statute’s practical effect.

Finally, we purport to be a democracy, and democracy, by one definition, is government of discussion.²⁰⁵ That discussion implies commitment to continued efforts to accept the philosophical pluralism of people; resolving differences through discussion rather than

202. One example of the submission of public input was in the famed “Storm King” case, *Scenic Hudson v. Federal Power Comm’n*, 354 F.2d 608, *cert. den.*, 384 U.S. 941. (1966). See also *Commonwealth v. National Gettysburg Battlefield Tower Case*, 454 Pa. 183, 311 A.2d 588 (1978).

203. The decision making board should be constituted in such a way as to “appreciate” the evidence. A cross sectional representation would be best suited to receive vote-type evidence. People with political experience and social survey expertise would be best able to evaluate the evidence of moderate subjectivism. Naturalists, social historians, and political representatives might be most sensitive to the expressionist evidence. Scientists might best be able to probe any scientific evidence.

204. See Williams, *supra* note 60.

205. For a definition of democracy as government by discussion, see F. KNIGHT, *FREEDOM AND REFORM* 184 (1947).

mandating one philosophical concept of beauty for all.²⁰⁶

206. One detailed philosophical discussion of the effort of government to regulate aesthetics for moral reasons concludes that the realms of aesthetics and political and moral thought inevitably conflict. If that is correct, then we can expect continuing problems in these areas. See M. ADLER, *POETRY AND POLITICS* (1965).