Chapter 21

Design Review: Selected Issues for an Architectural Review Board

21-100 Introduction

This chapter analyzes selected issues considered by architectural review boards ("ARB") established under Virginia Code § 15.2-2306. The issues addressed in this chapter include design guidelines and their proper application, the authority to regulate aesthetics, dealing with trademarks and service marks, and the proper application of design guidelines to religious structures.

21-200 Design guidelines and their proper application

Virginia Code § 15.2-2306 enables localities to determine whether a proposed structure is architecturally compatible with the historic landmarks, buildings or structures within a historic district. *See Worley v. Town of Washington*, 65 Va. Cir. 14 (2004) (designation of town as historic district by the Virginia Historic Landmarks Commission is not the equivalent of designating the town as an historic landmark under Virginia Code § 15.2-2306).

These determinations are usually made by an ARB by applying appropriate design *guidelines* adopted by the governing body. *For a discussion of the legal status of guidelines, see Appendix E.*

21-210 Reasonable specificity and objectivity required in design guidelines

There is little Virginia case law considering Virginia Code § 15.2-2306, and it appears that, to date, only one court has been asked to decide whether a locality's design regulations (not guidelines) were void for vagueness. In *Covel v. Town of Vienna*, 78 Va. Cir. 190 (2009), *affirmed* at 280 Va. 151, 694 S.E.2d 609 (2010), the circuit court considered whether the following aspects of a building, accessory building, structure, fence, or sign, contained in the town's historic district regulations, were unconstitutionally vague:

1. Exterior architectural features, including all signs, which are subject to public view at any time of the year from a public street, way or place.

2. General design and arrangement.

3. Texture and material.

4. The relation to similar features of buildings, accessory buildings, structures, fences or signs in the immediate surroundings.

5. Harmony or incongruity with the old and historic aspect of the surroundings.

6. The extent to which historic places and areas of historic interest in the District will be preserved or protected.

7. Special public value because of architectural and other features which relate to the cultural and artistic heritage of the Town of Vienna.

The circuit court held that the town's criteria were not unconstitutionally vague. Because the appellants failed to preserve their facial challenge to the town's regulations, the issue was not before the Virginia Supreme Court when it affirmed the trial court's decision.

In a limited sampling of cases from other jurisdictions, the courts have taken various perspectives as to the specificity required for a design guideline to be valid. For example, in *Diller & Fisher Co. v. Architectural Review Board*, 246 N.J. Super. 362, 587 A.2d 674 (1990), the court found the following guideline language to be too vague:

> Signs that *demand* public attention rather than *invite* attention should be discouraged. Color should be selected to *harmonize* with the overall building color scheme to create a *mood* and reinforce symbolically the sign's primary communication message. . . . Care must be taken not to introduce *too many* colors into a sign. A restricted use of color will maintain a communication function of the sign and create a *visually pleasing* element as an integral part of the *texture* of the street. [Emphasis supplied]

Likewise, in *City of Mobile v. Weinacker*, 720 So. 2d 953 (1998), the court rejected design guidelines that used undefined terminology such as *modern materials* and *modern architectural design* and statements such as:

> [T]he use of neon will be considered in cases where the architecture of the building is compatible with neon.
> . . .
>
> [T]he use of plastic, vinyl or similar materials is discouraged and will be approved only under the circumstances where the architecture of the building where the sign is to be located or if surrounding buildings are of a modern architectural design and the building incorporates modern materials.

The court held that these guidelines failed to provide "ascertainable criteria, requirements, or guidelines for approval, [and therefore subjects] applicants to the unbridled discretion of the Review Board." *Weinacker*, 720 So.2d at 955.

On the other hand, the Alabama Supreme Court in *Ex parte City of Orange Beach Board of Adjustment*, 833 So. 2d 51, 55 (2001) distinguished *Weinacker* and held that the phrase "structurally unsound," although it allowed for some judgment, was not ambiguous in the manner and to the degree that the terms "modern materials" and "modern architectural design" in *Weinacker* were.

In *A-S-P Associates v. Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979), the court held that the ordinance's standard of *incongruity* was a permissible general, yet meaningful, contextual standard that limited the discretion of the city's historic district commission. The court said that a *contextual standard* was one that derived its meaning from the objectively determinable, interrelated conditions and characteristics of the subject to which the standard is to be applied. In the city's case, the standard of *incongruity* had to derive its meaning, if any, from the total physical environment of the historic district, *i.e.*, the conditions and characteristics of the historic district's physical environment had to be sufficiently distinctive and identifiable to provide reasonable guidance to the historic district commission in applying the standard. The court added that in order to "achieve the ultimate purposes of historic district preservation, it is a practical necessity that a substantial degree of discretionary authority guided by policies and goals set by the legislature, be delegated to such an administrative body possessing the expertise to adapt the legislative policies and goals to varying, particular circumstances." *A-S-P Associates*, 298 N.C. at 223, 258 S.E.2d at 454; see also, *Nadelson v. Township of Millburn*, 297 N.J. Super. 549, 560, 688 A.2d 672, 677 (1996) ("the heterogeneity of architectural style for non-designated properties in the Short Hills Park Historic District is not such as to render the standard of 'incongruity' meaningless. The predominant architectural style for non-designated properties in the district is 'Colonial' or 'Colonial Revival,' the characteristics of which are readily identifiable").

In *Conner v. City of Seattle*, 153 Wn. App. 673, 687-688, 223 P.3d 1201, 1208-1209 (2009), the court found the city's regulations to be constitutionally sound. The regulations required the decision-makers to consider "[t]he extent to which the proposed alteration or significant change would adversely affect the specific features or characteristics specified in the . . . designating ordinance, " that "[n]ew additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property," and that "new work shall be differentiated from the old and shall be *compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property*

and its environment." The court said that these were general standards, which gained specificity from application to a particular landmark and a particular proposal, adding that the fact that an ordinance must be applied in context to a given proposal did not render it unconstitutionally vague.

In *U–Haul v. City of St. Louis*, 855 S.W.2d 424, 427 (Mo. App. 1993), the court held that an ordinance entrusting the city's heritage commission to enforce exterior appearance standards on a case-by-case basis was not unconstitutionally vague where it focused on specific areas, including "architectural development of the community, unattractiveness, compatibility with the neighborhood, and absence of detriment to the neighborhood" because "[i]t would be practically impossible and socially undesirable for the city to list all minimum exterior standards."

21-220 The proper application of design guidelines

There is limited Virginia case law examining whether an ARB has properly applied its guidelines and the cases discussed below only indirectly considered whether the guidelines were properly applied.

In *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d 126 (2004), Norton, a landowner in a historic district, was cited for replacing the all-wood front door on his house, constructed in 1884, with a door containing glass panes without a certificate of appropriateness. Both the city's commission of architectural review and the city council denied Norton's application for a certificate of appropriateness for the glass-paned door. The commission instructed Norton to restore the front door to its "original condition." In affirming the commission, the city council noted that the commission "feels the door was wooden when it was built," but stated no factual basis for determining the appearance or composition of the original door or whether it was a solid wooden door when the house was built. At trial, there was no evidence that the front door was a wooden door prior to 1992 and there was no evidence to verify how the city determined the original nature of the door. In fact, the city admitted that it did not know what type of door was on the house when it was constructed, and it could not explain why it instructed Norton to replace the front door, particularly since there were other glass-paned doors visible to the public not only on Norton's house, but on other houses in the neighborhood as well. Despite the absence of evidence, the trial court affirmed the decision of the city council, concluding that the issue was fairly debatable. The Virginia Supreme Court reversed, finding that Norton met his burden to show probative evidence of unreasonableness in the city council's action, and that the city failed to meet its burden to show that its decision was reasonable.

In *Rogers v. Loudoun County Board of Supervisors*, 38 Va. Cir. 235 (1995), the neighbors of landowners who obtained a certificate of appropriateness for a house and barn challenged the board's approval of the certificate, claiming that the house and barn were not appropriately concealed from their manor house under the design guidelines. The court upheld the board's decision, noting that the landowners had moved their proposed house 200 yards from its originally proposed location and that the plaintiff's attorney had conceded that the house was "real close" to being properly located but not yet there." The court concluded that if the location of the house and barn was *real close* to being properly located as the plaintiffs conceded, the board's decision could not be arbitrary or capricious.

21-300 An ARB's authority to make decisions based solely on aesthetics under Virginia Code § 15.2-2306

A locality has a substantial governmental interest in preserving its aesthetic character. *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001); *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993). Nevertheless, under Virginia law, absent express enabling authority such as that found in Virginia Code § 15.2-2306, a locality cannot limit or restrict the use a person makes of his property under the guise of its police power where the exercise of the power is justified *solely* on aesthetic considerations. *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).

One circuit court has described Virginia Code § 15.2-2306 as "a broad grant of legislative authority for localities to enact zoning provisions tailored to preserving the unique character of their historic areas." *Owens v. City Council of the City of Norfolk*, 78 Va. Cir. 436, 445 (2009) (upholding validity of district regulation allowing buildings taller than 35 feet with "authorized variations" determined to be architecturally compatible with the building's surroundings).

21-310 The general rule is that a locality may not base a zoning decision solely on aesthetics

The ordinance considered by the Virginia Supreme Court in *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) required that preliminary site plans within a particular zoning district be subjected to an architectural design review of the elevations of each façade, materials, colors, texture, light reflecting characteristics and other special features intended for each building. Each building was reviewed to determine whether it furthered the stated purposes for the review: to protect property values, to promote the general welfare by insuring buildings in good taste, proper proportion, and reasonable harmony with the existing buildings in the surrounding area, and to encourage architecture which was distinct from the Colonial Williamsburg architecture. The landowners challenging the ordinance asserted that the enabling legislation did not delegate authority to localities to impose restrictions on architectural design. *Rowe* is still the controlling law in Virginia on the question of whether a locality may consider solely aesthetic factors in rezoning matters or zoning restrictions. However, since *Rowe* the General Assembly has enabled localities to regulate aesthetics within historic districts established under Virginia Code § 15.2-2306.

In finding the ordinance to be invalid, the *Rowe* court relied on its earlier decision in *Kenyon Peck v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969). In *Kenyon Peck*, the challenged portion of the County of Arlington's zoning ordinance prohibited advertising by means of outdoor moving signs or devices. The plaintiff claimed that the basis for the prohibition was purely aesthetic; the county contended that the prohibition was based on, among other things, traffic safety. The Court stated:

> There is a generally accepted rule that a State, municipality or county cannot limit or restrict the use which a person may make of his property under the guise of its police power where the exercise of such power would be justified solely on aesthetic considerations. However, aesthetic considerations are not wholly without weight and need not be disregarded in adopting legislation to promote the general welfare. [citations omitted]
>
> Although aesthetic considerations alone may not justify police regulations, the fact that they enter into the reasons for the passage of an act or ordinance will not invalidate it if other elements within the scope of police power are present.

Kenyon Peck, 210 Va. at 64, 168 S.E.2d at 120.

21-320 A locality's authority to regulate aesthetics in a historic district under Virginia Code § 15.2-2306

After *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975), the General Assembly authorized localities to establish architectural review boards. Virginia Code § 15.2-2306 provides that a locality's historic district ordinance:

> . . . may include a provision that no building or structure, including signs, shall be erected, reconstructed, altered or restored within any such district unless approved by the review board or, on appeal, by the governing body of the locality as being architecturally compatible with the historic landmarks, buildings or structures therein.

The scope of the authority of an ARB to consider architectural compatibility must be delineated in the locality's zoning regulations and guidelines.

21-330 The distinction between aesthetics and visibility: considered in the context of wireless facilities

In the past, the providers of wireless services in Virginia sometimes argued that evidence pertaining to the visibility of a proposed facility may not be considered because visibility is an aesthetic consideration not allowed by Virginia law. This assertion is based on a misunderstanding of *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975), discussed in section 21-310. As noted above, the Virginia Supreme Court held in *Rowe* that Virginia localities were not enabled to impose *aesthetic* requirements related to the elevations of façades,

materials, colors, texture, light reflecting characteristics and other special features intended for buildings within a particular zoning district.

The *visibility* of a wireless facility is primarily based on its size, height, location or bulk, rather than the range of aesthetic considerations such as color and other features considered in *Rowe*. Virginia law expressly enables a locality to regulate the size, height, location and bulk of structures. *Virginia Code § 15.2-2280(2)*. Moreover, when a locality is considering the visibility of a proposed facility, it is considering whether the facility, as proposed, will adversely affect the neighboring properties, the character of the district, and the public in general. This determination is quite different than the regulations that were considered in *Rowe*.

21-400 The applicability of design guidelines to trademarks and service marks

Trademarks and *service marks* are two types of registered *marks* that may obtain protection under federal trademark laws. A *trademark* includes any word, name, symbol, or device, or any combination thereof used, or intended to be used, to identify and distinguish goods, including a unique product, from those manufactured or sold by others. *15 U.S.C. § 1127*. A *service mark* is similarly defined, except that service marks identify and distinguish services, rather than goods.

21-410 In the implementation of local zoning regulations and guidelines, an ARB may require that a registered logo or symbol not be displayed on a sign or that it be changed as a condition of granting a certificate of appropriateness

Federal law does not prohibit an ARB from applying its design guidelines to an exterior sign, even if that sign uses a registered mark.

15 U.S.C. § 1121(b), which is part of the Lanham Act, prohibits a locality from requiring the alteration of a registered mark. However, this prohibition applies only to regulations that require alteration of the registered mark itself, not the use of the mark in exterior features. *Lisa's Party City Inc. v. Town of Henrietta*, 185 F.3d 12 (2d Cir. 1999); *see also, Gold Coast Publications Inc. v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994) (ordinance regulating placement and color of newsracks did not violate 15 U.S.C. § 1121(b)); *Payless Shoesource Inc. v. Town of Penfield*, 934 F. Supp. 540 (W.D.N.Y. 1996) (sign ordinance requiring exterior sign to be a uniform color did not violate 15 U.S.C. § 1121(b)). In other words, 15 U.S.C. § 1121(b) only prohibits a locality from requiring that a business alter its registered mark in every display of that mark within the locality, such as on letterhead, leaflets, magazines, newspapers, television and Internet advertising, and point-of-sale displays inside the business. *Lisa's Party City, supra.* The Lanham Act does not prohibit the application of local zoning regulations and guidelines that control the design elements of an exterior sign.

In *Lisa's Party City*, the town's sign regulations required that the design and style of signs for individual stores within a shopping plaza be "coordinated so as to create an aesthetic uniformity within the plaza." The owner of the plaza at issue in *Lisa's Party City* had selected the color red for all signs within the plaza. Lisa's Party City sought a variance so that it could erect a multi-colored sign that was consistent with its trademark. When the variance was denied, Lisa's Party City sued, contending that the town's requirement for uniformity in sign color compelled the alteration of its trademark in violation of 15 U.S.C. § 1121(b). The court of appeals rejected this claim, holding that:

> [L]ocal uniform aesthetic and historic regulations simply limit color typefaces and decorative elements to certain prescribed styles. These regulations have no effect on the businesses' trademark. They limit only the choice of exterior sign at a particular location. As such, though entirely disallowing the use of a registered trademark in carefully delimited instances, these regulations do not require "alteration" at all.

Lisa's Party City, 185 F.3d at 15.

The legislative history of 15 U.S.C. § 1121(b) supports this conclusion. The House Report for H.R. 5154, the bill that became 15 U.S.C. § 1121(b), states:

> During the course of Committee debate Mr. Frank raised the issue of whether the bill would in any way restrict the zoning or historic site protection laws or regulations of states. On the advice of counsel, the Committee concludes that the bill in no way affects the powers of state and local governments in areas of concern raised by the gentleman from Massachusetts.

H.R. Rep. No. 97-778, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 2621, 2622. In addition, in response to Representative Frank's stated concerns, the Commissioner of Patents and Trademarks, Gerald J. Mossinghoff, responded that "it will be clear that [an otherwise uniform aesthetic or historic zoning regulation] would not be adversely affected by the legislation." *H.R. Rep. No. 97-778, at 10 (1982)*. One federal appeals court has ruled contrary to *Lisa's Party City*, holding that requiring a sign displaying a trademarked logo to comply with an approved color scheme in a shopping center violated 15 U.S.C. § 1121(b). *Blockbuster Videos Inc. v. City of Tempe*, 141 F.3d 1295 (9th Cir. 1998). The *Blockbuster* court also held, however, that the city could prohibit the trademarked sign altogether.

In summary, zoning regulations and guidelines merely control certain design elements to assure that a sign or structure is appropriate for the district.

21-420 Colors may be registered marks or trade dress, and they may be subject to local regulations and guidelines

If a color meets the ordinary trademark requirements, there is no special rule preventing it from serving as a trademark. *Qualitex Company v. Jacobson Products Company Inc.*, 514 U.S. 159, 115 S. Ct. 1300 (1995). Therefore, if a color, or combination of colors, used in a particular manner is non-functional, inherently distinctive, and the imitation of that color or combination of colors would cause confusion as to the source of the goods, it may qualify as a trademark (or trade dress). *Two Pesos Inc. v. Taco Cabana Inc.*, 505 U.S. 763, 112 S. Ct. 2753 (1992).

Nevertheless, an ARB may require that proposed colors be changed if it determines the change to be necessary to issue a certificate of appropriateness.

21-500 Considering the architectural design of religious buildings and properties

This section examines the relationship between the architectural review of religious buildings and properties and the First Amendment's Establishment and Free Exercise Clauses, and the Religious Land Use and Institutionalized Persons Act of 2000. The reader should review section 6-500 for a summary of the First Amendment's Establishment and Free Exercise Clauses, and chapter 34 for a general discussion of the Religious Land Use and Institutionalized Persons Act of 2000.

One commentator has stated that "[m]ajor religious traditions have been keenly aware of the symbiotic interaction between architecture and theology, of architecture's connection with doctrinal and liturgical reform, and of the role architecture plays in sustaining and revitalizing faith." Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Villanova Law Review 401 (1991). The relationship between architecture and religion was further explained by the commentator as follows:

> [E]cclesiastical architecture is religious expression, its semiotic properties reflecting and influencing choices made by religious communities regarding theological principles, liturgical practices, faith renewal, doctrinal developments, missional goals and ecclesial identity. . . Houses of worship . . . express, among other things, the religious community's purpose, theology, identity, hope, unity and reverence for the divine and its identification with or separation from certain aspects of culture.

Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review, *supra*. The commentator then provides the following caution to localities:

> By determining which religious beliefs are worthy of architectural expression, the state compels affirmation of particular religious beliefs and ecclesial self-understanding and denies affirmation to others. . . . The state becomes the reviewer and arbiter of internal design decisions, arrogates to

> itself the role of religious community, and places itself in a position to direct the long term development of ecclesiastical architecture.

Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review, *supra.*

Of course, First Amendment jurisprudence does not require that localities completely close their eyes to matters of architectural design where religious structures are involved – it is permissible to distinguish the secular from the religious. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305, 105 S. Ct. 1953, 1963-1964 (1985) ("The Establishment Clause does not exempt religious organizations from such secular government activity as fire inspections and building and zoning regulations . . ."). The Free Exercise Clause asks that the individual demonstrate that beliefs professed are "sincerely held" and in the individual's "own scheme of things, religious." *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003). Thus, on matters of architectural design, it is reasonable for the locality to ask whether a particular feature is related to a religious belief. *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 833, 109 S. Ct. 1514, 1517 (1989) ("States are clearly entitled to assure themselves that there is ample predicate for invoking the free exercise clause").

As explained in more detail in chapter 34, the neutral application of generally applicable and legitimate land use regulations will usually not be found to impose a substantial burden on religious exercise. In the architectural review context, therefore, the removal of religious artifacts such as crosses and stained glass windows depicting scenes in the life of Jesus Christ, a process known as deconsecration, is religious exercise. *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172 (D. Mass. 2011). However, requiring a church to file an application for a certificate of appropriateness before demolishing the church did not impose a substantial burden on religious exercise, despite allegations of delay, uncertainty and expense. *Roman Catholic Bishop, supra*. In *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009), the court concluded that a city's historic preservation ordinance did not impose a substantial burden on religious exercise where the city's landmark designation on an apartment house owned by a "substantial religious organization" prevented it from demolishing the building, which was located where the organization wanted to establish a family life center. *World Outreach Conference Center, supra*. The court said that the building remained habitable, could be sold to finance the construction of its family-life center elsewhere, and there were alternative sites on the organization's property to locate the family life center. *World Outreach Conference Center, supra.*

21-510 Determining whether a feature is religious exercise

Determining whether the exterior features of a religious property are the result of sincerely held religious beliefs can be "a difficult and delicate task." *Thomas v. Review Board of Indiana Employment Sec. Div.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 1430 (1981). An ARB must decide whether the beliefs held by the applicant are sincere and whether they are, in the scheme of things, religious in character. *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003). To that end, the ARB may ask for an explanation of the religious basis of the design features if their significance is not readily apparent. *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 109 S. Ct. 1514 (1989).

If the religious institution states that a feature is religious in character, the statement must be given great weight. *United States v. Seeger*, 380 U.S. 163, 85 S. Ct. 850 (1965). An ARB cannot inquire into the truth or falsity of the belief on which the statement is based. *United States v. Ballard*, 322 U.S. 78, 64 S. Ct. 882 (1944). Also, the ARB may not determine, or base a decision upon, whether including a particular feature is necessary for a particular religion. *Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 150, 747 N.E.2d 131, 138 (2001) (trial court impermissibly concluded that a steeple was not a necessary element of the Mormon religion; "[a] rose window at Notre Dame Cathedral, a balcony at St. Peter's Basilica, are judges to decide whether these architectural elements are 'necessary' to the faith served by those buildings?").

In conducting its review, an ARB is advised to heed the following passage from *First United Methodist Church v. Hearing Examiner for the Seattle Landmarks Preservation Board*, 129 Wash.2d 238, 250, 916 P.2d 374, 380 fn. 6 (1996): "While preserving aesthetic and historic structures may be of value to the [locality], 'the possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.'"

If the feature is not tied to a sincerely held belief that is religious in character, then the religious institution must comply with all requirements of the applicable land use regulations, and there are no further First Amendment or RLUIPA considerations. If the feature is tied to a sincerely held belief that is religious in character, then the ARB must determine whether compliance with the applicable regulations imposes a substantial burden on free exercise. Generally, the outright disapproval of a religiously-connected feature would impose a substantial burden on religious exercise. *See Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310 (1986) (implicitly recognizing burden caused by prohibition on the wearing of a yarmulke by Jewish military officer).

Imposing a substantial burden on religious exercise is permitted only if there is a compelling governmental interest to do so. *See chapter 34 for a discussion of the meaning of substantially burdening religious exercise*. However, neither aesthetic concerns nor historic preservation under local regulatory schemes have been found to be a compelling governmental interest. *See Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) ("a municipality's asserted interests in . . . aesthetics, while significant, have never been held to be compelling"); *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001) (flag case; city has *substantial* governmental interest in preserving its aesthetic character). As some courts have said, a locality's "interest in preservation of aesthetic and historic structures is not compelling and it does not justify the infringement of [the church's] right to freely exercise religion." *First Covenant Church of Seattle v. City of Seattle*, 120 Wash.2d 203, 223, 840 P.2d 174, 185 (1992); *Munns v. Martin*, 131 Wash.2d 192, 209, 930 P.2d 318, 326 (1997) (quoting *First Covenant*); *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879 (D.Md. 1996) (historic preservation is not a compelling governmental interest).

21-520 If a feature is related to a religious exercise, it should be exempt from ARB review because its change, modification or disapproval likely would be found to impose a substantial burden on a religious exercise

To understand the principle of *substantial burden* as it pertains to architectural review, bear in mind that *substantiality* must be measured by the impact of the land use regulation on religious exercise, not by the impact of the regulation on the particular feature in its relation to the development as a whole. This distinction is critical. For example, the denial of a certificate of appropriateness because of the existence of a small window in a front door – a window that is significant to the religion – may be a substantial burden on religious exercise, even though, from a purely architectural standpoint, the window is a minor feature when compared to the structure as a whole.

The religious importance of some features on a religious structure is self-evident, such as stained glass, crosses and steeples on churches, and minarets on mosques. Some features likely have no relation to a religious belief, such as the type of rain gutters, the materials used for a structure's exterior, or landscaping. Other features or elements issues may or may not be related to a religious belief, such as the color of the structure or its doors, the shape or orientation of a building, or the desire to construct an addition to an existing structure. The shape of a building (square, round, rectangular, a basilica, a cross) may be inextricably connected to liturgical experience and ecclesial identity. A building addition may be compelled as the result of a sincerely held religious belief because religious doctrine requires accommodating all people who wish to worship in a single structure.

Cases pertaining to the architectural design of proposed religious structures are limited. Most of the case law in this area pertains to historic preservation regulations that either prohibit the demolition of religious structures or require review and approval by the locality before exterior features of a designated religious structure are altered or demolished. Some of these cases have upheld the locality's denial of the demolition permit, even though the religious institution had outgrown its existing facilities and would face financial hardship by being required to find another site to accommodate its activities. *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp.2d 691 (E.D.Mich. 2004) (under RLUIPA); *Rector, Wardens and Members of Vestry of St. Batholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (pre-RLUIPA; pertaining to accessory building, not place of worship).

Other courts have found that these types of regulations impose a substantial burden on religious exercise. *First United Methodist Church v. Hearing Examiner for the Seattle Landmarks Preservation Board*, 129 Wash.2d 238, 916 P.2d 374 (1996) (holding that an ordinance prohibiting any alterations or significant changes to a church without city approval burdened the free exercise of religion because it prevented the church from selling its property and using the proceeds to advance its religious mission); *First Covenant Church of Seattle v. City of Seattle*, 120 Wash.2d 203, 840 P.2d

174 (1992) (holding that an ordinance requiring a church to get a certificate of approval before making certain alterations to the church's exterior violated the Free Exercise Clause because it required the church to seek approval from secular authorities before altering the exterior of the building and by cutting in half the value of the church's property); *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879 (D.Md. 1996) (city's denial of certificate of appropriateness to allow demolition of old monastery violated the Free Exercise Clause because the church had a sincere religious belief that the monastery had to be demolished and replaced as part of the church's mission to its members).

Controlling themes are hard to identify in these cases. The two Washington cases, *First United Methodist* and *First Covenant*, might be distinguishable from *St. Bartholomew's* because the Washington Supreme Court relied not only on the United States Constitution, but also the Washington Constitution, which admittedly granted more expansive religious protections than those under the United States Constitution. The buildings at issue in *First United Methodist* and *First Covenant* were the churches themselves, whereas the building at issue in *St. Bartholomew's* was an accessory structure. However, *Episcopal Student Foundation* involved a worship facility and the court found no substantial burden. *Keeler* has been criticized by one commentator as a misapplication of controlling Supreme Court precedent. Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and the Exceptions from Smith*, 75 N.Y.U. L. Rev. 1045 (2000). The facts in each case are critical.

21-530 If the size of a building is related to religious exercise, it may be exempt from ARB review because its change, modification or disapproval would be found to impose a substantial burden on a religious exercise

In *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp.2d 1203 (C.D.Cal. 2002) (denying redevelopment agency's motion to dismiss; granting church's request for preliminary injunction), the church sought to relocate to the city because its existing facility seated only 700 members, forcing it to hold multiple services for its congregation. Its senior pastor stated that the church's beliefs required that its congregation make a lasting impact in the communities served by the church by "ministering to the spiritual and physical needs of the members of these communities." The pastor concluded that its members were "compelled to continually seek growth in the size of [their] congregation and [their] ministries."

The city denied the church's application for a permit that would allow it to establish a 4,700 seat worship facility and accessory buildings. The court determined that the church was "unable to practice its religious beliefs in its current location. Simply put, its Los Alamitos facility cannot handle the congregation's large and growing membership, and its small quarters prevent Cottonwood from meeting as a single body, as its beliefs counsel." *Cottonwood Christian Center*, 218 F. Supp.2d at 1226. The court then found that the denial of the permit substantially burdened religious exercise, stating that the church had "demonstrated that meeting in one location at one time, as well as providing numerous ministries, [were] central to its faith. Thus, beyond the fundamental need to have a church, Cottonwood has shown a religious need to have a large and multi-faceted church." *Cottonwood Christian Center*, 218 F. Supp.2d at 1227.

Cottonwood may be unique to its facts since the church wanted to construct a new church facility on property the city wanted to condemn in favor of building a retail shopping center, and the church was able to establish that the *size* of the church was related to religious exercise.