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Land Use Aesthetics: A Citizen Survey Approach to Decision Making

John Edward Van Vlear

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Land Use Aesthetics: A Citizen Survey Approach to Decision Making*

TABLE OF CONTENTS

I. The Problem	208
II. Defining Aesthetics.....	209
A. Cultural-Stability Element of Aesthetics	210
III. Modern Acceptance of Aesthetics	213
A. Judicial Acceptance of Aesthetics.....	214
1. Aesthetics as an Invalid Basis (Initial Stance).....	215
2. Aesthetics as a Consideration (Intermediate Attitude)	216
3. Aesthetics as a Valid Sole Basis (Modern View) ..	216
a. United States Supreme Court	217
b. State Courts.....	220
B. Statutory Focus on Aesthetics	221
1. Land Use Regulation	221
2. Environmental Protection	222
IV. Aesthetic-Based Citizen Surveys	223
A. Why Surveys?.....	223
1. Cultural-Stability Link	223
2. Representative Public Participation	224
3. Triangulation	225
4. Select Disadvantages	226
B. Judicial Acceptance of Surveys as Evidence	228
C. Basics for Conducting Survey Research.....	231
1. Identifying a Purpose.....	231
2. Survey Structure	232
a. Choice of Format.....	232
b. Sampling Procedure.....	234
c. Response Measurement	236

* For WESTLAW computerized research regarding land use aesthetics, select the ALLSTATES or NTP database and use this search query: Aesthetics or Esthetics Preservation or Regulation. For similar research regarding citizen surveys, select the ALLFEDS, ALLSTATES or NTP database and use this search query: "Survey Research" or "Public Opinion Poll." WESTLAW is a registered trademark of the West Publishing Company.

d. Avoiding Biased Questions	238
3. Result Presentation and Analysis	240
V. Applying Aesthetic-Based Citizen Surveys	241
A. Impact Assessment in California	242
1. NEPA as a Model	242
2. Surveys as an Interdisciplinary Approach to EIS's	243
3. Parallel Between NEPA and CEQA.....	245
4. Aesthetic-Based Citizen Surveys in the EIR Process	247
a. Is the Project Subject to CEQA?.....	247
b. Initial Study.....	248
c. Preparation and Review of the EIR.....	250
i. Draft EIR	250
ii. Public Review and Comments	253
B. Impact Assessment in England	255
1. Aesthetics and "Amenity"	256
2. Conservation Areas.....	259
a. Public Participation	260
b. Village of North Cave Illustration	262
VI. The Proposal	265

I. THE PROBLEM

Aesthetics are necessarily involved in every land use decision. Granted, some changes to real property and its structures have only a de minimus affect on their surroundings. However, the vast majority of changes, or actions designed to prohibit changes, will have an impact on the aesthetics of the immediate environment. For the people in charge of formulating and implementing aesthetic policy, the major hurdle is determining exactly what type of effect a given course of action will have. In their quest to surmount this obstacle, these professionals are often constrained by an inadequate information base. In other words, insufficient data gathering techniques interfere with the accurate assessment of both aesthetic impacts and the viability of project alternatives. Innovative steps must be taken to ensure that decisions are based on timely, reliable, and above all, useful information. Accordingly, this comment explores a logical method of aesthetic research flowing from a single premise: the better a decision maker understands how an impact on the environment affects the public, the greater the probability of an enduring aesthetic-based decision.

II. DEFINING AESTHETICS

The word "aesthetic"¹ is derived from the Greek word "aisthetikos," which means perceptive.² The eighteenth century German philosopher Alexander Baumgarten first coined the term³ by applying it to "criticism of taste."⁴ Baumgarten's most significant work, *Aesthetica*,⁵ helped establish aesthetics as a distinct field of philosophical inquiry.

Classical notions about aesthetics have invariably concentrated on the elements of beauty and taste. For example, *The Oxford English Dictionary* defines aesthetic as "pertaining to the appreciation or criticism of the beautiful."⁶ Similarly, this focus is reflected in the definition given by Valdas Adamkus, a Regional Administrator for the United States Environmental Protection Agency (EPA), who states: "My definition of aesthetics is a traditional one: It is the concern with beauty in all its aspects, embracing that which is beautiful in nature and the works of man. It is an identifiable attitude toward beauty, completely divorced from moral, economic, political, or other considerations."⁷ Finally, the judiciary has traditionally expounded

1. There are three modern spellings of aesthetics. The most antiquated form is "aesthetiks"; this Greek hybrid was the standard until the turn of the century. The second and third forms are "esthetics" and "aesthetics," respectively. While the "e" spelling is still in use today, the "ae" version is clearly the most popular.

2. FUNK & WAGNALLS NEW COMPREHENSIVE INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 435 (1982).

3. 1 ENCYCLOPAEDIA BRITANNICA: MICROPEDIA 885 (15th ed. 1977).

4. In protest to Baumgarten's usage, Immanuel Kant (1724-1804), Konigsberg, East Prussia (modernly Kaliningrad, U.S.S.R.), 5 ENCYCLOPEDIA BRITANNICA: MICROPEDIA 695 (15th ed. 1977), the foremost thinker of the Enlightenment, applied aesthetics to "the science of sensuous perception." While Kant's approach enjoyed short term success, it was Baumgarten's position which ultimately gained popular acceptance, appearing in England after 1830. THE OXFORD ENGLISH DICTIONARY 147 (1978).

5. 2 A. BAUMGARTEN, AESTHETICA (n.p. 1750-58) (exists only in Latin).

6. THE OXFORD ENGLISH DICTIONARY, *supra* note 4, at 148. See also BLACK'S LAW DICTIONARY 52 (5th ed. 1979) (aesthetic relates "to that which is beautiful or in good taste."); FUNK & WAGNALLS, *supra* note 2, at 435 (aesthetics pertains "to beauty, taste, or the fine arts . . .").

7. Letter from Valdas V. Adamkus, Regional Administrator Environmental Protection Agency [hereinafter EPA], Region 5, to John E. Van Vlear (July 25, 1986). The following definitions of aesthetics are further examples of the classical notion: "[A] sense of taste; ability to discern beauty." Letter from Gary Kurutz, senior member of the California Heritage Preservation Commission, to John E. Van Vlear (July 16, 1986); "Beauty as subjectively determined by the beholder." Letter from Barry L. Kotler, Vice President and General Counsel for Chevron Land and Development Co., to John E. Van Vlear (July 8, 1986).

In the summer of 1986, the author conducted research for this article by sending questionnaires to individuals who might reasonably be expected to deal with aesthetics

classical sentiments about the meaning of aesthetics. In *City of Youngstown v. Kahn Bros. Building Co.*,⁸ the court found difficulty in using aesthetics as a basis for restrictions on property because "the public view as to what is necessary for aesthetic progress greatly varies. Certain legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats."⁹

A. Cultural-Stability Element of Aesthetics

An aesthetic focus which centers on beauty and taste results in what legal scholar John Costonis has termed a "visual beauty" approach:

"Aesthetics," as the term is used in the visual beauty rationale, connotes pleasure or offense to the sense of sight resulting from the visual form of environmental features or settings. Consequently, aesthetic regulation's purpose is assumed to be the creation or preservation of features or settings that are "beautiful"—pleasing to the eye—or, conversely, the proscription of those that are "ugly"—offensive to the eye. . . .

At the outset, it emphasizes the sensory dimension of human aesthetic response over its intellectual, emotional, and cultural aspects. . . .

The visual beauty approach posits that an object's formal visual qualities—color, line, proportion, and the like—determine whether it will be perceived as beautiful or ugly.¹⁰

A visual beauty emphasis presents a virtually unresolvable problem for the aesthetic decision maker: how can workable standards be developed where views of a project are largely dependent on personal taste? In other words, a decision maker who adheres to a "beauty is in the eye of the beholder" approach, one which emphasizes the subjective aspects of aesthetics, may overlook useful information-gathering tools simply because they are objectively oriented.

on a professional level. Three basic groups were polled: 1) Regional Administrators for the 10 EPA regions; 2) key people within relevant branches of the California government; and 3) corporate counsel for petrochemical and power companies. This comment will refer to excerpts from the informal survey as a means of illustration. The inclusion of professionals' views coincides with the goal of this writing to present a practical context in which to examine the process of aesthetic-based land use decision making.

8. 112 Ohio St. 654, 148 N.E. 842 (1925).

9. *Id.* at 661-62, 148 N.E. at 844. For a modern judicial decision focusing on the traditional notions of aesthetics, see *Maryland-National Capitol Park & Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029, 1038-39 (D.C. Cir. 1973). In *Maryland-National*, the court refused to believe that Congress, in enacting the National Environmental Policy Act of 1969 § 102, 42 U.S.C. §§ 4321-4370 (1982) [hereinafter NEPA], would allow preparation of an Environmental Impact Statement [hereinafter EIS] to hinge "on such issues as: Is this proposed building beautiful?" since aesthetic considerations "pertain essentially to issues of individual and potentially diverse tastes." 487 F.2d at 1038-39. For a detailed analysis of the EIS requirement, see *infra* notes 197-212 and accompanying text.

10. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 396 (1982).

The key to resolving this dilemma lies not in finding *the* solution, but rather in rethinking the problem. Costonis helps refocus modern aesthetics by formally recognizing its long dormant "cultural-stability" component:

Family, religion, values, language, and government . . . manifest and reinforce values that orient the lives of individuals and groups. . . .

By virtue of its semiotic properties, the environment also plays a socially integrative and, hence, identity-nurturing role

[E]xisting resources differ from other environmental phenomena because their import is usually much richer in associations that transform them into sources of orientation . . . in the emotional and cognitive lives of individuals, groups, and entire communities. "New entrants" may imperil a correlative existing resource, thereby threatening the individuals, groups, or communities bonded to it by associational clasps. The threat materializes in the form of the destruction or alteration of the physical resource, but what shocks its constituencies is the concomitant loss or contamination of the network of meanings . . . that it has come to embody for them over time.¹¹

The cultural-stability approach, which is associational in nature,¹² has the distinct advantage of clarifying aesthetic-based problems which seem hopelessly subjective under a visual beauty approach. An excellent illustration arose in *United States v. County Board*.¹³ The relevant legal battle focused on the construction of several Vir-

11. *Id.* at 418-19. As it relates to logic, "semiotic" means: "The study of relationships between signs and symbols and what they represent." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1177-78 (1979).

An "existing resource" is an existing environmental feature or setting, the preservation of which is at issue in a given aesthetic-based controversy. Costonis, *supra* note 10, at 382, 389. For example, the resource may be a natural physical resource (e.g., a landscape), or man-made (e.g., a building), or it may be intangible (e.g., the character of a neighborhood).

A "new entrant" is a replacement for, or an addition to, the existing resource. An illustrative list includes: billboards (*see e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981)); junkyards (*see, e.g.*, *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982)); mobile campers (*see, e.g.*, *City of Coral Gables v. Wood*, 305 So. 2d 261 (Fla. Dist. Ct. App. 1974)); building modifications (*see, e.g.*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)); prisons (*see, e.g.*, *Ely v. Velde*, 363 F. Supp. 277 (E.D. Va. 1973), *rev'd*, 497 F.2d 252 (4th Cir. 1974)); and even rag-strewn clotheslines (*People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963)).

"Constituencies" are the opposing elements in an aesthetic-based dispute. First, the no-change constituencies (e.g., neighbors, historic preservationists, and environmentalists) oppose the modification of the existing resource. Second, the change constituencies (e.g., developers, labor unions and suppliers of capital, and potential beneficiaries of the new entrant) favor new entrants over the existing resource. Costonis, *supra* note 10, at 382.

12. "The associationist theory of beauty . . . [asserts] that objects are often defined as beautiful on the basis of associations that viewers have with them that are not necessarily related to the object's formal aesthetic qualities" Costonis, *supra* note 10, at 424 n.251.

13. 487 F. Supp. 137 (E.D. Va. 1979).

ginia office towers which, when completed, would have greatly overshadowed the Capitol building directly across the Potomac River. Using a cultural-stability analysis, Costonis offers:

[While] the Washington Monument would "visually deface" the skyline of the White House . . . obviously no American "sees" the Monument that way. [Similarly here,] the root objection was that speculatively built commercial towers dwarfing the Capitol would constitute an associationally repugnant intrusion on that cherished totem of national identity, just as the construction in medieval times of a private or government building overwhelming the town's cathedral would have been.¹⁴

By focusing on the associations creating popular sentiment, Costonis employs a cultural-stability approach to clearly identify the motivation of the no-change constituency.

In the same manner, the common sense notions inherent in the cultural-stability model help explain results which appear inconsistent under a traditional visual beauty focus. For example, supporters of many landmarks and historic districts do not describe them as beautiful.¹⁵ An associational approach helps resolve the inconsistency by recognizing how an existing resource creates bonds: over time, the landmark fosters a strong sense of identity in those people who are most likely to become the no-change constituency. Hence, adverse alterations meet with hostility because they threaten the underlying cultural links. By comparison, a visual beauty approach lacks the capacity to adequately explain historic preservation in aesthetic terms because it does not recognize the interplay between visual appraisals and cognizable underlying emotional themes.

Beyond the fact that cultural-stability thinking now flourishes in academic circles,¹⁶ the courts are increasingly aware of the need to base their decisions on this type of associational approach. As the ultimate decision makers, the judiciary represents an important role

14. Costonis, *supra* note 10, at 395 n.119.

15. *Id.* at 427. A prime example of this phenomenon was the fight to save the Jefferson Market Courthouse, a landmark in Greenwich Village, New York. One commentator described the courthouse drama as follows: "It is an elaborate Victorian building, and opinions differ radically as to whether it is architecturally handsome or architecturally ugly. *However, there is a remarkable degree of unanimity, even among those who don't like the building, that it must be retained and used for something.*" *Id.* at 406 n.167 (emphasis in original) (quoting J. JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 397 (1961)).

16. See, e.g., P. SCHAEENMAN, *USING AN IMPACT MEASUREMENT SYSTEM TO EVALUATE LAND DEVELOPMENT* 36 (1976) (one social impact area worthy of consideration is "Aesthetics and Cultural Values" as measured by the "Change in community's 'image' and 'sense of place.'"); Vining & Stevens, *The Assessment of Landscape Quality: Major Methodological Considerations*, in *FOUNDATIONS FOR VISUAL PROJECT ANALYSIS* 168 (1986) ("The landscape, or some particular landscape feature, can serve as a symbol or representation of some entity that has value. For example, a mountainous landscape might represent a challenge for one person or a mystical experience for another."); Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 479 (1981) (the relevant section is entitled "The Evolution of A Community-Building Preservation Rationale").

model for all levels of aesthetic policy makers. An exemplar of this new attitude surfaced in *State v. Miller*¹⁷ when the New Jersey Supreme Court offered the following as the key rationale for upholding a sign control ordinance based solely on aesthetics: "The development and preservation of natural resources and clean, salubrious neighborhoods contribute to psychological and emotional stability and well-being as well as stimulate a sense of civic pride."¹⁸ Similarly, in *Sun Oil Co. v. City of Madison Heights*,¹⁹ the court upheld a sign control ordinance stating: "The modern trend is to recognize that a community's aesthetic well-being can contribute to urban man's psychological and emotional stability. . . . We should begin to realize . . . that a visually satisfying city can stimulate an identity and pride which is the foundation for social responsibility and citizenship."²⁰

Of course, aesthetics would be a very different creature if detached completely from concepts of visual beauty. However, a narrow focus on beauty, to the exclusion of obvious cultural-stability elements, plunges aesthetic-based land use policy into an endless abyss of subjective arguments. Thus, this comment highlights the realistic benefits of a cultural-stability mentality to the aesthetic decision maker.

III. MODERN ACCEPTANCE OF AESTHETICS

On a practical level, awareness of the contours of aesthetic land use issues covers the spectrum. The author's research²¹ is illustrative. While both an EPA Regional Administrator and the Chairman of the California Board of Forestry responded with three page typed letters,²² the entire response of Chief Counsel for the Bechtel Power Corporation was, "I don't understand any of this!"²³ This anecdote emphasizes the extent to which some professionals remain unaware

17. 83 N.J. 402, 416 A.2d 821 (1980).

18. *Id.* at 409, 416 A.2d at 824. As a point of explanation, "salubrious" is defined as: "Conducive or favorable to health or well-being; wholesome; healthful." THE AMERICAN HERITAGE DICTIONARY 1146 (1979).

19. 41 Mich. App. 47, 199 N.W.2d 525 (1972).

20. *Id.* at 53-54, 199 N.W.2d at 529, quoted in Costonis, *supra* note 10, at 419-20 n.231.

21. See *supra* note 7.

22. Adamkus, *supra* note 7; Letter from Harold R. Walt, Chairman of the California Board of Forestry, to John E. Van Vlear (July 24, 1986).

23. Letter from John F. McGuinn, Chief Counsel for Bechtel Power Corp., to John E. Van Vlear (June 23, 1986). The corporate sector returned the only two unanswered questionnaires due to lack of awareness about aesthetics. The second such reply was "I simply have no background or knowledge on these matters." Letter from

of the growing implications of aesthetic policy. The history of aesthetics in the law offers a striking parallel to this disparate treatment. While the overwhelming modern trend centers on recognizing aesthetics as an essential element in land use decisions, the not so distant past reveals a remarkably countervailing attitude.

A. Judicial Acceptance of Aesthetics

Most governmental land use regulation adversely affects some private landowner. Thus, the judicial history of aesthetics is inseparably linked to private actions challenging "unfair" ordinances and statutes. Generally, aesthetic-based land use regulations fall into one of three categories. First, a zoning plan designating permissible uses may be based wholly or partially on aesthetic considerations.²⁴ Second, aesthetic regulations may be legislative proscriptions or restrictions focusing on items such as signs, historic structures, or building height.²⁵ Third, "aesthetic standard[s] may be maintained through an architectural review board where residents regulate the composition of their city's visual environment on a case by case basis."²⁶

The United States Supreme Court formalized the basic test for the validity of land use police power actions in two seminal early zoning decisions. In *Nectow v. City of Cambridge*,²⁷ Justice Sutherland, who also authored the majority opinion in *Village of Euclid v. Ambler Realty Co.*,²⁸ stated:

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a *substantial relation to the public health, safety, morals, or general welfare*.²⁹

While courts in general had been struggling since the turn of the century to come to grips with aesthetics,³⁰ this 1920's standard became

Patrick S. Hobin, Vice President and General Counsel for Chevron U.S.A. Inc., to John E. Van Vlear (June 23, 1986).

24. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (preservation of open space); *State ex rel. Civello v. City of New Orleans*, 154 La. 271, 97 So. 440 (1923) (exclusion of commercial uses from residential district); *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982) (junkyard ordinance).

25. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (billboard ban); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (historic preservation: Grand Central Terminal); *Welch v. Swasey*, 214 U.S. 91 (1909) (building height restrictions).

26. Note, *Aesthetic Regulation and the First Amendment*, 38 VA. J. NAT. RESOURCES 237 n.1 (1984). "See generally *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970); *Civello v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963) (upholding review board's denial of a construction permit for a one-story modern residence in a multi-story residential neighborhood)." *Id.*

27. 277 U.S. 183 (1928).

28. 272 U.S. 365 (1926).

29. 277 U.S. at 188 (emphasis added).

30. For example, in the landmark case of *Attorney General v. Williams*, 174 Mass.

the overriding gauge for the validity of aesthetic-based regulations.

In this century, the American judiciary has sequentially adopted three basic views pertaining to aesthetics.³¹ The reversal in overall approach has been striking. Norman Williams' comments in his treatise on planning law highlight this dramatic progression: "In no other area of planning law has the change in judicial attitudes been so complete; in fact, aesthetic regulations have a special importance as a reliable bellweather to indicate basic judicial attitudes."³²

1. Aesthetics as an Invalid Basis (Initial Stance)

The now famous statement of New Jersey's highest court in 1905 epitomizes the early view:

No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a *matter of luxury and indulgence rather than of necessity*, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.³³

The courts during this early period were hostile to the claim that the police power encompassed notions of aesthetics: if a regulation was even partially based on notions of beauty, it was often held invalid. In retrospect these decisions seem unenlightened. However, it must

476, 55 N.E. 77 (1899), the Massachusetts Supreme Judicial Court upheld a height restriction statute stating that "it would be hard to say that this statute might not have been passed in the exercise of the police power, as other statutes regulating the erection of buildings in cities are commonly passed." *Id.* at 478, 55 N.E. at 77. ("This was the sentence that started modern zoning." 1 N. WILLIAMS, *AMERICAN PLANNING LAW* §§ 11, 11.09 n.19 (1974)). Later in its opinion, the court turned to a discussion of parks, interjecting: "Their aesthetic effect has never been thought unworthy of careful consideration." 174 Mass. at 480, 55 N.E. at 78.

31. The heart of the initial period extended until 1915, with the second period flourishing in the 1920's. The modern period, while gaining its first momentum in the 1930's, truly arrived with Justice Douglas' dicta in *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (*see infra* notes 41-46 and accompanying text). Adapted from 1 N. WILLIAMS, *supra* note 30, at § 11.03.11.

32. 1 N. WILLIAMS, *supra* note 30, at § 11.02.

33. *City of Passaic v. Paterson Bill Posting Co.*, 72 N.J.L. 285, 287, 62 A. 267, 268 (1905) (sign control ordinance) (emphasis added). Similarly, the Ohio Supreme Court offered a typical early period sentiment by holding:

It is commendable and desirable, but not essential to the public need that our aesthetic desires be gratified We are therefore remitted to the proposition that the police power is based upon public necessity, and that the public health, morals, or safety, and not merely aesthetic interest, must be in danger in order to justify its use.

City of Youngstown v. Kahn Bros. Bldg., 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925) (restrictive zoning ordinance precluding construction of an apartment house). For a further eloquent discourse from the same opinion, *see supra* text accompanying note 9.

be realized that the courts generally focused only on a visual beauty definition of aesthetics.³⁴ Thus, the courts' consistent striking down of aesthetic-based regulations is understandable because they thought legislatures were dictating what was beautiful or tasteful.³⁵

2. Aesthetics as a Consideration (Intermediate Attitude)

The intermediate period is characterized by the view that while aesthetics may not be the sole basis for regulating land, such legislative reliance will not invalidate the regulation as long as some "traditional" rationale is the key motivation.³⁶ As the Massachusetts Supreme Court stated in 1975: "In the past, courts have upheld billboard regulations, including total prohibitions, primarily on the basis of traditional police power concepts, such as the preservation of property values and the promotion of highway safety, and have relied only secondarily on aesthetic considerations."³⁷ Describing this type of logic, Norman Williams offers a splendid example of the middle period point of view:

A famous passage in Judge Pound's opinion in *Perlmutter v. Greene*, the classic statement of the middle period attitude, sounds more like Cardozo:

Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency.³⁸

Thus, while courts increasingly recognized the validity of aesthetics as a consideration, they felt compelled to legitimize their holdings by finding a more readily defensible basis for the regulation in question. Since health or safety grounds could usually support the action, courts had inherent freedom to comment upon aesthetics in dictum, while basing their holdings on more traditional notions. This flexibility was very beneficial for the development of aesthetic law: outside the pressures of determining the merits of a given case, the judiciary could reflect upon the theoretical issues involved in allowing governmental use of the police power solely for aesthetic objectives.

3. Aesthetics as a Valid Sole Basis (Modern View)

Under the modern approach, regulations based solely on aesthetics are a valid exercise of governmental police power. In 1980, the New Jersey Supreme Court presented a self-contained example of the ju-

34. See *supra* notes 6-9 and accompanying text.

35. See 1 N. WILLIAMS, *supra* note 30, at § 11.04-11.06; Costonis, *supra* note 10, at 373-74.

36. See 1 N. WILLIAMS, *supra* note 30, at § 11.11 (1974 & Supp. 1986); Costonis, *supra* note 10, at 374.

37. *John Donnelly & Sons v. Outdoor Advertising Bd.*, 369 Mass. 206, 216-17, 339 N.E.2d 709, 716 (1975) (sign control ordinance).

38. 1 N. WILLIAMS, *supra* note 30, at § 11.11 (quoting *Perlmutter v. Greene*, 259 N.Y. 327, 332, 182 N.E. 5, 6 (1932) (highway sign control)).

diciary's historic reversal on aesthetic thought. Directly rebutting its predecessor's 1905 statement on the issue,³⁹ the court upheld a sign control ordinance based exclusively on aesthetics in the following terms: "Consideration of aesthetics in municipal land use and planning is *no longer a matter of luxury or indulgence*. To the extent that our earlier cases may hold to the contrary, they no longer represent sound zoning law."⁴⁰

a. United States Supreme Court

Justice Douglas' dicta in the 1954 United States Supreme Court case of *Berman v. Parker*⁴¹ paved the road for the inevitable full recognition of aesthetics:

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . .

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those in the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.⁴²

The cultural-stability approach to aesthetics⁴³ permeates this section of the *Berman* opinion. Beyond the above quoted language, the following excerpt emphasizes Justice Douglas' concern for community identity and stability:

Miserable and disreputable housing conditions may . . . *suffocate the spirit* by reducing the people who live there to the status of cattle. . . . They may also

39. See *City of Passaic v. Paterson Bill Posting Co.*, 72 N.J.L. 285, 287, 62 A. 267, 268 (1905).

40. *State v. Miller*, 83 N.J. 402, 409, 416 A.2d 821, 824 (1980) (emphasis added). For a quote of the same phrase in the original *Passaic*, see *supra* text accompanying note 33.

41. 348 U.S. 26 (1954). The case involved an eminent domain action in Washington D.C. for the purposes of urban renewal. Thus, Justice Douglas' statements are dictum because:

It is one thing to say that aesthetics are an appropriate consideration in deciding whether to condemn and pay; it is quite a different matter to decide that the same considerations are appropriate as a basis for police power regulations. . . . Yet this case is usually cited as heralding a new era in the latter context.

1 N. WILLIAMS, *supra* note 30, at § 11.18. ("In part the confusion here derives from the fact that eminent domain was . . . treated not as a separate sovereign power but as merely the means to an end within the power of Congress.") *Id.* at n.72.

42. *Berman*, 348 U.S. at 32-33.

43. See *supra* notes 10-20 and accompanying text.

be an ugly sore, a blight on the community which *robs it of charm*, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.⁴⁴

Thus, the limited usefulness of a visual beauty analysis surfaces here, making it difficult to explain the Court's approach. Under this narrow view, the change constituency's⁴⁵ desire for urban renewal would be defined in terms of the color, line, and proportion of individual structures. Yet, it cannot be seriously asserted that a "suffocating of the spirit" or a "robbing of charm" results solely from the ugly visual components of the neighborhood. On the contrary, using a cultural-stability approach, the driving force behind the change constituency is revealed as the negative associations surrounding the existing resource.⁴⁶ In other words, those pushing for change may associate poverty or oppression with the neighborhood's deplorable housing.

After *Berman*, the Court upheld many regulations which necessarily involved aesthetics. Realizing the breadth of such decisions, the Court consolidated the various litigational contexts under the heading of "quality of life." Thus, in *Penn Central Transportation Co. v. New York*,⁴⁷ Justice Brennan stated: "[T]his Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city. . . ."⁴⁸ In proceeding to list its previous decisions in *New Orleans v. Dukes*,⁴⁹ *Young v. American Mini Theatres, Inc.*,⁵⁰ *Village of Belle Terre v. Boraas*,⁵¹ *Berman v. Parker*,⁵² and *Welch v. Swasey*,⁵³ the Court illustrated the scope of its "quality of life" label.⁵⁴ However, beyond recognizing that aesthetics involve many community-oriented aspects, the *Penn*

44. 348 U.S. at 32-33 (emphasis added).

45. For a definition of change constituency, see *supra* note 11.

46. For a definition of existing resource, see *supra* note 11.

47. 438 U.S. 104 (1978) (historic preservation: Grand Central Terminal, New York).

48. *Id.* at 129.

49. 427 U.S. 297 (1976) (street vendor restriction ordinance: French Quarter, New Orleans, Louisiana).

50. 427 U.S. 50 (1976) (zoning ordinance restricting adult movie theaters: Detroit, Michigan).

51. 416 U.S. 1 (1974) (ordinance limiting specific land uses to one-family dwellings using a restrictive definition of "family": Bell Terre, New York).

52. 348 U.S. 26 (1954) (eminent domain action for urban renewal: Washington, D.C.).

53. 214 U.S. 91 (1909) (height restriction statute: Boston, Massachusetts).

54. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978). If the Court was compiling this list today, a logical addition would be *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (restrictive zoning ordinance to preserve open-space: Tiburon, California).

An intriguing parallel to the Court's discourse is the "quality of life" elements offered by Senator Henry Jackson in his report to the Senate regarding passage of NEPA § 102, 42 U.S.C. §§ 4321-4370 (1982). For an excerpt from Senator Jackson's speech, see *infra* note 203.

Central decision failed to forge new ground regarding the validity of regulating solely for aesthetics reasons.

The situation changed in 1981 with the decision in *Metromedia, Inc. v. City of San Diego*.⁵⁵ For the first time, the United States Supreme Court⁵⁶ explicitly recognized that aesthetics, standing alone, are a valid basis for regulating via the police power. The cause of the dispute was a very restrictive municipal sign control ordinance.⁵⁷ The Court, after stating that the "appearance of the city" is a substantial governmental goal,⁵⁸ noted that the California Supreme Court had specifically overturned a 1909 case in holding that regulating "purely for aesthetic reasons" was constitutionally valid, thus placing the state's position "in accord with that of most other jurisdictions."⁵⁹ Thereafter, the Court reached "a similar result"⁶⁰ as to the legislative motives for regulation based on aesthetics as it had on the issue of regulation for traffic safety in finding that there was nothing "to suggest that these judgments are unreasonable."⁶¹ Ultimately, however, the plurality opinion struck down the regulation as an unconstitutional abridgement of the freedom of speech.⁶² One commentator noted that Justice White had "struck down the land use regulation because it inverted the proper order of first amendment protection, giving more protection to commercial speech than to its noncommercial counterpart."⁶³ However, Justice Brennan, in his concurring opinion, applied a strict scrutiny analysis and found

55. 453 U.S. 490 (1981).

56. The opinion of the Court was authored by Justice White, with Justices Stewart, Marshall, and Powell concurring. Justice Brennan, joined by Justice Blackmun, filed a concurring opinion. Justice Stevens wrote a separate opinion in which he dissented as to Parts V-VII, while concurring as to Parts I-IV of the plurality opinion. Chief Justice Burger and Justice Rehnquist each issued dissenting opinions. *Id.* at 492. Since Justice Stevens concurred as to Part IV, where the relevant aesthetic issues are discussed, a majority exists (the configuration of which may be reversed only if Justice Scalia, for retired Chief Justice Burger who dissented, and concurring Justice Powell's replacement both vote against the majority holding).

57. The San Diego ordinance basically prohibited all outdoor advertising display signs. There were two exceptions: First, on-site signs (e.g., identifying the premises or items sold/manufactured on such premises); and second, public service signs (e.g., transportation, historical, religious, "for sale," and temporary political signs). *Id.* at 493-96.

58. *Id.* at 507-08.

59. *Id.* at 508 n.13 (citing the California Supreme Court's overturning of *Varney & Green v. Williams*, 155 Cal. 318, 100 P. 867 (1909)).

60. *Id.* at 510.

61. *Id.* at 509.

62. *Id.* at 521.

63. Note, *supra* note 26, at 242.

the ordinance invalid on both the safety and aesthetic grounds.⁶⁴ Thus, while the Court clearly validated aesthetic regulation in theory, the question of proper standards, especially in first amendment cases, remains subject to debate.⁶⁵

b. State Courts

While some jurisdictions still adhere to the rule that aesthetics can be a valid consideration in regulating land only so long as accompanied by other valid purposes, they are a vanishing breed. Over the last two decades, the number of courts converting to full acceptance of the aesthetics approach has been astounding. At present, the following twenty-one states⁶⁶ view regulation based solely on aesthetics as a valid exercise of the police power: California,⁶⁷ Colorado,⁶⁸ Delaware,⁶⁹ Florida,⁷⁰ Hawaii,⁷¹ Illinois,⁷² Kentucky,⁷³ Massachu-

64. 453 U.S. at 528-30.

65. A recent article describes how lower courts have applied the *Metromedia* decision in the sign control context:

The mixed messages conveyed by the Court in *Metromedia*, combined with the diversity of billboard regulations reviewed, have produced a distinct lack of uniformity in subsequent lower court decisions. Those courts evaluating regulations which distinguish between commercial and noncommercial speech have adopted the plurality's bifurcated analysis. Their conclusions differ, however, depending on the type and applicability of the regulation. The *Metromedia* plurality's application of a less strict standard of review for the traffic safety and aesthetic rationales has prompted some courts to defer to legislative judgments on these matters. Other courts prefer Justice Brennan's approach, and have revived the standard of strict scrutiny effectively abandoned by the *Metromedia* plurality.

Meiselman, *The Regulation of Outdoor Advertising: Balancing Freedom of Speech and Aesthetics*, 1985 ANN. SURV. AM. L. 671, 682 (1986).

66. See generally 1 N. WILLIAMS, *supra* note 30, at § 11 (1974 & Supp. 1986); Buford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulations*, 48 UMKC L. REV. 125 (1980); Annotation, *Aesthetic Objectives or Considerations as Affecting Validity of Zoning Ordinance*, 21 A.L.R. 3d 1222, § 4 (1968 & Supp. 1987).

67. *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1979) (sign control ordinance), *rev'd on other grounds*, 453 U.S. 490 (1981).

68. *Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs*, 195 Colo. 48, 575 P.2d 835, *appeal dismissed*, 439 U.S. 809 (1978) (sign control ordinance).

69. *Franklin Builders, Inc. v. Sartin*, 207 A.2d 12 (Del. Super. Ct. 1964) (sign control ordinance).

70. *Lamar-Orlando Outdoor Advertising v. City of Ormond Beach*, 415 So. 2d 1312 (Fla. Dist. Ct. App. 1982) (sign control ordinance). See also *City of Coral Gables v. Wood*, 305 So. 2d 261 (Fla. Dist. Ct. App. 1974) (mobile camper storage ordinance).

71. *State v. Diamond Motors*, 50 Haw. 33, 429 P.2d 825 (1967) (sign control ordinance).

72. *City of Champaign v. Kroger Co.*, 88 Ill. App. 3d 498, 410 N.E.2d 661 (1980) (sign control ordinance).

73. *Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964) (sign control ordinance).

74. *John Donnelly & Sons v. Outdoor Advertising Bd.*, 369 Mass. 206, 339 N.E.2d 709 (1975) (sign control ordinance).

setts,⁷⁴ Michigan,⁷⁵ Mississippi,⁷⁶ Montana,⁷⁷ New Jersey,⁷⁸ New Mexico,⁷⁹ New York,⁸⁰ North Carolina,⁸¹ Ohio,⁸² Oregon,⁸³ Pennsylvania,⁸⁴ Tennessee,⁸⁵ Utah,⁸⁶ and Wisconsin.⁸⁷ While the litigational contexts may be different, the cases handed down in these states have a crucial common theme: an effective modern land use policy must recognize that aesthetics serve as an important environmental backdrop which fosters community health and well-being.

B. Statutory Focus on Aesthetics

1. Land Use Regulation

On the federal level, Congress has often stated aesthetics as a policy goal for regulatory legislation. For instance, in the National Highway Beautification Act⁸⁸ Congress declared that control of outdoor advertising was necessary in order to "protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty."⁸⁹ Similarly, the National Historic Preservation Act⁹⁰ states:

[T]he spirit and direction of the Nation are founded upon and reflected in its historic heritage . . . the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspi-

75. *National Used Cars, Inc. v. City of Kalamazoo*, 61 Mich. App. 520, 233 N.W.2d 64 (1975) (junkyard shielding ordinance).

76. *Mississippi State Highway Comm'n v. Roberts Enter. Inc.*, 304 So. 2d 637 (Miss. 1974) (sign control statute).

77. *State v. Bernhard*, 173 Mont. 464, 568 P.2d 136 (1977) (junkyard licensing statute).

78. *State v. Miller*, 83 N.J. 402, 416 A.2d 821 (1980) (sign control ordinance).

79. *Temple Baptist Church v. City of Albuquerque*, 98 N.M. 138, 646 P.2d 565 (1982) (sign control ordinance).

80. *Suffolk Outdoor Advertising Co. v. Hulse*, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977) (sign control ordinance) (reaffirming position taken in *Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967) (sign control ordinance)).

81. *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982) (junkyard ordinance).

82. *State v. Buckley*, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968), *cert. denied*, 395 U.S. 163 (1969) (junkyard fencing statute).

83. *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965) (wrecking yard ordinance).

84. *David Aaron, Ltd. v. Borough of Jenkintown*, 63 Pa. Commw. 577, 439 A.2d 1322 (1982) (sign control ordinance).

85. *State v. Smith*, 618 S.W.2d 474 (Tenn. 1981) (automotive junkyard statute).

86. *Buhler v. Stone*, 533 P.2d 292 (Utah 1975) (unsightly waste ordinance).

87. *Racine County v. Plourde*, 38 Wis. 2d 403, 157 N.W.2d 591 (1968) (automobile wrecking yard ordinance).

88. National Highway Beautification Act of 1965 § 403, 23 U.S.C. §§ 131-136 (1982).

89. *Id.* § 131(a).

90. National Historic Preservation Act Amendments of 1980 § 1, 16 U.S.C. §§ 470 (1982).

rational, economic, and energy benefits will be maintained and enriched for future generations of Americans. . . .⁹¹

Finally, as a parallel example on the state level, Hawaii, Maine, and Vermont have all found it necessary to promulgate a statewide ban on billboards in order to help protect the aesthetic assets within their borders.⁹²

2. Environmental Protection

One of the hallmarks of environmental protection legislation is its sensitivity to subtle influences on the environment. Hence, it is not surprising that this type of legislation often singles out aesthetics as a vital environmental concern. Unlike the more substantively oriented land use regulations, these laws tend to focus on the procedural aspects of implementing environmental quality goals. With the enactment of the National Environmental Protection Act (NEPA)⁹³ in 1969, environmental protection on the federal level came of age. The policy behind NEPA is to ensure that the nation may "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations . . . [and] assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings. . . ."⁹⁴ Following on NEPA's coattails, Congress promulgated additional environmental protection legislation which recognizes the significance of aesthetic values. For instance, the

91. *Id.* § 470(b)(1), (4). The perspective of this statute is a prime example of cultural-stability thinking. First, Congress declared existing resources to be an important element in national identity. Second, the legislators sought to prevent changes which would disrupt the associational bonds which Americans have developed with those existing resources.

The following oath, which citizens of the ancient Greek polis (city-state) of Athens were bound to recite, offers a haunting parallel to the objectives of the National Historic Preservation Act:

We will ever strive for the ideals and sacred things of the city, both alone and with many; we will unceasingly seek to quicken the sense of public duty . . . we will transmit this city not only not less, but *greater, better and more beautiful than it was transmitted to us.*

E. PHILLIPS & R. LEGATES, *CITY LIGHTS: AN INTRODUCTION TO URBAN STUDIES* 117 (1981) (emphasis added). Athenian Oath of Citizenship: "Citizens pledged to transmit the polis' cultural heritage and to improve Athens as part of their civic duty." *Id.* at 117.

92. HAW. REV. STAT. §§ 264-272 (1985) ("No person shall erect or maintain any outdoor advertising outside of the right of way boundary and visible from the main-traveled way of any federal-aid or state highway within the state . . ." except for on-site advertising, directional signs, etc.); ME. REV. STAT. ANN. tit. 23, §§ 1901, 1902 (1964) (the purposes of the chapter include: "[to] [p]rohibit and control the indiscriminate use of outdoor advertising; and . . . [e]nhance and protect the natural scenic beauty of the State."); VT. STAT. ANN. tit. 10, § 488 (1984) ("No person may erect or maintain outdoor advertising visible to the traveling public" except for lawful businesses, directional signs, etc.).

93. NEPA § 102, 42 U.S.C. §§ 4321-4370 (1982).

94. *Id.* § 4331(b)(1), (2). Again, note the similarity to the Athenian Oath *supra* note 91.

Coastal Zone Management Act⁹⁵ and Marine Sanctuaries Act⁹⁶ both emphasize the urgent need to preserve America's aesthetic heritage.⁹⁷ Lastly, at the state level many jurisdictions followed the federal lead by enacting "little NEPA's." As the name suggests, these statutes mirror NEPA in many important respects, including the isolation of aesthetics as a key element in environmental protection.⁹⁸

IV. AESTHETIC-BASED CITIZEN SURVEYS

A. *Why Surveys?*

1. Cultural-Stability Link

Aesthetic-based problems rest on a continuum. At one end lie the "least common denominator" items: a common consensus is presumed to regard land uses in this category as particularly unappealing. In other words: "We refer not to some sensitive or exquisite preference but to concepts of congruity held so widely that they are inseparable from the enjoyment and hence the value of property."⁹⁹ Billboards and junkyards are prime examples of such items. Absent evidence to the contrary,¹⁰⁰ decisions regarding these unsightly uses are presumed to parallel the community consensus. Thus, while citizen surveys in this area might prove academically interesting, such research would be of limited use to decision makers.

95. Coastal Zone Management Act of 1972 § 301, 16 U.S.C. §§ 1451-1464 (1982).

96. Marine Sanctuaries Amendments of 1984 § 102, 16 U.S.C. §§ 1431-1439 (Supp. I 1985).

97. The Coastal Zone Management Act aims to encourage and assist states in achieving "wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development. . . ." 16 U.S.C. § 1452(2) (1982). The Marine Sanctuaries Act declares that "certain areas of the marine environment possess conservation, recreational, ecological, historical, research, educational, or aesthetic qualities which give them special national significance. . . ." *Id.* § 1431(a)(2).

98. See, e.g., CAL. PUB. RES. CODE §§ 21000-2117.7 (West 1986) (California Environmental Quality Act [hereinafter CEQA], enacted 1970; aesthetics referred to in section 21001(b)); MINN. STAT. ANN. §§ 116B.01-116B.13 (West 1979 & Supp. 1987) (Minnesota Environmental Rights Act, enacted 1971; aesthetics referred to in § 116B.02(4)); N.Y. ENVTL. CONSERV. LAW §§ 17 1/2-0101 to 72-0702 (McKinney 1984 & Supp. 1987) (enacted 1972; aesthetics referred to in section 1-0101(3)(a)).

99. 1 N. WILLIAMS, *supra* note 30, at § 11.15 (quoting United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 5-6, 198 A.2d 447, 449 (1964)).

100. "The 'common consensus' may in fact be somewhat less than universal: what appears ugly to the typical upper-middle-class American may not be ugly to those with other kinds of backgrounds, economic and/or ethnic." *Id.* at § 11.15 n.65. As a collateral note, where a survey is employed and such disparities seem likely, a distinct need to "stratify" the research arises. For a discussion of the benefits of survey stratification, see *infra* notes 164-65 and accompanying text.

At the other end of the continuum lie those aesthetic land use problems traditionally considered so subjective as to defy rational decision making. However, the practical adoption of a cultural-stability mentality¹⁰¹ represents the cornerstone in the effort to overcome this conceptual obstacle. Workable aesthetic standards are more realistic where there is a focus on the underlying associational bonds linking a constituency with an existing resource. Once this foundation has been laid, the next step centers on providing the decision makers with the most suitable information base: enter citizen surveys.

Survey research is an optimal vehicle for pushing the cultural-stability approach beyond its explanatory function¹⁰² into the role of enhancing data gathering techniques. The driving force behind this proposition is the realization that surveys are uniquely capable of discerning and describing the associations which foster a community's aesthetic preferences.

2. Representative Public Participation

At one extreme, aesthetic-based decisions could be made in a vacuum, thereby isolating the relevant policy makers. Another remark by the EPA's Mr. Adamkus illustrates this hierarchical approach: "[C]reate a council of elders, or aesthetes, on a national, regional, and local scale. They, like the most wise and best-qualified statesmen in Plato's 'republic,' would steer the aesthetic course of the Nation, the State, and the local community."¹⁰³ At the other extreme, an aesthetic-based decision could proceed only upon full public approval. While such a voting scheme would almost always be impractical, fairness and validity dictate some degree of citizen participation: "Systematic assessment of the public's perception of scenic effects of landscape management and design enables more informed planning decisions, provides important communication and educational messages for the public, and may help to circumvent costly legal battles."¹⁰⁴ Moreover, an increasing number of statutes require public participation as an essential step in the decision making process. Specifically, environmental assessment legislation is especially likely to mandate such involvement.¹⁰⁵

The usefulness of traditional forms of citizen participation, e.g.,

101. See *supra* notes 10-20 and accompanying text.

102. See, e.g., *supra* notes 12-15 and accompanying text, and notes 43-46 and accompanying text.

103. Adamkus, *supra* note 7.

104. Vining & Stevens, *supra* note 16, at 169.

105. Regarding NEPA's Environmental Impact Statement requirement, see 40 C.F.R. § 6.400(c) (1986) ("The responsible official shall conduct a public hearing on a draft EIS."); *Colony Fed. Sav. & Loan Ass'n v. Harris*, 482 F. Supp. 296, 304 (W.D. Pa. 1980) (citing *Nat'l Ass'n of Gov't Employees v. Rumsfeld*, 418 F. Supp. 1302, 1307 (E.D. Pa. 1976)) ("An opportunity for local citizens or other interested parties to participate

hearings, as information gathering devices is hampered by the following representation problem: "These persons who have the time, awareness, know-how, and economic wherewithal to come forward may not represent all of the numerous groups having an important stake in the decisions."¹⁰⁶ Citizen surveys represent an appealing avenue for resolving this inadequacy. Surveys attempt to obtain sample results which may be generalized to the appropriate "universe" from which the sample was obtained: "A sample is a smaller group of individuals than is contained in the entire population; it is a group of individuals who, if properly selected, are representative of that population and whose attitudes and perceptions resemble those of the population."¹⁰⁷ In other words, whereas views expressed at a public hearing may only represent motivated segments of the community, surveys foster representative public participation by securing information from each targeted sub-group.

3. Triangulation

A major advantage of survey use stems from what social scientists have termed "triangulation." The basic premise is that a decision maker enhances her ability to estimate, i.e., properly assess community attitudes, by "using several different methodologies . . . where their liability of each alone is questionable."¹⁰⁸ Thus, by using surveys as an *additional* source of information, decision makers gain a more accurate portrayal of the issue at hand.¹⁰⁹ The following excerpt illustrates the value of triangulation, even where it produces contradictory results:

If the results of using several approaches are mixed, some pointing one way and some another, it is difficult to know which is right. But at least appropriate lines of further inquiry are drawn. For example, if representatives at a public hearing claim the community feels one way, but a citizen survey shows the majority feel another way, one can inquire as to how the representatives

in the preparation of the environmental analysis is *mandatory* under NEPA.") (emphasis in original).

106. P. SCHAEENMAN, *supra* note 16, at 39.

107. Sorensen, *Survey Research Execution in Trademark Litigation: Does Practice Make Perfection?*, 73 TRADEMARK REP. 349, 354 (1983). "The extent to which this correspondence, this smaller scale mirror image, exists between sample and parent population depends on the homogeneity of the parent population, the techniques prescribed for drawing the sample, the accuracy of their implementation, and the interview completion rate." *Id.* at 354-55 (emphasis added). For a discussion of sampling techniques, see *infra* notes 162-70 and accompanying text.

108. P. SCHAEENMAN, *supra* note 16, at 60 n.7.

109. "In advanced navigation or in statistical decision theory, a better estimate can be made using data from several sources . . . than using any single source alone." *Id.*

obtained their data (from whom, by what process) and can compare this to the results from the random sample broken down by various citizen groupings (for example by area, age, home owners versus renter).¹¹⁰

The triangulation aspect of surveys can uncover hidden interests which may be fueling a land use controversy. For instance, the position asserted in a public forum may not accurately portray the true underlying concerns of the constituencies. As an illustration, suppose that in their attempt to stop a zoning variance requested by a convenience market, a group of neighbors have voiced strong opposition to the ugliness of such stores. As a result, the public meetings are generally consumed by heated debates over visual concerns, such as building design and color, placement and size of signs. However, if the developers used a neighborhood survey they might find that nearby residents are actually most concerned with a possible increase in local crime and noise. Armed with this insight, the developers might be able to successfully settle the dispute by offering the following changes: construct extraordinary lighting and fencing fixtures to minimize crime, and position the building in a "U" shaped fashion to help shield neighbors from avoidable noise. Thus, a survey may foster effective decision making by highlighting a constituency's underlying interests and avoiding a superficial focus on their stated position.¹¹¹

The end result of a triangulation approach is a more defensible decision. Multiple information sources help lay broader foundations: "Presumably a more comprehensive, clearer set of decision criteria should help decision makers explain and defend decisions, making it easier to demonstrate that a thorough, rational, fair and consistent approach was used."¹¹²

4. Select Disadvantages

A major disadvantage of most surveys is that they tend to slow the

110. *Id.* at 61.

111. A simple but powerful example of the benefits of focusing on interests, rather than positions, is offered in a national best-seller on negotiation:

Consider the story of two men quarreling in a library. One wants the window open and the other wants it closed. They bicker back and forth about how much to leave it open. . . .

Enter the librarian. She asks one why he wants the window open: "To get some fresh air." She asks the other why he wants it closed: "To avoid the draft." After thinking a minute, she opens wide a window in the next room, bringing in fresh air without a draft.

.....

The librarian could not have invented the solution she did if she had focused only on the two men's stated positions of wanting the window open or closed. Instead she looked to their underlying interests of fresh air and no draft.

R. FISHER & W. URY, *GETTING TO YES* 41 (1981).

112. P. SCHAEFMAN, *supra* note 16, at 5.

decision making process¹¹³ and thus, generally increase costs. While the costs, both in terms of time and actual expenditures, may be reduced by choosing a condensed format,¹¹⁴ the general expense problem holds true for most survey research.¹¹⁵ Next, in a paradoxical twist, a decision relying heavily on survey results may actually become more vulnerable to the opposition's attack because they will have "a clearer target to shoot at. . . ."¹¹⁶ Finally, change constituencies may be hostile to surveys because they often advocate a "let sleeping dogs lie"¹¹⁷ approach. For instance: "Where citizens are not especially active, impact measurements—especially those involving use of citizen surveys—are sometimes viewed negatively as having the potential to 'stir up' neighborhoods against development that may be desirable."¹¹⁸ Frequently, governmental bodies and the developers they promote fall quite naturally into this change constituency category.

Whatever the outcome after balancing pros and cons, surveys should enhance rather than extinguish traditional information sources. Hence: "It is noteworthy that surveys should not be used to circumvent existing channels of community participation and decision making but should, rather, *complement* them. Surveys are merely broad approximations of community interests and cannot supplant [sic] consensus building mechanisms nor adequately substitute for more direct forms of involvement."¹¹⁹

113. "It would be difficult to incorporate surveys into short-term evaluation studies in the two- to four-month range. The attempt to do so might result in cutting back on the questionnaire design and pretest phases, a practice that generally leads to unsatisfactory results." Swidorski, *Sample Surveys: Help for the "Out-of-House" Evaluator*, 40 PUB. ADMIN. REV. 67, 70 (1980). For a list of the time consuming steps involved in conducting mail surveys, see *infra* note 158.

114. For a description of one such method, mini surveys, which relinquish reliability in favor of cost efficiency, see *infra* notes 169-70 and accompanying text.

115. "On the other hand, recent evidence indicates these costs are modest, and incurring them ultimately may reduce net time by not requiring the development of an ad hoc approach for each case." P. SCHAEINMAN, *supra* note 16, at 5.

116. *Id.* at 6.

117. As a literary note, the English origins of this proverb are traceable to Chaucer's work in 1374: "It is nought good a slepyng hound to wake." G. CHAUCER, *TROILUS* (n.p. 1374), quoted in THE OXFORD DICTIONARY OF ENGLISH PROVERBS 456 (3rd ed. 1979).

118. P. SCHAEINMAN, *supra* note 16, at 64.

119. Daneke & Klobus-Edwards, *Survey Research for Public Administrators*, 39 PUB. ADMIN. REV. 421, 422 (1979) (emphasis added).

B. Judicial Acceptance of Surveys as Evidence

To a large extent, judicial treatment of surveys as evidence determines the persuasiveness of such results in other legal contexts. Specifically regarding judicial acceptance of aesthetic-based surveys, the author's research¹²⁰ revealed an intriguing variety of professional opinions. For instance, Barry Kotler, Vice President and General Counsel for Chevron Land and Development Company, rejects the visual beauty approach, claiming that courts will not accept such survey results because "[a]esthetics' is the quintessence of subjectivity and quantification is its opposite."¹²¹ Jerry Partain, Director of the California Department of Forestry, shows a clear uncertainty in responding that he has "no idea what courts will do."¹²² On the other end of the spectrum, Mr. Henderson of the EPA believes that courts will accept such surveys because they are "[g]enerally credible as less subjective."¹²³ Finally, Harold Walt, Chairman of the California Board of Forestry, is more pessimistic: "Courts will accept [such] testimony from expert witnesses, but there is little tangible evidence that can be submitted and not be refuted."¹²⁴

While some professionals may doubt the judicial acceptance of aesthetic-based citizen research, the overall use of surveys has blossomed: "Survey research is becoming an increasingly potent force in legal proceedings, providing evidence that cannot be obtained in any other way. Its acceptance by courts, regulatory agencies, and arbitrators is now well established."¹²⁵ Furthermore, specifically with regard to litigation: "Survey evidence is being used in a myriad of traditional and new ways . . . receiving greater acceptance inside the courtroom as an influential tool to illustrate and enlighten arguments, and outside as an effective means to negotiate settlements."¹²⁶

The most common use of surveys in court involves trademark and unfair competition litigation.¹²⁷ Surveys are the primary method for showing consumer confusion, the key element in any trademark in-

120. See *supra* note 7.

121. Kotler, *supra* note 7.

122. Letter from Jerry Partain, Director of the California Department of Forestry, to John E. Van Vlear (June 24, 1986).

123. Letter from Mr. Henderson, United States EPA, Region 6, to John E. Van Vlear (June 30, 1986).

124. Letter from Harold R. Walt, Chairman of the California Board of Forestry, to John E. Van Vlear (July 24, 1986).

125. Dutka, *The Use of Survey Research in Legal Proceedings*, 68 A.B.A. J. 1508 (1982).

126. Ostberg & Christopher, *Survey Evidence: A Lawyer's Secret Weapon*, TRIAL, Nov. 1986, at 74. See also, *Use of Surveys as 'Expert Witness' Is Up, Expert Says*, L.A. Daily J., July 10, 1980, at 3, col. 6.

127. Ostberg & Christopher, *supra* note 126, at 74; Haller, *Using Public Opinion Surveys*, LITIGATION, Winter 1982, at 17. For a detailed analysis of the sampling techniques especially important in this type of research, see Sorensen, *supra* note 107.

fringement action. Thus, it is not surprising that *Zippo Manufacturing v. Rogers Imports*,¹²⁸ a 1963 infringement matter, represents the "landmark case dealing with the admissibility of surveys and polls."¹²⁹ The Zippo company introduced survey evidence showing that the defendant had marketed a cigarette lighter so similar to Zippo's as to create public confusion.¹³⁰ This case is pivotal because it formulated a rational solution to the major procedural roadblock to the introduction of surveys: exclusion under the hearsay rule.¹³¹ Traditionally, courts wishing to admit surveys resorted to one of two methods. First, a court could completely avoid the rule by declaring that surveys were simply not hearsay since they were "not offered to prove the truth of what respondents said . . ."¹³² However, the court in *Zippo* properly rejected this view, stating that a survey "respondent's answer is hearsay in the classic sense."¹³³ The second traditional method was to declare that surveys were hearsay, but were an exception to the rule as "statements of present state of mind, attitude, or belief."¹³⁴

While recognizing that surveys would be admissible under the second approach, the *Zippo* court forged new ground by formalizing a

128. 216 F. Supp. 670 (S.D.N.Y. 1963).

129. Debra P. v. Turlington, 564 F. Supp. 177, 182-83 n.7 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984).

130. "[T]he purpose of the study was to determine whether the physical attributes of the Zippo standard and slim-lighters serve as indicators of the source of the lighters to potential customers. . . ." 216 F. Supp. at 680-81. Essentially, after removing all trade markings, two groups of respondents viewed the Zippo lighters and were asked to identify the brand type. Similarly, another group viewed the Rogers lighters, with all markings in place, and they were asked to identify what brand type it was and why. *Id.* at 681-82.

131. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). The Court of Appeals for the Ninth Circuit summarized the logic behind the hearsay rule in the following terms:

A traditional explanation for the exclusion of hearsay evidence is that it deprives the opposing party of the opportunity for cross-examination. The declarant is not present and thus cannot be cross-examined. On the other hand, the witness who is present and testifying to the hearsay does not have any personal knowledge of the hearsay on which testimony is sought, and therefore cannot be cross-examined in a meaningful manner.

NLRB v. First Termite Control Co., 646 F.2d 424, 426 (9th Cir. 1981).

132. 216 F. Supp. at 682. *See, e.g.*, *United States v. 88 Cases, More or Less, Containing Bireley's Orange Beverage*, 187 F.2d 967, 974 (3rd Cir. 1951), *cert. denied*, 342 U.S. 861 (1957).

133. 216 F. Supp. at 683.

134. *Id.* at 682. *See, e.g.*, *Miles Laboratories, Inc. v. Federal Frolich Fin. Corp.*, 195 F. Supp. 256, 262 (S.D. Cal.), *aff'd per curiam*, 296 F.2d 740 (9th Cir. 1961), *cert. denied*, 369 U.S. 865 (1962).

necessary and trustworthy approach.¹³⁵ "Necessity in this context requires a comparison of the probative value of the survey with the evidence, if any, which as a practical matter could be used if the survey were excluded."¹³⁶ Correspondingly, the court proceeded to find necessity: "When, as here, the state of mind of the smoking population (115,000,000) is the issue, a scientifically conducted survey is necessary because the practical alternatives do not produce equally probative evidence."¹³⁷ Regarding the trustworthiness prong, the court found that "[t]he sampling procedure substantially guarantees trustworthiness insofar as the respondent's sincerity is concerned, [and] other survey techniques substantially ensure trustworthiness in other respects."¹³⁸ Thus, by focusing on the survey procedure,¹³⁹ the court steered away from the technicalities of the hearsay rule which had consumed previous courts. *Zippo* ushered in a new era for using surveys as evidence: modernly, admissibility is seen as a minor hurdle whereas the validity battle goes to the weight of such evidence.¹⁴⁰

In addition to traditional litigational uses, courts are permitting survey evidence in other legal contexts as well.¹⁴¹ The following survey uses are indicative of this recent trend: establishing elements of damages¹⁴² and defamation,¹⁴³ assessing the representativeness of

135. The court's approach parallels the federal "catch-all" exception to the hearsay rule: a statement may be deemed an exception, even if it does not fall within one of the enumerated categories, if it has "equivalent circumstantial guarantees of trustworthiness" and "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. . . ." FED. R. EVID. 803(24). The fact that the relevant federal rules were adopted nearly twelve years after the *Zippo* decision (see Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 28 U.S.C. §§ 101-1103 (1975))) magnifies the inherent logic of the court's two-pronged approach.

136. 216 F. Supp. at 683.

137. *Id.* at 683-84. "With such a survey, the results are probably approximately the same as would be obtained if each of the 115,000,000 people were interviewed. . . . The alternative of having 115,000,000 people testify in court is obviously impractical." *Id.* at 684.

138. *Id.* at 684.

139. For instance: "[T]he methodology of the survey bears directly on trustworthiness, as it does on necessity." *Id.*

140. "Today a litigant can reasonably expect a properly designed and executed survey to be admitted as evidence; the major question is how much weight will be assigned to the findings." Dutka, *supra* note 125, at 1508.

141. Ostberg & Christopher, *supra* note 126, at 76-77.

142. See, e.g., *Morgan v. S. Cent. Bell Tel. Co.*, 466 So. 2d 107 (Ala. 1985) (survey of new patient rate for doctors similarly situated helped establish lost profits from failure to include plaintiff-doctor in Yellow Pages); *Liberty Fin. Management Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40 (Mo. Ct. App. 1984) (survey of employees' time consumption, indicating that old computer system was more efficient than new one, helped prove consequential damages for breach of contract).

143. See, e.g., *Ollman v. Evans*, 713 F.2d 838 (D.C. Cir. 1983) (survey of leading political scientists, indicating plaintiff was ranked 10th in esteem in the field, helped show injury to reputation).

jury composition,¹⁴⁴ and rebutting constitutional challenges to legislation.¹⁴⁵ In summarizing the ever expanding role of surveys, one recent article indicates that public-opinion polls can be used to help answer almost any legal question in which community sentiment or community standards are relevant.¹⁴⁶

C. Basics for Conducting Survey Research

1. Identifying a Purpose

Surveys further two compatible purposes: detailing preferences and establishing baselines. The primary goal of any survey is to describe the preferences of the respondents, with an eye toward generalizing the results to the entire target population. Regarding land use changes, "citizen surveys may be used to identify citizen preferences for types of development desired in their neighborhood and types to be avoided. Specific comparisons among various proposed development alternatives or a proposed development versus no development may also be undertaken."¹⁴⁷ For instance, a survey might ask community members to comment on the aesthetic consequences of a new building project or the destruction of a landmark.

A beneficial yet often secondary purpose behind surveys is to establish baselines as a "benchmark against which to assess later social and psychological changes."¹⁴⁸ Again focusing on land use decisions, a baseline can be established at several different times:

144. See, e.g., *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226 (8th Cir. 1985) (surveys, correlating death penalty attitudes and verdicts, i.e., conviction-proneness, helped invalidate systematic exclusion of certain juror types).

145. See, e.g., *Debra P. v. Turlington*, 564 F. Supp. 177, 182-83 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984) (surveys showing that a mandatory functional literacy examination which fairly tested the high school curriculum, helped overcome due process and equal protection challenges).

146. Ostberg & Christopher, *supra* note 126. Elaborating on community standards, the commentators offer:

Obscene material can be banned only when their display violates community standards. An alien can become naturalized only if he establishes good moral character by reference to the common conscience. Courts traditionally have struggled to establish neutral principles for such determinations. A scientific public-opinion poll, however, can provide objective evidence of community standards. To juries that are often hopelessly divided over such questions, objective data can prove to be invaluable.

Id. at 77.

147. P. SCHAEFMAN, *supra* note 16, at 48.

148. Lounsbury, Sundstrom, Schuller, Mattingly, Jr. & DeVault, *Toward an Assessment of the Potential Social Impacts of a Nuclear Power Plant on a Community: Survey of Residents' Views*, in *METHODOLOGY OF SOCIAL IMPACT ASSESSMENT* 265, 266 (1977).

This may be done at the time a special development is under review, or on a periodic basis independent of specific development reviews. A third option is a mix of the two: an inventory is taken of baseline conditions for community characteristics likely to be affected by developments, with additional spot analyses undertaken as needed to identify baseline conditions for characteristics only infrequently pertinent to decision making (e.g., the importance of selected landmarks).¹⁴⁹

Baselines are the anchor against which subsequent fluctuations are gauged; i.e., the decision maker can trace the scope and direction of changes in citizen attitudes. Correspondingly, where the policy maker accommodates a recognized swing in community preferences, the outcome is necessarily more enduring than if the decision was premised on outdated information.¹⁵⁰

2. Survey Structure

The design of a survey is crucial to its scientific validity. In turn, the validity of a given instrument determines its persuasiveness and influence. Hence, the professional who desires to effectively utilize a survey must grasp the basic underpinnings of survey research. The public, decision makers, and ultimately the courts¹⁵¹ will closely scrutinize a survey's validity in order to weigh it properly against other information or evidence.

a. Choice of Format

Basically, a survey is "a series of questions . . . submitted in written or oral form to a sample of people representative of those likely to experience the impact [at issue]. . . ."¹⁵² The three basic survey formats are: interview, telephone, and mail.¹⁵³ Where budget constraints are minimal, personal interviews may be ideal since face-to-face contact with the respondents can yield rich and accurate responses. However, because interviews are often prohibitively expensive, alternative telephone or mail formats are more typical.

Telephone surveys are often the cheapest and fastest survey

149. P. SCHAEENMAN, *supra* note 16, at 48.

150. For a discussion of the baseline concept as it relates to the use of mini surveys in environmental assessment, see *infra* note 242 and accompanying text. Also, for the British perspective on the baseline concept, see *infra* text accompanying note 318.

151. See, e.g., *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226 (8th Cir. 1985) (detailed review of six surveys on jurors' conviction-proneness, with each set of results either presented in table or bar graph form).

A final comment by EPA Regional Administrator Adamkus highlights how judicial scrutiny might focus on sampling techniques: "The courts would find ample reason to reject such a survey by saying, for example, that it does not represent the community's aesthetic views—only the views of a select group of aesthetes." Adamkus, *supra* note 7.

152. Vining & Stevens, *supra* note 16, at 170.

153. For a comparison of the three basic survey formats, see *id.* at 170-71; Daneke & Klobus-Edwards, *supra* note 119, at 424; Ostberg & Christopher, *supra* note 126, at 14-75.

method.¹⁵⁴ Yet, three main problems hamper their use. First, since not every household has a telephone or a listed number, results may not be representative of the entire community.¹⁵⁵ Second, because most people work during the daytime, cumbersome off-hour calling may be required to ensure representativeness.¹⁵⁶ Finally, the use of visual stimuli,¹⁵⁷ which may be crucial to an aesthetic-based survey, may be extremely difficult or impossible when interviews are by telephone.

Mail surveys represent a familiar and frequently used survey method. While usually more expensive and time consuming¹⁵⁸ than telephone surveys, they offer greater flexibility and more tangible results. However, the major problem with mail surveys is the low response rate.¹⁵⁹ While an understanding of statistical confidence intervals¹⁶⁰ can greatly reduce the mental impact of such low response rates, there is an increased risk that those unfamiliar with statistics may view the absence of an overwhelming response as fatal to a survey's usefulness.

The following summary by Clifford Holliday of Everybody's Opinion Polls, in assessing the proper format for a hypothetical aesthetic-based survey, details the pros and cons of each approach further:

Personal interviews with community people are most effective; however, much more personal time is required, and the number of people interviewed

154. If "time and cost constraints are severe, a 'quick and dirty' telephone survey is the only viable alternative." Daneke & Klobus-Edwards, *supra* note 119, at 424 (emphasis in original).

155. "Telephone surveys . . . by nature, exclude every household without a telephone." Rahim & Adamson, *The Whys and Hows of Community Attitude Surveys*, 8 CURRENT MUN. PROBS. 225, 228 (1981-82).

156. For example, regarding a contemporary survey: "Interviews were conducted during evening hours and on weekends to avoid biasing the results by contacting too few people who work during normal daytime hours." Hale & Slovak, *Citizen Surveys as Tool for Public Policy Making*, 7 CURRENT MUN. PROBS. 438, 440 (1980-81).

157. Visual stimuli might include photographs (original or retouched), drawings of proposed changes, or computer generated simulations. See generally Sheppard, *Simulating Changes in the Landscape*, in FOUNDATIONS FOR VISUAL PROJECT ANALYSIS 187 (1986).

158. A minimum number of months must be allocated to completing mail questionnaires since "[t]ime must be allocated for: (1) designing and pre-testing the questionnaire; (2) obtaining sampling frames and selecting the sample; (3) preparing the surveys for mailing; (4) allowing an adequate period of time for the questionnaires to be returned; and (5) coding and analyzing the data." Swidorski, *supra* note 113, at 69-70.

159. "[A] 50 percent return rate is about the best one can expect. . . ." Daneke & Klobus-Edwards, *supra* note 119, at 424.

160. For a discussion of confidence intervals, see *infra* notes 169-70 and accompanying text.

must be limited. Telephone sampling for community reaction can be misleading because a phone call does not give people time for study, so they may then change their minds regarding their answers. It is my opinion that the written questionnaire is the best option. Furthermore, it provides printed evidence with which you can verify your results.¹⁶¹

Regardless of which survey format a researcher ultimately adopts, the key to persuasiveness rests with the instrument's design and implementation.

b. Sampling Procedure

Surveys are premised on the theory that the sub-population or sample which responds possesses characteristics which approximate those of the general population or statistical "universe."¹⁶² Thus, precise sampling is important to ensuring a valid survey:

Sampling is a critical issue for users of surveys and questionnaires. It must be determined in advance which people will be the appropriate respondents. . . . Once the appropriate population is identified, a sampling procedure may be used to select the respondents. A basic rule is that results may be generalized only to those individuals who in principle had an equal chance of being included in the survey sample.¹⁶³

The initial step in sampling is to determine the proper universe. A key to defining an adequate universe is the notion of sub-groups, or "clienteles groups," which can be based on physical proximity (such as living or working on or near an existing resource), demographics (including age, race, or income level), or other relevant interest factors (such as tourism or land ownership).¹⁶⁴ By "stratifying" the sample, or structuring the universe according to important sub-groups, the researcher helps ensure a representative and valuable sample.¹⁶⁵ For example, a survey evaluating the aesthetic consequences of a new building might be stratified according to homeowners versus renters. By including the same percentage of renters in the sample as prevails in the community, the survey presents an accurate reflection of community composition instead of being biased by a disproportionate percentage of homeowner responses.

161. Letter from Clifford W. Holliday, Everybody's Opinion Polls, Gardena, California, to John E. Van Vlear (February 12, 1987) (commenting on methods and procedures for conducting an aesthetic-based survey).

162. Surveys are based upon "*inferential statistics*—techniques for drawing inferences about an entire population based on data obtained from a sample drawn from the population." J. WELKOWITZ, R. EWEN & J. COHEN, *INTRODUCTORY STATISTICS FOR THE BEHAVIORAL SCIENCES* 74 (2d ed. 1976) (emphasis in original).

163. Vining & Stevens, *supra* note 16, at 170.

164. P. SCHAEENMAN, *supra* note 16, at 40.

165. For an excellent example of the value of stratification in a coastal zone survey, see E. ZUBE, *ENVIRONMENTAL EVALUATION: PERCEPTION AND PUBLIC POLICY* (1980).

In responding to the author's research (see *supra* note 7) Noelle Michaelson, Administrative Assistant to James G. Dieter, Chief Counsel for Bechtel Petroleum, noted the importance of stratification. When asked what elements would be crucial to an aesthetic-based survey, she replied: "Age and educational background." Letter from Noelle Michaelson to John E. Van Vlear (July 9, 1986).

While generally beyond the scope of this comment, the mechanics of survey sampling lie at the heart of research validity. However, as a summary of the basic theory: "Sampling technique specifies not who but *how* members of a defined population are selected. . . ."¹⁶⁶ The likelihood of a representative survey increases with the probability that each respondent, whether from the entire population or a stratified segment thereof, will be included in the sample.¹⁶⁷ Thus, using a stratification example: "within the given strata, randomized and/or systematic selection and weighing techniques can be utilized to insure representativeness and reduce sampling error."¹⁶⁸

Finally, the choice of sample size, which is inseparably tied to the estimated response rate and appropriate confidence interval, represents a vital component in constructing a statistically persuasive survey. To illustrate, suppose a researcher wants to use a survey to determine how valuable a community landmark is to the residents. He estimates one-half of the surveys will be returned. In order to determine the appropriate sample size, the researcher must first choose a "confidence interval," which in turn hinges on the notion of sampling error. The vast majority of statistical data is calculated using a .05 sampling error; in other words, the generalization that an individual's response represents that of the population at large will be wrong only one out of every twenty times. A common statistical table based on .05 sampling errors reveals that a sample size of 100, with an estimated 50% response rate, will yield a confidence interval of between 40% and 60%. Thus, the researcher can be 95% confident that the population proportion, e.g., those in the general population whose answers should parallel the sample response, will not deviate more than 10% in either direction from the sample proportion. To further illustrate the dynamics involved, assume the researcher decides to use a cost effective "mini survey" approach¹⁶⁹ and reduce the

166. Sorensen, *supra* note 107, at 354 (emphasis added).

167. In other words, "every member of the population has a known—not necessarily equal, but known—chance of being included. . . ." *Id.* at 355.

168. Daneke & Klobus-Edwards, *supra* note 119, at 424 (citing Garson, *Handbook of Political Methods* 151-544 (1976)).

169. "Mini surveys (sample sizes from 20 to 80) are ideally suited to the needs of social impact assessment (SIA). They are inexpensive, quick, easy to conduct and often enormously informative. They cannot produce a high degree of certainty however." Finsterbusch, *The Use of Mini Surveys in Social Impact Assessments*, in METHODOLOGY OF SOCIAL IMPACT ASSESSMENT 291 (1977). The logic behind the mini survey approach is that an increased sample size only marginally increases the confidence interval. For instance, by increasing the sample size all the way to 1,000, the confidence interval is only narrowed to between 47% and 53%. *Id.* at 292.

survey size to forty. Although less expensive, the reduced sample necessarily diminishes the accuracy of the survey because the confidence interval would be widened to between 34% and 66%. Phrased differently, the researcher is now 95% confident that the population proportion will not deviate more than 16% from the sample proportion.¹⁷⁰ Thus, the choice as to proper sample size involves an important trade-off: the larger the sample, and the tighter the confidence intervals, the more expensive the survey.

c. Response Measurement

There are four basic types of response measurement: rating, pair comparison, sorting, and magnitude estimation.¹⁷¹ Rating methods are the most prevalent response procedure: "This method requires the observer to choose which of a number of categories best reflects his or her perception of objects or stimuli presented one at a time. . . . Rating methods are also commonly used for the assessment of attitudes, beliefs, or statements."¹⁷² A perception type rating method might involve the presentation of drawings or photographs. For example, in order to assess the aesthetic impact of a street design change, individual respondents would be randomly presented with a series of photographs. The series would include one original and several retouched photos which incorporate various design changes. After looking at a given altered picture, the respondent would be asked to rate the desirability of the hypothetical change on one of the following scales.¹⁷³

Low Desirability				High Desirability					
1	2	3	4	5	6	7	8	9	10
Very Low Desirability		Low Desirability		Neutral		High Desirability		Very High Desirability	
1		2		3		4		5	

An attitude type rating method measures the strength of the respondent's agreement with a particular statement. A question employing this type of measurement might appear as follows:

I cherish the look of Main Street because it reminds me of small town America.

170. The calculations used in this hypothetical were adapted from the table and explanations presented in Finsterbusch's article. *Id.* at 292-93 (reproducing a 95% confidence band table from 1 E. PEARSON & H. HARTLEY, *BIOMETRIKA TABLES FOR STATISTICIANS* (1966)). See generally J. WELKOWITZ, R. EWEN & J. COHEN, *supra* note 162, at 104-33, 143-44 (confidence intervals for single populations and between two populations respectively).

171. Vining & Stevens, *supra* note 16, at 171-73.

172. *Id.* at 171-72.

173. The examples in this section were adapted from Vining & Stevens' article. See *id.* at 171-72.

Agree Strongly	Agree	Disagree	Disagree Strongly
1	2	3	4

Thus, both variations of the rating method seek to measure the relative weight of a given response according to a set range of categories.¹⁷⁴ Finally, as to the category layout of rating instruments:

There is some disagreement as to whether or not a neutral middle point should be included in the scale. It has been argued that the omission of a neutral center category forces the observer to make a more definite choice, resulting in a more reliable measurement. Others have argued that omission of the neutral point results in the use of two interior categories of the scale as a neutral point thereby reducing the true number of categories . . .¹⁷⁵

While each of the three remaining types of response measurements can be very useful under ideal circumstances, they all have rather distinct limitations. In pair comparison, "the observer makes a judgment indicating which member of the pair has a greater value of some attribute."¹⁷⁶ While pairing works well with limited stimuli, the requirement that all possible combinations be presented severely limits its viability if many items are involved. Alternatively, a sorting method may be used which requires each respondent to physically place the stimuli into piles.¹⁷⁷ However, once again the observer is engaged in simultaneous comparisons and the task of sorting many objects may often be cumbersome. Finally, in magnitude estimation each "observer examines an object or stimulus and assigns a number to his or her perception of the object on a stated attribute."¹⁷⁸ However, the typical use of this method presents serious standardization problems since "[n]o constraints are placed on the range of the numbers the observer may assign."¹⁷⁹

Response measurement deals with closed-ended questions because

174. "The number of rating categories should probably be limited to 10 or fewer." *Id.* at 172.

175. *Id.* "Whether a neutral category is used depends on the nature of the observers, the task, and the stimuli to be rated. If, for example, very fine distinctions must be made, a neutral category might be overused, resulting in decreased reliability." *Id.*

176. *Id.* at 171. "For example, scenic beauty of several landscapes might be assessed by presenting pairs of landscape scenes to the observer. On each presentation, the observer would indicate which scene is perceived to have greater scenic beauty." *Id.*

177. "For example, several landscape scenes might be sorted by the observer into five piles, ranging from pile 1, low aesthetic value, to pile 5, high aesthetic value." *Id.* at 172.

178. *Id.* "For example, the observer might be instructed to assess the scenic beauty of a series of landscape scenes and to provide a numeric estimation of the scenic quality of each scene." *Id.*

179. *Id.* While this problem may be alleviated by using an anchor, e.g., establishing a benchmark by assigning a value of 100 to a standard object, such a cure partially

there are a limited number of response choices available. Even magnitude estimation, with no constraints on the range of numerical responses, falls into this category because all the answers are in numbers. This narrow form of questioning offers distinctly manageable results. Hence, in comparison: "Open-ended questions provide rich information at the cost of coding, analyzing, and interpreting those data. Because responses are more variable, they may be difficult to interpret."¹⁸⁰ Thus, while preliminary studies can effectively use open-ended questions to identify issues, most primary research employs closed-ended questions in order to facilitate analysis.¹⁸¹

d. Avoiding Biased Questions

While statistically sound sampling procedures¹⁸² can help avoid biasing due to misrepresentative sample populations, biasing problems also arise regarding the proper wording and presentation of questions.¹⁸³ The wording of a survey can help ensure, or alternatively, doom its validity. At one extreme, the inclusion or exclusion of certain words may completely destroy an instrument's usefulness: "For example, a town in the Southwest used a citizen survey to justify construction of a nuclear plant, yet the words nuclear or atomic did not appear in the questionnaire."¹⁸⁴ Alternatively, biased wording may invalidate a whole series of questions. For instance, suppose a survey was conducted by environmentalists in an attempt to stop construction of an offshore oil drilling platform. One of the questions in the instrument reads: Should oil companies be allowed to destroy coastal beauty? By inserting this question, the researcher has biased the heart of his own survey. The remaining questions on coastal aesthetics are irreversibly tainted because the respondents now know

defeats the value of magnitude estimation since "it usually influences the rest of the magnitudes obtained from the observer." *Id.*

180. *Id.* at 173. A typical open-ended question might read: What does the appearance of Main street mean to you? This type of question may yield interesting and often surprising results. However, the varying depth and perspective of each response severely hampers statistical analysis.

181. However, compare the contradictory litigational advice offered by Mr. Terry Haller, Chairman of the Legal Surveys Center: "You may think race prejudice is your greatest problem in selecting an unbiased jury; if you ask only closed-end questions, you may never discover that veniremen are prejudiced for or against your client for other reasons." Haller, *supra* note 127, at 18. Moreover, regarding an overall strategy: "[Y]our questionnaire should be spiced with a sufficient number of open-end questions—the kind you never would ask on cross-examination. . . . [I]f the responses are recorded verbatim, they can make a vivid impression when quoted in court." *Id.* at 17-18.

182. For an overview of sampling procedure, see *supra* notes 162-70 and accompanying text.

183. "The wording, sequencing, and saliency of all questions drastically affect the validity of the survey." Daneke & Klobus-Edwards, *supra* note 119, at 423.

184. *Id.* at 421.

that the researchers harbor an obvious hostility toward coastal development, especially construction by oil companies. Hence, where a question reveals the researcher's personal views, inherent bias arises because a respondent may tailor her answer to gain the researcher's approval, instead of answering according to her own feelings. Finally, the validity of a single question may be impaired through manipulative phrasing¹⁸⁵ or ambiguous wording. Thus, as an extension of the drilling platform example, suppose one of the questions asked: What common terms best describe the coastal view from Rocky Cove? While designed to elicit a response based on personal reactions, the question is ambiguous because a respondent might think of terms commonly used in the community instead of answering with the non-elaborate common terms which describe her own feelings.¹⁸⁶

A second type of internal problem with surveys is presentation bias. This often arises from the improper sequencing of questions. For example, screening questions, designed to assess a respondent's knowledge of the controversy, should always precede those questions which explore the issue in detail. Hence, continuing the drilling platform illustration, it is reasonable to assume that answers will vary according to an individual's awareness of the proposed project. In order to confirm this presumption, thereby helping secure representative results, the researcher may wish to stratify the survey according to levels of awareness.¹⁸⁷ However, a natural bias will result if the questions evaluating the aesthetic consequences of the drilling platform precede those designed to screen for knowledge of that very project.¹⁸⁸

A further form of subtle biasing, which involves both wording and presentation concerns, centers on the notion of "social support." In

185. As Daneke and Klobus-Edwards aptly advise: "Do not force or manipulate responses. *Example*: All or nothing questions: 'would you rather be hung or shot?' " *Id.* (emphasis in original).

186. This aesthetic-based illustration of ambiguity was adapted from the following trademark/unfair competition example:

[I]f you want to know what the public thinks about a company, the questionnaire should ask "What do you think of company X?" not "What is the reputation of company X?" The latter question might mean what does the respondent think of the company or what does the respondent think other people think of the company. Therefore, this question would evoke unclear responses that could not be used.

Haller, *supra* note 127, at 19.

187. For a discussion on the value of stratifying a survey, see *supra* notes 164-65.

188. While this may seem an elementary point, similar problems can easily arise where questions are "scrambled" into a random order in an effort to avoid other sequencing biases.

order to foster honest answers, which if standing alone might seem unpopular or extreme, a survey must offer a congenial response setting. Thus, as a final extension of the oil platform example, the survey instrument might try and make people who favor offshore development feel comfortable about voicing their opinion by lending social support in this manner:

The following statements have been made by citizens in coastal communities just like yours. Do you agree or disagree?

1) I would rather see oil rigs on the horizon than wait in future gas lines to fill up my car.

2) While I enjoy the ocean view as much as anyone, the United States must become an independent oil producer in order to avoid the dominance of oil cartels.

....

8) There is no economic or political interest strong enough to outweigh a coastal resident's right to an unspoiled ocean scene.

Prefacing the questions in this way¹⁸⁹ indicates that similarly situated people have voiced parallel thoughts. Thus, the survey offers an honesty-fostering atmosphere, where all responses obtain some degree of validity, because the origin of the answers rests with other coastal residents "just like" the respondents.

3. Result Presentation and Analysis

While the specifics of presenting and analyzing data exceed the scope of this comment, a brief summary is in order. The 1983 federal district court case of *Grigsby v. Mabry*,¹⁹⁰ which represents an extraordinary modern judicial discourse on surveys, offers detailed examples of the two basic types of data presentation. The *Grigsby* court assessed the validity of jury composition procedures by reviewing various surveys on conviction-proneness, e.g., correlations between death penalty attitudes and returned verdicts. As the centerpiece of its analysis, the court reproduced six sets of survey results. The opinion sets out the data both in tables and bar graph form as if illustrating a textbook.¹⁹¹ Of these two methods, the table format provides the most detailed method for describing information. On the other hand, bar graphs offer a simple yet effective method of visually depicting the survey data.

Finally, the use of effective analysis techniques plays a vital role in yielding persuasive survey results. The field of statistics offers a wide range of analytical tools which are extremely helpful in preparing survey results for presentation.¹⁹² The following excerpt, focusing on

189. Adapted from Daneke & Klobus-Edwards, *supra* note 119, at 423.

190. 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226 (8th Cir. 1985).

191. *Id.* at 1288-89, 1297-1301.

192. Three common forms of statistical analysis very suitable for survey research are cross tabulations, comparison of mean responses, and regression analysis:

stratified surveys, details the advantages of such statistical techniques:

Survey analysis does not require advanced statistical knowledge but should not rely solely on descriptive techniques. Although simple frequency distributions provide general information regarding the nature of responses to a survey, they do not facilitate comparison by interest groups (i.e., income, race, location), nor do they enable a ranking of community priorities.¹⁹³

Thus, by analyzing surveys with appropriately strong statistical techniques, both advocates and decision makers gain an enhanced ability to discover and persuasively detail community-wide patterns which might otherwise remain hidden.

V. APPLYING AESTHETIC-BASED CITIZEN SURVEYS

Besides highlighting the fact that decision makers, legislatures, and ultimately the courts are succumbing to the inevitable tide by fully recognizing aesthetic considerations,¹⁹⁴ two basic themes have been woven throughout this comment. First, a workable aesthetic policy must be based on the emerging cultural-stability approach.¹⁹⁵ Second, aesthetic-based citizen surveys represent a golden opportunity for ensuring the broad scope of public participation necessary for effective and enduring aesthetic policies.¹⁹⁶ The following examples, set in the environmental impact assessment context, are a practical

Cross tabulations are frequency distributions of at least two categorical variables displayed in a tabular format. They enable comparisons of group attitudes or behavior, as well as a statistical examination of the degree to which variables influence one another. . . .

A second method of analysis frequently used in community assessment surveys is a comparison of mean responses, categorized by group characteristics, to a series of related responses. This technique allows the investigator to determine value priorities . . . both within and between groups. . . .

The basic principles of regression may be applied to analysis of community surveys. . . . [R]egression enables evaluation of the contribution of a specific independent variable, or set of independent variables, to the variation in a dependent variable. . . . [For example,] [t]he regression technique allows for analysis of the effect of each socio-demographic variable . . . while controlling for the effect of the remaining socio-demographic variables."

Daneke & Klobus-Edwards, *supra* note 119, at 424-25.

193. *Id.* at 424. "Fairly simple statistical operations can be conducted through the use of a 'canned' . . . computer program such as SPSS (Statistical Package for the Social Sciences)." *Id.* The author used SPSS while doing undergraduate research in Social Ecology at the University of California, Irvine. The breadth of statistical capabilities, combined with ease of use, makes programs such as SPSS an invaluable tool for the expert and novice alike.

194. See *supra* notes 24-98 and accompanying text.

195. See, e.g., *supra* notes 10-20 and accompanying text, and notes 99-102 and accompanying text.

196. See, e.g., *supra* notes 103-119 and accompanying text.

synthesis of these themes. These realistic illustrations are necessary in order to add flesh to the conceptual skeleton.

A. *Impact Assessment in California*

1. NEPA as a Model

The National Environmental Policy Act (NEPA)¹⁹⁷ sets forth a mandatory environmental impact assessment procedure in the following terms:

[A]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions *significantly affecting* the quality of the *human environment*, a detailed statement by the responsible official on — (i) the environmental impact of the proposed action . . . [and] (iii) alternatives to the proposed action. . . .¹⁹⁸

An early NEPA decision summarized the process as follows: "The impact statement provides a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action."¹⁹⁹ Thus, the Environmental Impact Statement (EIS) requirement was put into place to make federal agencies actively consider the environmental consequences of their decisions; Congress fashioned the EIS process as an "action-forcing" mechanism²⁰⁰ which serves to implement the substantive policies of NEPA.

In order to fit aesthetics within the gambit of EIS subject matter, it must fall within the definition of "human environment." Since NEPA itself failed to explain the phrase, the Council on Environmental Quality²⁰¹ (CEQ) has subsequently defined it as including "the natural and physical environment and the relationship of people

197. NEPA § 102, 42 U.S.C. §§ 4321-4370 (1982).

198. *Id.* § 4332(2)(C)(i), (iii) (1982) (emphasis added). Additional elements which must be addressed in the report include: any adverse environmental effects, short-term and long-term relationships of environmental and productivity aspects, and any irreversible and irretrievable commitments of resources. *Id.* (ii), (iv), (v).

199. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972).

200. *See Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1112-13 (D.C. Cir. 1971) ("Senator Jackson, NEPA's principal sponsor, stated that '[n]o agency will [now] be able to maintain that it has no mandate, or no requirement to consider the environmental consequences of its actions.' He characterized the requirement of section 102 as 'action forcing'. . . ." (quoting *Hearings on S. 1075, S. 237 and S. 1752 Before Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 206 (1969) (statement of Senator Henry Jackson))).

201. Congress created the Council on Environmental Quality [hereinafter CEQ] in NEPA and empowered it to develop guidelines (modernly regulations) in order to implement the Act. 42 U.S.C. § 4342 (1982). "The Council shall . . . be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment." *Id.*

with that environment."²⁰² In conjunction with this definition of human environment, the regulations refer to the provision on "effects," which offers: "Effects and impacts as used in these regulations are synonymous. Effects include ecological . . . aesthetic, historic, cultural, economic, social or health, whether direct, indirect, or cumulative."²⁰³ Thus, by viewing the CEQ regulations in combination with NEPA's substantive goals,²⁰⁴ aesthetics represent a clear candidate for impact assessment.

2. Surveys as an Interdisciplinary Approach to EIS's

An adequately prepared EIS must necessarily utilize a wide variety of assessment techniques. While "hard" sciences such as geology, physics, and topography are important tools in measuring physical impact, the so called "soft" sciences are needed to gauge much of the human impact associated with environmental change.²⁰⁵ The following excerpt from NEPA emphasizes how congressional thought mirrors this reality:

[A]ll agencies of the Federal Government shall:

(A) utilize a systematic, *interdisciplinary approach* which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures . . . which will insure that *presently unquantified environmental amenities and values* may be given appropriate consideration in decision-making along with economic and technical considerations. . . .²⁰⁶

The lack of effective interdisciplinary assessment has become an unfortunate hallmark of the EIS process. Courts and commentators

202. 40 C.F.R. § 1508.14 (1986).

203. *Id.* § 1508.8. It is interesting to note how these CEQ elements mirror the "quality of life" components mentioned by Senator Henry Jackson, NEPA's key mentor, in his 1969 conference report to the Senate: "[H]aphazard urban and suburban growth . . . man's social and psychological well-being; the loss of valuable open space . . . poor architectural design and ugliness in public and private structures . . . [and] an increasingly ugly landscape cluttered with billboards, powerlines, and junkyards. . . ." 115 CONG. REC. 40417 (1969) (statement of Sen. Jackson). For a discussion of the United States Supreme Court's aesthetic-based "quality of life" concept, see *supra* notes 47-54 and accompanying text.

204. See *supra* text accompanying note 94.

205. For an exemplar interdisciplinary approach to community assessment, from an ecological point of view, see R. CATALANO, HEALTH, BEHAVIOR AND THE COMMUNITY (1979). This work represents the blueprints for the Program in Social Ecology offered at the University of California, Irvine.

206. 42 U.S.C. § 4332(2)(A), (B) (1982) (emphasis added). See also *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1113 (D.C. Cir. 1971) (quoting the same NEPA language).

alike have condemned the historically narrow-minded approach to impact assessment. For instance, the Court of Appeals for the Second Circuit found an EIS for a high-rise housing project wholly inadequate because of a failure to utilize the social sciences in assessing impacts.²⁰⁷ In commenting that the EIS in question confirmed the fears of NEPA's drafters, the court offered a timely comment on the Act's legislative history: "The Senate Committee Report accompanying NEPA states: 'Using an interdisciplinary approach . . . would result in better planning and better projects. Too often planning is the exclusive province of the engineer and cost analyst.'" ²⁰⁸ In a similar vein, two legal commentators observe: "Rarely do EIS's refer to relevant social science literature. The lack of references to social science literature is notable in contrast to references to technical literature of the natural sciences."²⁰⁹

The minimal focus on interdisciplinary methods results in an undesirably low quality of assessment, especially in the "subtle" impact areas. Hence, since aesthetic impacts are often very subtle, this area is particularly susceptible to inadequate treatment. For instance, after studying the treatment of aesthetic impacts in ninety-six water project EIS's from 1968 to 1977, one set of commentators offered:

[T]he vague and general terms used to describe visual impacts in most cases made judgment almost impossible in regard to severity of visual impact What can be seen from this analysis . . . is that, procedurally, visual considerations as treated in EIS's have rarely met the requirements as stated in NEPA and the CEQ . . . guidelines. Subsequently, the treatment of visual and aesthetic considerations has often not advanced with a few notable exceptions in certain EIS's. . . ."²¹⁰

Citizen surveys represent a viable tool for helping fill the interdisciplinary gap which currently exists in impact assessment.²¹¹ Specifically regarding aesthetics, surveys represent an innovative and effective method for assessing the subtle impacts involved. The nebulous character of aesthetics, which often presents a stumbling-block for decision makers, actually lends itself to the use of interdisciplinary techniques. Congress, in enacting NEPA, could have envisioned

207. *Chelsea Neighborhood Ass'n v. United States Postal Serv.*, 516 F.2d 378, 388 (2nd Cir. 1975).

208. *Id.* at 388 n.25 (quoting S. REP. NO. 296, 91st Cong., 1st Sess. 8, 20 (1969)).

209. Frieseman & Culhane, *Social Impacts, Politics, and the Environmental Impact Statement Process*, 16 NAT. RESOURCES J. 339, 345 (1976). Moreover, even when assessments do employ "soft" sciences, they are typically one-dimensional: "[t]he primary deficiency of social impact assessment in EIS's is that the statements usually consider only one social consequence—the economic impact of the project." *Id.* at 343.

210. Smardon, Palmer & Felleman, *Decision-Making Model for Visual Resource Management and Project Review*, in FOUNDATIONS FOR VISUAL PROJECT ANALYSIS 29 (1986). "The reader should note also that very few EIS's considered visual quality alternatives or detailed measures to minimize harm." *Id.*

211. Surveys also help satisfy NEPA's public participation requirements for the EIS process. See *supra* note 105 and accompanying text.

using methods such as surveys to assess aesthetics when they mandated that the EIS process focus on "presently unquantified environmental amenities and values. . . ." ²¹² Hence, the time has come for those who conduct impact assessment to embrace surveys as an important tool for ensuring a more well-rounded aesthetic policy.

3. Parallel Between NEPA and CEQA

After the passage of NEPA in 1969, the California state legislature took less than one year to enact its own version of the national law: the California Environmental Quality Act (CEQA). ²¹³ California modeled this exemplary "little NEPA" directly on the national model. ²¹⁴ At the macro-level, CEQA followed NEPA's lead in isolating aesthetics as an important environmental concern ²¹⁵ by declaring that the state policy is to "[t]ake all action necessary to provide the people of this state with . . . enjoyment of aesthetic, natural, scenic, and historic environmental qualities. . . ." ²¹⁶

The identical nature of the impact assessment process under NEPA and CEQA further highlights the influence of the federal legislation. In *Friends of Mammoth*, the California Supreme Court commented: "Not only does [sic] the timing and the titles of the two acts tend to indicate that the EQA was patterned on the federal act, the

212. 42 U.S.C. § 4332(2)(B) (1982).

213. CAL. PUB. RES. CODE §§ 21000-21177 (West 1986) (signed into law on September 18, 1970, less than 9 months after NEPA became effective on January 1, 1970). For a practically-oriented overview of each provision of CEQA, with annotations, see generally J. LONGTIN, CALIFORNIA LAND USE REGULATIONS (Supp. 1985).

214. The California Supreme Court in *Friends of Mammoth v. Bd. of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972), emphasized the NEPA-CEQA link via the following comparisons:

Indeed, much of the phraseology of the EQA is either adopted verbatim from or is clearly patterned upon the federal act. . . . Compare Pub. Resources Code, § 21100, subd. (a), and 42 U.S.C. § 4332 subd. (2)(C)(i); Pub. Resources Code, § 21100, subd. (b), and 42 U.S.C. § 4332 subd. (2)(C)(ii); Pub. Resources Code, § 21100, subd. (d), and 42 U.S.C. § 4332 subd. (2)(C)(iii); Pub. Resources Code, § 21100, subd. (e), and 42 U.S.C. § 4332 subd. (2)(C)(iv); Pub. Resources Code, § 21100, subd. (f), and 42 U.S.C. § 4332 subd. (2)(C)(v); Pub. Resources Code, § 21000, subd. (e), and 42 U.S.C. § 4331 subd. (c); Pub. Resources Code, § 21001, subd. (e), and 42 U.S.C. § 4321; Pub. Resources Code, § 21001, subds. (f) and (g), and 42 U.S.C. § 4332 subds. (2)(B) and (2)(D); Pub. Resources Code, §§ 21104 and 21105 and 42 U.S.C. § 4332 subd. (2)(C); Pub. Resources Code, § 21107 and 42 U.S.C. § 4333.

Friends of Mammoth, 8 Cal. 3d at 260-61 & n.4, 502 P.2d at 1057-58 & n.4, 104 Cal. Rptr. at 769-70 & n.4.

215. For the relevant NEPA provisions focusing on aesthetics, see text accompanying note 94.

216. CAL. PUB. RES. CODE § 21001(b) (West 1986).

key provision of the two acts, the environmental impact report is the same.”²¹⁷ Specifically, the administrative guidelines²¹⁸ implementing CEQA require the Environmental Impact Report (EIR) to “identify and focus on the significant environmental effects of the proposed project. . . . The discussion should include . . . changes induced in . . . other aspects of the resource base such as . . . scenic quality. . . .”²¹⁹ Besides the Guidelines’ reference to “scenic quality,” CEQA itself defines environment as “the physical conditions which exist within the area which will be affected by a proposed project, including . . . objects of historic or aesthetic significance.”²²⁰ Moreover, both pieces of legislation mandate meaningful public participation in the assessment process.²²¹ Finally, the Guidelines parallel NEPA by requiring that “[a]n EIR shall be prepared using an *interdisciplinary approach* which will ensure the integrated use of the natural and social sciences and the consideration of qualitative as well as quantitative factors.”²²²

The necessity for detailing how closely key provisions of CEQA mirror those found in NEPA arises primarily from the fact that judicial analysis at the state level often uses NEPA as a guide.²²³ Moreover, decision makers will be more willing to accept survey instruments which further both state and national policy goals. Thus, any serious attempt to introduce aesthetic-based citizen surveys into the California EIR process should be formulated with the parallel national framework in mind. Finally, since NEPA logic is a driving force behind aesthetic assessment at the state level generally,²²⁴ the CEQA-NEPA link enhances the applicability of the EIR example discussed below outside California.

217. 8 Cal. 3d at 260, 502 P.2d at 1057, 104 Cal. Rptr. at 769 (“Compare 42 U.S.C. § 4332, subd. (2)(C) with Pub. Resources Code, § 21100; *see also* Pub. Resources Code, §§ 21101, 21102, 21105, 21150, 21151.”).

218. CAL. ADMIN. CODE tit. 14, §§ 15000-15387 (1986) (“State EIR Guidelines”) [hereinafter Guidelines]. For a practically oriented overview of each provision of the Guidelines, with annotations, *see generally* J. LONGTIN, *supra* note 213.

219. CAL. ADMIN. CODE tit. 14, § 15126(A) [sic] (the correct section heading should be (a), not (A)). For a comparison of the NEPA provision focusing on “significant” effects, *see supra* text accompanying note 198.

220. CAL. PUB. RES. CODE § 21060.5 (West 1986).

221. *See supra* note 105 and accompanying text.

222. CAL. ADMIN. CODE tit. 14, § 15142 (1986) (emphasis added). For a comparison of the NEPA provision focusing on an interdisciplinary approach, *see supra* text accompanying note 206.

223. For the prime California example, *see* *Friends of Mammoth v. Bd. of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

224. For a reference to several “little NEPA’s” which specifically isolate aesthetics, *see supra* note 98.

4. Aesthetic-Based Citizen Surveys in the EIR Process

a. Is the Project Subject to CEQA?

The Guidelines outline a three-step process under which a public agency may ultimately be required to prepare an EIR.²²⁵ The first step is "to determine whether the project is subject to CEQA at all."²²⁶ Generally, a project falls outside the scope of CEQA if it fits within a categorical exemption.²²⁷ Since determining the exemption status is ministerial in nature, and thus often based on scant information, the use of surveys at this stage in the process would be both impractical and unnecessary.

To illustrate a theme of this comment, the CEQA exemption categories themselves follow a cultural-stability approach. For example, in *Dehne v. County of Santa Clara*,²²⁸ the court validated a categorical exemption for a plant modernization, the construction of which would utilize one-third of the present plant's six-acre site. The exemption at issue allowed for "[r]eplacement of a commercial structure with a new structure of substantially the same size, purpose and capacity."²²⁹ The court held that "'same site' must be construed in a way that includes structures of 'substantially' the same size, not precisely or literally the same size, as old structures. Obviously, the site need not be in exactly the same location if the new structure need not be exactly the same size."²³⁰ Thus, by allowing new projects to be exempt if they stay within the scope of a previous use, both in terms of general design and type of activity, CEQA avoids focusing on the distinct elements of visual appearance which often prove highly subjective. In other words, by placing statutory requirements only on projects which alter the *character* of the environment, CEQA adopted a cultural-stability mentality instead of one based on visual beauty.

225. CAL. ADMIN. CODE tit. 14, § 15002(k) (1986). For an excellent summary of the three-step process, see *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 183 Cal. App. 3d 229, 240-41, 227 Cal. Rptr. 899, 906-07 (1986). Also, for a comprehensive visual representation of the CEQA process, see CAL. ADMIN. CODE tit. 14, ch. 3 app. A (1986) ("CEQA Process Flow Chart").

226. CAL. ADMIN. CODE tit. 14, §§ 15002(k)(1) (1986).

227. "An extensive definition of the term 'project,' including a description of what the term does *not* include is contained in the Guidelines. . . . The project is the activity being approved, not the approval itself." J. LONGTIN, *supra* note 213, at 206 (emphasis in original). See CAL. ADMIN. CODE tit. 14, § 15378 (1986).

228. 115 Cal. App. 3d 827, 171 Cal. Rptr. 753 (1981).

229. *Id.* at 837 n.4, 171 Cal. Rptr. at 759 n.4 (citing CAL. ADMIN. CODE tit. 14, § 15102(b)) (current version at CAL. ADMIN. CODE tit. 14, § 15302(b) (1986)).

230. *Id.* at 837, 171 Cal. Rptr. at 759.

b. Initial Study

The second step under CEQA, for projects which are not otherwise exempt, is for the public agency to conduct "an initial study . . . to determine whether the project may have a significant effect on the environment."²³¹ As the *Carmel-by-the-Sea* court summarized:

There are two possible results of the initial study. "If the agency determines that there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment . . .," it must prepare an EIR, although it can use an existing EIR if one has been prepared which adequately analyzes the project at hand. . . . If, on the other hand, "the agency perceives no substantial evidence that the project or any of its aspects may cause a significant effect on the environment," the agency may prepare a negative declaration.²³²

The initial study is the earliest phase of the EIR process where the use of citizen surveys might be practical. While the Guidelines focus on the physical changes,²³³ rather than the social effects of a project, citizen surveys can be used as evidence of the "social effects of a project [which] may be used to determine the significance of physical changes caused by the project."²³⁴ As an illustration, suppose the fictitious region of Prosperous desires to continue the impressive expansion it has undergone in the past decade. Developer has applied to the controlling agency for approval to construct an office complex on a vacant hillside. However, some Prosperous residents oppose any more development which will destroy their rolling hills. Hence, visual impact assessment becomes crucial in deciding whether or not to prepare an EIR because the agency must be sensitive to the Guidelines' pronouncement that a project may well have a significant effect on the environment if it will "[h]ave a substantial and demonstrable negative aesthetic effect."²³⁵ Thus, the results of a citizen survey might give the agency preparing the initial study a valuable gauge of the project's aesthetic significance by detailing the community's perception of the proposed physical changes.

The main stumbling-block to an effective use of surveys during this

231. CAL. ADMIN. CODE tit. 14, § 15002(k)(2) (1986). For a description of the initial study requirement, see *id.* § 15063.

232. *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 183 Cal. App. 3d 229, 241, 227 Cal. Rptr. 899, 907 (quoting CAL. ADMIN. CODE tit. 14, § 15063(b)(1), (2) (1986)). After the public agency adopts the negative declaration, and there is a mandatory public review, the decisionmakers must consider and approve the document before granting final approval to the project in question. CAL. ADMIN. CODE tit. 14, ch. 3 app. A (1986) ("CEQA Process Flow Chart").

233. CAL. ADMIN. CODE tit. 14, § 15131(a) (1986).

234. *Id.* § 15131(b). "For example, if the construction of a new freeway or rail line divides an existing community, the construction would be the physical change, but the social effect on the community would be the basis for determining that the effect would be significant." *Id.*

235. Comment, *Environmental Decision Making Under CEQA: A Quest for Uniformity*, 24 UCLA L. REV. 838, 859 n.110 (1977) (quoting CAL. ADMIN. CODE tit. 14, § 15081(c) (1976)) (current version at CAL. ADMIN. CODE tit. 14, ch. 3 app. G (1986)).

early stage is the short time frame: the initial study must be completed within forty-five days after the agency accepts a completed project application.²³⁶ While it would be nearly impossible to implement a standard survey in forty-five days,²³⁷ two innovative alternatives should be considered: master environmental assessments and mini surveys.

Regarding the first option, the Guidelines provide: "A public agency may prepare a master environmental assessment, inventory, or data base for all, or a portion of, the territory subject to its control. . . . Neither the content, the format, nor the procedures to be used to develop a master environmental assessment are prescribed by these guidelines."²³⁸ Besides serving as a "central source of current information" regarding EIR's and negative declarations,²³⁹ "[a] master environmental assessment may provide information agencies can use in *initial studies* to decide whether certain environmental effects are likely to occur and whether certain effects will be significant."²⁴⁰ Concerning Developer's project application in the Prosperous hypothetical, such an elaborate assessment process would be ineffective due to time constraints. However, since Prosperous anticipates future development, an overall appraisal of the aesthetic environment might prove extremely valuable in future cases. In other words, by establishing a data base which details community sentiment on the aesthetics of Prosperous, agencies making land use decisions in the future inherit an established information tool.

The use of mini surveys²⁴¹ may also be helpful in the initial study phase. First, a mini survey may be used to augment a master environmental assessment by clarifying and substantiating the existing data pool.²⁴² Second, a mini survey can be used in isolation to obtain

236. CAL. ADMIN. CODE tit. 14, § 15102 (1986).

237. For a discussion regarding the general time constraints on survey use, see *supra* note 113 and accompanying text.

238. CAL. ADMIN. CODE tit. 14, § 15169(a) (1986).

239. *Id.* § 15169(d)(3).

240. *Id.* § 15169(d)(2) (emphasis added).

241. For a description of mini surveys, including the relevant statistical logic, see *supra* notes 169-70 and accompanying text.

242. The concept of baseline is relevant here. By using the principal survey as a reference point, the decision maker may document the direction of any community-wide changes in attitude. For example, a mini survey may reveal that residents feel stronger about preserving open spaces than they did in the primary study five years ago. Thus, the agency presently conducting the initial study will find it easier to deem an open space project as aesthetically significant. For a discussion of the baseline purpose of surveys, see *supra* note 148-50 and accompanying text. Also, for the British perspective on the baseline concept, see *infra* text accompanying note 318.

a rough estimate of community sentiment. For instance, the agency may poll forty households in Prosperous regarding the aesthetic consequences of the proposed project. While the representativeness of such a survey is somewhat limited, the results obtained can provide a helpful indicator of how those in the region actually feel.²⁴³ Moreover, mini surveys often function as an effective filter in a large-scale research project, such that subsequent surveys will be designed to focus on the issues highlighted in the mini survey.²⁴⁴

c. Preparation and Review of the EIR

Once the agency has determined that a project has a significant environmental effect, it must prepare an EIR as the third and final step in the process.²⁴⁵ The *Carmel-by-the-Sea* court offered a concise summary of this phase by stating: "In general terms the EIR process provides for extensive research and information gathering, consultation with other state, federal and local agencies and with persons or organizations directly concerned, public review and comment, evaluation and response to comments, and detailed findings."²⁴⁶ There are two points in this final phase where input from surveys might be especially useful: during preparation of the draft EIR and the ensuing public review.²⁴⁷

i. Draft EIR

The agency, or its contractor,²⁴⁸ first presents the often massive²⁴⁹

243. "Mini surveys are less precise in measuring parameters than full-scale surveys but they often are adequate for policy making purposes." Finsterbusch, *supra* note 169, at 296.

244. This filtering approach to survey research is exemplified in the following passage: "The basic idea is to dynamically integrate field work, questionnaire construction, and analysis. In this manner learning and feedback can occur throughout the study. Blind alleys are discovered and dropped early and profitable avenues are vigorously pursued." *Id.*

The Guidelines adopt a parallel filtering logic: "Effects dismissed in an Initial Study as clearly insignificant and unlikely to occur need not be discussed further in the EIR. . . ." CAL. ADMIN. CODE tit. 14, § 15143 (1986). Additionally, as a technique for making the EIR process more efficient, the Guidelines suggest: "Using initial studies to identify significant environmental issues and to narrow the scope of EIRs." *Id.* § 15006(d) ("Reducing Delay and Paperwork").

245. *Id.* § 15002(k)(3).

246. *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 183 Cal. App. 3d 229, 241, 227 Cal. Rptr. 899, 907 (1986). "Suffice it to say, 'the EIR requirement is the heart of CEQA.'" *Id.* (citing *San Franciscans for Reasonable Growth v. City of San Francisco*, 151 Cal. App. 3d 61, 72, 198 Cal. Rptr. 634, 639 (1984)).

247. See generally CAL. ADMIN. CODE tit. 14, ch. 3 app. A (1986) ("CEQA Process Flow Chart").

248. "The draft EIR shall be prepared directly by or under contract to the lead agency." *Id.* § 15084(a).

249. The Guidelines reflect the possible size of the document in the expansive page limit requirements: "The *text* of draft EIRs should normally be less than 150 pages and for proposals of unusual scope or complexity should normally be less than 300

EIR document as a draft. Use of citizen surveys may prove valuable in the preparation of the draft EIR because of the pressing need to document all relevant views on the project. The California Supreme Court in *Woodland Hills Residents Association v. City Council*,²⁵⁰ outlined this necessity:

It must be apparent that in serving the policy of CEQA it is necessary to secure all conflicting views prior to preparation of even a draft EIR. Once a draft has been prepared by persons who have not had full opportunity to be apprised of all conflicting views, it becomes more difficult for those persons to accept at full value new views necessarily critical of the draft. Such contrary views cannot be weighed with the same objective balance had they been considered at the time of initial presentation.²⁵¹

Specifically, survey data might be valuable in describing two required elements of a draft EIR: the proposed project's environmental setting and environmental impact.²⁵² As to the first requirement:

An EIR must include a description of the environment in the vicinity of the project, as it exists before the commencement of the project, from both a local and regional perspective. . . . Knowledge of the regional setting is critical to the assessment of environmental impacts. Special emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project.²⁵³

While a trained professional could surely detail the topography and visual features of an area, a survey would be vital to describing how residents of the affected community perceive the aesthetic setting. The values which residents attach to their region's aesthetics serve as a lens which helps properly focus the assessment of proposed changes. In other words, the significance of an impact depends upon whose eyes one is looking through.²⁵⁴ Thus, a citizen survey can present an enhanced appreciation of the community's vision.

Returning to the hypothetical construction project in Prosperous,²⁵⁵ survey results might be included in the draft EIR in order to better present the environmental setting. Adopting a cultural-stabil-

pages." *Id.* § 15141 (emphasis added). An EIR must be a suitable girth in order to satisfy most courts. Regarding an inadequate two-page attempt, an appellate court stated: "This document resembles an EIR as mist resembles a Colorado cloudburst." *J. LONGTIN, supra* note 213, at 234 (quoting *City of Coronado v. California Coastal Zone Conservation Comm'n*, 69 Cal. App. 3d 570, 583, 138 Cal. Rptr. 241, 249 (1977)).

250. 26 Cal. 3d 938, 609 P.2d 1029, 164 Cal. Rptr. 255 (1980).

251. *Id.* at 950, 609 P.2d at 1035, 164 Cal. Rptr. at 262.

252. For details of the EIR content requirements, see CAL. ADMIN. CODE tit. 14, §§ 15120-15132 (1986).

253. *Id.* § 15125(a).

254. "By themselves, words, gestures, symbols, and objects are meaningless; only people make them meaningful." E. PHILLIPS & R. LEGATES, *supra* note 91, at 240.

255. See *supra* text accompanying notes 235-244.

ity approach, the relevant survey section might include this illustrative sequence:

Please indicate your agreement with the following statements by ranking them from 1 to 3 (with 1 being the strongest agreement):

1) I think Prosperous should allow the development of hillsides:

- a) For commercial projects which will increase the tax base and create new jobs within the region.
- b) If the project design parallels the prevailing style of construction in the surrounding area.
- c) Never, because unspoiled hills are just too beautiful.

The ranking of these statements indicates the strength and character of a respondent's attachment to the hillsides of Prosperous.²⁵⁶ For instance, a person ranking statement "a" as highest gives preference to the project's economic benefits over its aesthetic consequences. Alternatively, a person choosing "b" as number one has strong aesthetic feelings oriented toward maintaining the community's design continuity. Finally, a person preferring "c" attaches a great deal of aesthetic value to the hillsides. By determining how the community feels about its hillsides, the agency preparing the EIR can more reliably outline the project's aesthetic setting.

Regarding the second required EIR element mentioned above, the paramount environmental impact requirement, there are three key components: "The Significant Environmental Effects of the Proposed Project. . . . Mitigation Measures Proposed to Minimize the Significant Effects. . . . [and] Alternatives to the Proposed Action."²⁵⁷ Again, a citizen survey might prove useful in enhancing the presentation. First, as illustrated in the preceding paragraph, in order to most appropriately attach significance to an aesthetic impact it is necessary to determine how the community feels about the existing resource. Second, the effectiveness of an aesthetic mitigation measure can best be gauged by looking at the responses of those who will view the completed project. Third, the viability of alternatives must be considered in light of the community's preferences. Especially regarding the exploration of alternatives, the value of the EIR process can be destroyed if decisions are based on inadequate information. The classic example is approval of an unpopular alternative where a simple survey would have disclosed that citizens actually found it more aesthetically objectionable than the original proposal.

As a concrete illustration of addressing impacts, another section of the Prosperous questionnaire illustrated above might focus on the aesthetic consequences of the project. In this part of the survey, the

256. For a general discussion of response measurement, including another example of this type of attitude rating, *see supra* notes 171-81 and accompanying text.

257. CAL. ADMIN. CODE tit. 14, § 15126(A) [sic], (c), (d) (1986) (the correct section heading should be (a), not (A)).

respondent would be presented with visual stimuli depicting Developer's proposal and several creative alternatives, e.g., building design and lot placement options. Next, the respondent would be asked to rate the aesthetic desirability of each.²⁵⁸ A cultural-stability focus is maintained by inquiring into the overall desirability of an option, not its relative "beauty." Additionally, the survey might employ a follow-up question to further ensure a valuable cultural-stability result. For example, after each desirability rating, this sequence might appear:

Which of the following factors most influenced your rating:

- a) The type of use associated with such a building.
- b) The compatibility of building design with the neighborhood.
- c) The effect on the overall appearance of the hillside.

The responses here help identify which associational bonds are threatened by the new entrant. A choice of "a" indicates an aesthetic feeling heavily influenced by the purpose for a structure. A selection of "b" revolves around the continuity of design within the community. Lastly, where "c" is selected, it indicates a landscape-oriented perspective. By employing this method, the decision-maker can gain an insight into the community's perception of a project's impact. Moreover, the survey will yield information about the underlying factors influencing a particular perception of aesthetic change. This utilitarian process will result in more feasible and community-oriented mitigation measures and alternatives.

ii. Public Review and Comments

While the agency preparing the draft EIR has no duty to seek public comments before the document is complete,²⁵⁹ a key interactive phase of the EIR process is the ensuing mandatory public review and comment.²⁶⁰ This stage represents a golden opportunity for the no-change constituency to utilize citizen surveys. Essentially, after notice is given that the draft EIR is complete and available for re-

258. For an explanation of perception rating, including two format examples, see *supra* notes 173-75 and accompanying text.

259. CAL. PUB. RES. CODE § 21082.1 (West 1986). In 1981 this section was amended in order to clarify any uncertainties which may have resulted from the California Supreme Court decision in *Woodland Hills Residents Ass'n v. City Council*, 26 Cal. 3d 938, 609 P.2d 1029, 164 Cal. Rptr. 255 (1980). Thus, while the agency must consider all comments received in preparing the draft EIR, it has no affirmative duty to seek comments from organizations or individuals prior to the public review stage. For a discussion of *Woodland Hills*, see *supra* text accompanying notes 250-51.

260. CAL. ADMIN. CODE tit. 14, § 15087 (1986) ("Public Review of Draft EIR").

view,²⁶¹ the public has between thirty and ninety days in which to formally comment.²⁶² At this point, the agency has a statutory obligation to respond to comments in the final EIR by either revising the appropriate provisions or creating a separate section solely for such responses.²⁶³ The key for those opposing the new entrant, or even those merely desiring a modification of the original proposal, revolves around the agency's duty to specifically respond: "[T]he comments must be addressed in detail giving reasons why specific comments and suggestions were not accepted. There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice."²⁶⁴

Using the Prosperous development scenario to illustrate the use of surveys at the draft stage, the neighbors who want to preserve their "rolling hills" would want to comment on the undesirable aspects of the draft EIR by offering survey data indicating a community-wide desire to maintain the hillside aesthetics of Prosperous. This no-change constituency would employ the same type of questions as the agency would in preparing the EIR. The mechanism which makes this aspect of the process so profitable is that the agency must specifically address responsibly submitted comments. Hence, the more accurate the data, the more formidable an obstacle it presents for the decision maker. Thus, if the neighbors actually obtain the "save the hills" results they are looking for, the agency must seriously formulate additional mitigation or alternative options.

Two last comments are required to complete the discussion of the EIR process. First, as the final step, the agency must certify "that: (a) The final EIR has been completed in compliance with CEQA; and (b) The final EIR was presented to the decisionmaking body of the lead agency and that the decisionmaking body reviewed and considered the information contained in the final EIR prior to approving the project."²⁶⁵ Second, there is a one-year maximum time frame for completing the entire EIR process, beginning with acceptance of a completed application and continuing until certification of the final EIR.²⁶⁶ This time allowance would accommodate both the use of

261. Regarding the notice procedures:

Notice shall be given to all organizations and individuals who have previously requested such notice and shall also be given by at least one of the following procedures: (1) Publication. . . . (2) Posting . . . on and off site. . . . [and] (3) Direct mailing to owners of property contiguous to the parcel or parcels on which the project is located. . . .

Id. § 15087(a)(1)-(3).

262. *Id.* § 15087(c).

263. *Id.* § 15088(c).

264. *Id.* § 15088(b).

265. *Id.* § 15090.

266. *Id.* § 15108. The practicability of the one-year time frame is subject to debate. See generally Sahm, *Project Approval Under the California Environmental Quality*

surveys in the draft EIR stage and during the ensuing review and comment phase.²⁶⁷

B. Impact Assessment in England

At one end of the environmental impact assessment scale lies the United States, with NEPA and its state equivalents representing a highly formalized system of impact assessment.²⁶⁸ At the other end of the scale, regarding developed countries, lie Italy and Greece which have virtually no impact analysis mechanisms.²⁶⁹ Somewhere between these extremes is the British system. The distinguishing factor for the Anglo approach is that in England "it is the planning system that provides the focus for environmental assessment. . . ."²⁷⁰ Thus, a rudimentary grasp of the British planning system is necessary for a proper consideration of aesthetic-based impact assessment there. After years of ineffective planning controls,²⁷¹ a post-war Parliament promulgated the modern approach:

Act: It Always Takes Longer Than You Think, 19 SANTA CLARA L. REV. 591 (1979). Specifically: "The County Supervisors Association of California (CSAC) pointed out the impossibility of a one-year deadline on EIR's in a letter to Assemblyman McCarthy (sponsor of A.B. 884) in April, 1977, well before the bill [retaining it] was passed and signed in September, 1977." *Id.* at 593 n.71.

Also, because there is no penalty outlined in the Guidelines, there is confusion about the consequences of exceeding the one-year maximum: "Reading CEQA alone, it can only be assumed either that work stops with no decision on the project, that there is no complete EIR and the sponsor must reapply to start a new year, or that the deadline is ignored and work on the EIR continues." *Id.* at 593.

267. For a discussion of the general time constraints on survey use, see *supra* note 113 and accompanying text.

Regarding the feasibility of using survey results for public comment, while the actual review period is only between 30 and 90 days, CAL. ADMIN. CODE tit. 14, § 15087(c) (1986), the person or group wishing to use such results would have the entire period from the notice of preparation of the draft EIR, *id.* § 15082(a), until the date set by agency when all comments are due.

268. For a detailed discussion of NEPA and its California counterpart, see *supra* notes 197-267 and accompanying text.

269. "In Italy the existing environmental protection measures are extremely fragmented and unco-ordinated and there is little provision for public consultation. The same only more so can be said of Greece." Haigh, *The EEC Directive on Environmental Assessment of Development Projects*, 1983 J. PLAN. & ENV'T L. 585, 591 (emphasis in original).

270. *Id.* As a collateral note, France adopted the American approach, rather than Britain's reliance on the planning system for impact analysis, and thus "was the first European country to follow the United States model and to introduce legislation requiring an *étude d'impact*—a single public document giving prescribed information about environmental effects. . . ." *Id.* at 590.

271. The earlier planning system was defective because: "It was optional on local authorities; planning powers were essentially regulatory and restrictive; such planning as was achieved was purely local in character; the central government had no effective

The 1947 Town and Country Planning Act brought almost all development under control by making it subject to planning permission. But planning was to be no longer merely a regulative function. Development plans were to be prepared for every area in the country. These were to outline the way in which each area was to be developed or, where desirable, preserved.²⁷²

Essentially, "[t]he system was designed to guide urban redevelopment, town expansion and new town construction, while preserving the countryside."²⁷³ Yet modernly, this three-pronged approach has deteriorated into a one-dimensional focus:

To the local authority land use planner of 1980, development control is at the heart of the system. . . . Not much remains of the work on slum clearance and urban renewal which occupied him in the 1960s and his role in managing the land market, so vital to the 1947 Act, is largely ignored.²⁷⁴

Finally, under the 1947 centralized system, planning authorities were given such broad powers that even today their function remains highly discretionary.²⁷⁵

1. Aesthetics and "Amenity"

Using large-scale development projects as a focal point, recent literature abounds with instances of how aesthetic-based concerns often lie at the heart of English land use conflicts.²⁷⁶ Yet, the for-

powers of initiative, or of co-ordinating local plans. . . ." J. CULLINGWORTH, *TOWN AND COUNTRY PLANNING IN BRITAIN* 15 (9th ed. 1985).

272. *Id.* at 16. See generally Town and Country Planning Act, 1947, 10 & 11 Geo. 6, ch. 51, amended by Town and Country Planning Act, 1971, ch. 78. "As one commentator has put it, the Act contained some of the most drastic and far-reaching provisions ever enacted affecting the ownership of land." D. BARNSELY, *CONVEYANCING LAW AND PRACTICE* 174 (1973) (quoting HEAP, *AN OUTLINE OF PLANNING LAW* 12 (5th ed.)).

273. P. HEALEY, *LOCAL PLANS IN BRITISH LAND USE PLANNING* 40 (1983).

274. *Id.* at 38.

275. "[O]verseas commentators, particularly Americans, find the wide discretion with which development control powers are exercised hard to understand. . . . The explanation, of course, is that it derives from the 1947 conception when the public sector was expected to dominate development activity." *Id.* Similarly: "The authority have considerable discretion in this matter. Though they must have regard to the provisions of the development plan' they may take 'any other material considerations' into account." J. CULLINGWORTH, *supra* note 271, at 78.

276. See, e.g., TOWN AND COUNTRY PLAN. ASS'N, 1986 ANNUAL REPORT 7-8 (1987) (as to the proposed 10 million square foot Canary Wharf office development scheme, to be located several miles down the Thames River from the heart of London, one of the voiced concerns was "[m]assive scale—the three 850 feet high tower blocks envisaged would have a visually dominating effect and some views of international importance would be destroyed, notably those northward from Greenwich Park."); *Protest at Dumping at White Cliffs*, *The Times* (London), Oct. 15, 1986, at 5, col. 8 (regarding dumping up to 1.8 million cubic meters of spoil excavated from the proposed Channel Tunnel project, which would physically link England with France, at the foot of Shakespeare Cliff in Dover: "Environmentalists fear the proposed new land mass may destroy the area's natural beauty."); King, *Skyline Change Likely to Go Ahead*, *The London Standard*, Sept. 1, 1986, at 10, col. 1 (as part of a continuing battle to create a new office block in the core of the City (downtown London), the developer's second and third options to the proposed 290 foot tower (which Prince Charles dubbed "another glass stump") resulted from commissioning a new architect "to design two alternatives which will make less impact on the City skyline.").

eigner must be careful of terminology in this area because British planning authorities utilize the term "aesthetics" narrowly to mean "visual beauty." A strongly worded Department of the Environment circular exemplifies this view:

Planning authorities should recognize that aesthetics is an extremely subjective matter. They should not therefore impose their tastes on developers simply because they believe them to be superior. Developers should not be compelled to conform to the fashion of the moment at the expense of individuality, originality or traditional styles.²⁷⁷

However, beyond harshly criticizing a general visual beauty approach to planning, the circular outlines a crucial exception which easily accommodates the modern cultural-stability mentality:

Nevertheless, control of external appearance can be important especially for instance in environmentally sensitive areas such as national parks, areas of outstanding natural beauty, conservation areas and areas where the quality of environment is of a particularly high standard. Local planning authorities should reject obviously poor designs which are out of scale or character with their surroundings.²⁷⁸

Thus, where governmental mechanisms determine that an area's visual component is unusually valuable, e.g., designation as an Area of Outstanding Natural Beauty (AONB),²⁷⁹ planners are encouraged to actively formulate and implement an aesthetic policy which focuses on the scale and character of the existing resource.

277. DEP'T OF THE ENV'T, CIRCULAR NO. 22/80, ¶ 20 (1980), *quoted in* J. CULLINGWORTH, *supra* note 271, at 133-34.

278. J. CULLINGWORTH, *supra* note 271, at 134.

279. As of 1979, the National Parks Commission had designated 33 separate Areas of Outstanding Natural Beauty [hereinafter AONB] in England and Wales, with the first such designation being Gower in 1956. The AONB's range in size from Scilly Isles (16 square kilometers) to North Wessex Downs (1,738 square kilometers). The total area so far designated (14,493 square kilometers) represents 9.6% of the total area of England and Wales (151,096 square kilometers). *Id.* at 206.

A comparison of AONB's with national parks gives some context to the relevant designation: "National parks in this country are not vast reserves of the kind found in Africa or America. They are areas of designated land in which ordinary rural life, rural industry and afforestation continue normally." *Id.* at 202. Furthermore: "Areas of outstanding natural beauty are generally smaller than national parks. . . . In contrast to national parks, however, the emphasis in areas of outstanding natural beauty is on the conservation of landscape beauty." *Id.* at 205.

Finally, on a more pessimistic note, recent studies have cast doubts on the effectiveness of the AONB designation:

Blacksell and Glig (1977) conclude that in an area designated as an Area of Outstanding Natural Beauty (AONB) in Devon, there was actually a higher rate of approval of applications within the AONB than outside, although more conditions were attached to permissions. A similar picture was found by Preece (1979) in the Cotswolds AONB, although he concludes that though development has not been more restricted than elsewhere, design standards have been raised.

P. HEALEY, *supra* note 273, at 41.

While elements falling under the Anglo interpretation of aesthetics may properly justify many governmental actions,²⁸⁰ the notion of "amenity" is crucial to a realistic understanding of British planning law.²⁸¹ As a starting point, Parliament has never seen fit to define the term.²⁸² Hence, the favored definition of the concept remains a 1919 formulation by Lord Justice Scrutton: "The word 'amenity' . . . appears to mean 'pleasant circumstances or features, advantages.'"²⁸³ As modern usage has extended it, "[t]he word may be taken to express that element in the appearance and lay-out of town and country which makes for a comfortable and pleasant life rather than a mere existence. . . ."²⁸⁴ A sampling of land uses which are controlled in the name of amenity might include: unsightly neglected wasteland, preservation of trees, and "[p]oor architecture, ill-conceived schemes, [and] 'mock-Tudor' frontages. . . ."²⁸⁵ Additionally, the concept of amenity is vital to the extensive English regulation of advertisements,²⁸⁶ especially where the area warrants special attention:

In some areas, for example, national parks or near a cathedral, it may be desirable virtually to prohibit all advertisements of the poster type and seriously to restrict other advertisements including those normally displayed by the ordinary trader. Accordingly, local planning authorities have power to define "areas of special control" where "special protection on grounds of amenity" is thought desirable.²⁸⁷

Amenity may also encompass a scenic setting, such as a countryside landscape.²⁸⁸ Thus, while planning for purely *aesthetic* grounds is modernly disfavored, the British planning system encourages effective policy decisions where the visual components of *amenity* are at issue.

280. For example, the designation of northeastern England's breathtaking Northumberland Coast as one of the country's first AONB's, J. CULLINGWORTH, *supra* note 271, at 206, is a decision easily justified on visual beauty grounds alone.

281. "'Amenity' is one of the key concepts in British town and country planning. . . ." *Id.* at 122.

282. *Id.*

283. *Ellis v. Ruislip-Northwood Urban Dist. Council*, 1 K.B. 343, 370 (C.A., 1919). For authoritative quotations of this exact definition, see 46 HALSBURY'S LAWS OF ENGLAND 311 n.2 (4th ed. 1984); 51 HALSBURY'S STATUTES OF ENGLAND 1167 (3rd ed. 1981).

284. 51 HALSBURY'S STATUTES OF ENGLAND 1167 (3rd ed. 1981).

285. J. CULLINGWORTH, *supra* note 271, at 122.

286. For the basic statutory scheme regarding the control of advertisements, see Town and Country Planning Act, 1971, Ch. 78, § 63.

287. J. CULLINGWORTH, *supra* note 271, at 126. For a discussion of the controlling American view on restricting advertisements, especially where commercial and non-commercial speech are treated separately, see *supra* notes 62-65 and accompanying text. For an overview regarding aesthetic and freedom of speech concerns in the control of American advertising, see generally Meiselman, *supra* note 65.

288. For example, planning agencies were given the statutory power to enter into management agreements with private landowners "for the purpose of conserving or enhancing the natural beauty or amenity of any land which is . . . in the countryside. . . ." McCoubrey, *Countryside Conservation and The Wildlife and Countryside Act 1981*, 132 NEW L.J. 826 (1982) (quoting the Wildlife and Countryside Act, 1981, ch. 69, § 39(1)).

2. Conservation Areas

Under the 1971 Town and Country Planning Act, local authorities are required to determine "which parts of their area are areas of special historic or architectural interest the character or appearance of which it is desirable to preserve or enhance, and [to] designate such areas as conservation areas."²⁸⁹ Governmental control over the physical aspects of these special areas stems from a community-wide desire to maintain existing resources. In other words, "public opinion is now overwhelmingly in favor of conserving and enhancing the familiar and cherished local scene."²⁹⁰ While the visual beauty aspects of a conservation area are an inevitable concern,²⁹¹ the true focus centers upon relevant cultural-stability components.²⁹² This reality prompted the Department of Environment to set forth the parameters of conservation areas in the following terms:

They may be large or small, from whole town centres to squares, terraces and smaller groups of buildings. They will often be centred on listed buildings, but not always. Pleasant groups of other buildings, open spaces, trees, an historic street pattern, a village green, or features of archaeological interest may also contribute to the *special character of an area*. Areas appropriate for designation as conservation areas will be found in almost every town and many villages. It is the *character of areas, rather than individual buildings*,

289. Town and Country Planning Act, 1971, ch. 78, § 277(1).

290. DEP'T OF THE ENV'T, CIRCULAR NO. 2377, 4 (1977), *quoted in* Mynors, *Conservation Areas—I: Protecting the Familiar and Cherished Local Scene*, 1984 J. PLAN. & ENV'T L. 144, 145.

291. *See, e.g.*, LONDON BOROUGH OF BARNET, MONKEN HADLEY CONSERVATION AREA: ARTICLE 4 DIRECTION (1983) (extensive guidance to area residents, regarding structural changes such as extensions, windows, porches, driveways, location of oil tanks, and fencing, via descriptive text and side-by-side illustrations showing correct and inappropriate construction alternatives).

292. The following excerpt describing the Monken Hadley Conservation Area exemplifies the cultural stability focus:

At the center of Monken Hadley is St. Mary's Church around which are grouped cottages and fine large houses rich in *historical associations*. Within the area there are twenty-five buildings of architectural or historic interest and many others which contribute to the pleasing *character and appearance* of this part of Barnet.

... In a Conservation Area it is especially important for the Local Planning Authority to safeguard the pleasant and *distinctive character* of the neighbourhood.

The *character and charm* of Monken Hadley is largely determined by the quality of its individual buildings and their *relationship to each other*. The informal arrangement of houses around Hadley Green and Hadley Common suggests a natural form of development which harmonizes well with the landscape of the area to produce an attractive and balanced composition.

LONDON BOROUGH OF BARNET, MONKEN HADLEY CONSERVATION AREA: ARTICLE 4 DIRECTION (1975) (emphasis added).

that section 277 of the 1971 Act seeks to preserve or enhance.²⁹³

Thus, a strict visual beauty approach, which parallels the modern British definition of aesthetics, is inappropriate for assessing the impacts of the visual changes in a conservation area. However, by adopting a cultural-stability mentality, which focuses on associational bonds, the controlling local authority can enhance its ability to assess the aesthetic consequences of land use actions in sensitive conservation areas.

a. Public Participation

Public opinion—your opinion—is of the utmost importance in the making of planning decisions. Elected members and officers go to considerable lengths to find out what you think about the issues and problems facing us in planning and to discover your reaction to the proposed solutions. The City does not belong to the Council much less the Planning Committee. It is your City and your views matter.²⁹⁴

The above passage reflects an effort on the part of city officials to come to grips with the growing realization that public participation is essential to modern British land use decisions.²⁹⁵ Granted, in the preparation of nearly forty-one percent of local planning instruments there is some form of citizen involvement.²⁹⁶ However, traditional

293. DEP'T OF THE ENV'T, CIRCULAR NO. 23/77, ¶ 32 (1977), *quoted in* Mynors, *supra* note 290, at 146 (emphasis added).

As an explanatory note regarding listed buildings:

Under planning legislation, the central departments maintain lists of buildings of 'special architectural or historic interest.' There are two objectives here. First, 'listing' is intended to provide guidance to local planning authorities in carrying out their planning functions. . . . Secondly, and more directly effective, when a building is listed no demolition or alternation which would materially alter it can be undertaken by the owner without the approval of the local authority.

J. CULLINGWORTH, *supra* note 271, at 127-28 (footnote omitted).

In 1978, there were 260,000 listed buildings in England and Wales. *Id.* at 128. By the end of 1982, the total number of listed buildings had grown to 282,795. *Current Topics*, 1983 J. PLAN. & ENV'T L. 425. By the end of 1984 the total had climbed to 338,079. *Current Topics*, 1985 J. PLAN. & ENV'T L. 517, 519. Finally: "When the re-survey of buildings which was instituted by the Secretary of State in 1980 is completed, (and this is expected during 1987), the number of buildings which will be listed is expected to be in the region of 500,000. *Id.*

For a comparison with historic preservation in the United States, *see generally* Rose, *supra* note 16; Comment, *Cultural Ecology: The Urban Landmark as an Environmental Resource*, 11 U.S.F. L. REV. 720 (1977). Regarding the same topic in California, *see generally* J. O'CONNELL, T. OWEN & M. WARNER, *HISTORIC PRESERVATION IN CALIFORNIA* (1982); Gray, *A Guide to Historic Preservation for the California Practitioner* [sic], 21 SANTA CLARA L. REV. 613 (1981).

294. J. CULLINGWORTH, *supra* note 271, at 317 ("This passage comes from the foreword to *Planning for Leicester*, a publication of the Leicester City Council, which is aimed at explaining the planning process and seeking the participation of the Leicester citizens in it.") *Id.*

295. Succinctly stated: "The point is basically a simple one: planners cannot effectively move too far ahead of public opinion." *Id.* at 318.

296. Bruton & Nicholson, *The Use of Non-statutory Local Planning Instruments in Development Control and Section 36 Appeals—I*, 1984 J. PLAN. & ENV'T L. 552; 562.

methods seem unable to produce a sufficient quality of public participation.²⁹⁷ Recently, a leading authority summarized the British planning process: "One general conclusion is that central government, the courts, local authorities, business interests and planners have exerted considerable influence, while the public, apart from environmental pressure groups, have had little impact on the outcome of planning policy."²⁹⁸

Regarding decision-making for conservation areas, citizen surveys represent a valuable means of complementing existing public participation methods. The basic issue centers on which alterations should be allowed where the designation of "conservation" necessarily implies preservation.²⁹⁹ While this pressure to preserve is paramount, the words of former Environment Secretary Patrick Jenkin, regarding a proposed downtown office building, typify the opposing sentiment: it would be "wrong to attempt to freeze the character of the City of London for all time."³⁰⁰ Thus, by using surveys to obtain an accurate appraisal of community feelings, the decision-maker improves his ability to preserve the existing resource while accommodating the ever increasing winds of change.³⁰¹ Moreover, through focusing the survey instrument on an area's cultural-stability elements,³⁰² the researcher creates an inherently more manageable information base.

The relevant instruments, and degree of public participation for each, are as follows: Informal Local Plans (73.4%), Special Area Work (54.8%), Single Topic-based Framework (41.1%), Other Policy Framework (36.6%), Local Plan Briefs (36.2%), Development Briefs (26.6%), Informal Joint Studies (24.2%), Design Guides (21.4%), Development Control Notes (15.7%), and Unspecified (4.3%). *Id.*

297. In formal planning inquiries, for example: "The ponderous and measured ceremonial is meant to make sure that everyone has a fair hearing. But it can easily reinforce the fears held by many local people. Local objectors complain again and again that the odds are stacked against them." *Planning Controls: 1, Inquiries Become Their Own Industry*, *The Times* (London), Oct. 13, 1986, at 5, col. 1.

298. P. HEALEY, *supra* note 273, at 42.

299. "In most neighbourhoods permitted development will have no marked effect upon the general environment but in a conservation area, which has special aesthetic significance, even a minor change could have unfortunate consequences and may spoil a particularly pleasing prospect." LONDON BOROUGH OF BARNET, *supra* note 291.

300. King, *supra* note 276.

301. Regarding the developmental pressures on conservation areas: "The changing demands of society and the modern desire for more spacious accommodation for both residential and other uses have created an increasing pressure for the rebuilding and extension of existing buildings." LONDON BOROUGH OF BARNET, *supra* note 292.

302. For example, the rich "historical associations" of Monken Hadley's cottages. *See id.*

b. Village of North Cave Illustration

North Cave is a pleasant village of about 385 houses with a population of approximately 1200. . . . Part of North Cave was in 1974 designated a Conservation Area in the hope that this would help preserve its best features and that new buildings would be planned to harmonize with the rest of the village.³⁰³

North Cave lies in the Borough and District of Boothferry, Humberside County, England.³⁰⁴ The opening sentence of the "Environment" section of the Humberside Structure Plan³⁰⁵ summarizes the general setting: "Humberside is a pleasant place in which to live and work, with its attractive country-side, long coastline, and historic towns and villages."³⁰⁶ Moreover, since the county has seventy-two conservation areas, often centered upon one or more of its 2,277 listed buildings and 230 scheduled ancient monuments ("including former Roman settlements and the sites of medieval villages"),³⁰⁷ preservation and enhancement concerns are always an important element in land use decisions. Hence, regarding the conservation areas, the controlling provision of the Structure Plan mandates that "any new development nearby must of course be sympathetic in scale, design and use."³⁰⁸

In North Cave, the Borough Council recently promulgated a set of development control guidelines concerning land use.³⁰⁹ The control guidelines "provide a framework within which to consider applications for residential development in North Cave. . . ."³¹⁰ Beyond outlining key features of the village which any development must

303. NORTH CAVE PAROCHIAL CHURCH COUNCIL, WALKING ROUND NORTH CAVE, General Notes (1978). North Cave "lies on the edge of the Vale of York with the Wolds to the east and Wallingfen to the west." *Id.* As a historical note: "In the Domesday Book, compiled for William the Conqueror in 1086, Normans, including the Count of Mortain and Robert Malet, are among those listed as having land in the 'other Cave' (North Cave). William rewarded his supporters with large amounts of land in England when he became King." *Id.*

304. Humberside lies on the east coast of Britain midway between London and Edinburgh. "The County covers an area of 1,356 square miles (351,200 hectares) and has a population of about 850,000. There are nine Districts. . . . The City of Kingston upon Hull and the towns of Grimsby and Scunthorpe account for over half of the County's population and provide most of its jobs." HUMBERSIDE COUNTY COUNCIL, HUMBERSIDE STRUCTURE PLAN CONSULTATION DRAFT 3 (1983).

305. "This document is the Draft 'Explanatory Memorandum' of the second Humberside Structure Plan. It contains strategic policies for land use and transport in the County up to 1996 together with background information, explanation and proposals for monitoring progress." *Id.* at Foreward.

306. *Id.* at 63.

307. *Id.* at 66.

308. *Id.*

309. BOOTHFERRY BOROUGH COUNCIL, DEVELOPMENT CONTROL GUIDELINES FOR NORTH CAVE (June 25, 1984) (available from Boothferry Borough Council, Planning and Development Department, 41, Hailgate, Howden, Goole DN14 7SL, Humberside, England).

310. *Id.* at 1.1.

properly respect,³¹¹ the document details the propriety of construction in certain areas.³¹² Most importantly, the development control guidelines set a conservationist tone in response to two conflicting pressures. The first stemmed from the Structure Plan's continued designation of North Cave as a "selected settlement," and imposes a formal obligation on the Village to provide for new housing development.³¹³ While the Structure Plan adopts an accommodating view of broad-based aesthetic concerns,³¹⁴ the second pressure on North Cave's land use policies, resulting from the prestige of being declared a conservation area,³¹⁵ favors the status quo over development. In formulating an approach which handles both pressures, the Borough Council adopted a conservation-oriented framework by mandating that "any policy for future development in the village must recognize the need to preserve its existing character, whilst recognizing the status of North Cave and the consequent need to allow for further development."³¹⁶ While setting the tone for construction is vital, there remains the practical problem of finding manageable standards for assessing its aesthetic impacts.

A key initial step in helping resolve this decision making dilemma

311. For example: "Through the centre of the village runs North Cave Beck which serves as a surface water drain as well as a valuable amenity feature. . . ." *Id.* at 3.1.

312. For instance: "To the east, along Everthorpe Lane, beyond a small outcrop of ribbon development and a small Council estate, lies open countryside. Further development in this area would be visually intrusive." *Id.* at 3.8.

313. Selected settlements "complement the role of urban centres in meeting the housing needs of rural areas. . . . [Therefore] provision will be made for new housing development." HUMBERSIDE COUNTY COUNCIL, *supra* note 304, at 35, 37.

The designation in the Structure Plan is a continuing one because: "The status of the following villages was reviewed, but no changes were recommended: . . . North Cave. . . ." *Id.* at 35. The local Parish Council formalized its ongoing objection to the designation at a meeting on March 14, 1984: "RESOLVED—That the Parish Council inform the County Council that it remains opposed to North Cave being designated a Selected Settlement. . . ." Letter from Clerk of Parish Council to The Director Of Planning, Humberside County Council (March 26, 1984) (discussing the proper designation of North Cave). This local opposition stems from a desire for the alternative designation of non-selected settlement: "In non-selected settlements only small scale housing development, such as conversion or infilling, in the main body of the village will normally be permitted." HUMBERSIDE COUNTY COUNCIL, *supra* note 304, at 37.

314. For example, regarding construction in selected settlements: "New development should be compatible with the size and character of the settlement. . . . Large scale development . . . which would detract from the amenity or character of the village should not be permitted." HUMBERSIDE COUNTY COUNCIL, *supra* note 304, at 37.

315. Not everyone agrees that conservation is a positive avenue: "Britain has a remarkable wealth of historic buildings, but changing economic and social conditions often turn this legacy into a liability." J. CULLINGWORTH, *supra* note 271, at 126.

316. BOOTHFERRY BOROUGH COUNCIL, *supra* note 309, at 3.6.

is the creation of a useful information base. The local authority must have enough quality data to ensure that the mandatory housing projects proceed with a proper focus on conservation. Correspondingly, citizen surveys represent an ideal vehicle for assembling the necessary information. In addition to the basic function of detailing community sentiment, such instruments provide baselines³¹⁷ against which to measure changes in attitude. The Humberside Structure Plan advocates this aspect of survey use in the context of monitoring and implementation:

Inevitably, circumstances will change over time with new trends in the economy, technology, and Society as a whole. So it will be important to continue to monitor events carefully to check whether the assumptions that underpin the Plan's policies are still valid and to see if any new issues are emerging. Monitoring can also help to assess how policies are being implemented and whether they are having the desired effect. . . .

Information for monitoring is from many sources . . . [including] surveys. . . .³¹⁸

As a general illustration of these principles, an initial survey regarding North Cave would summarize how the residents feel about their village's aesthetic components. By adopting a cultural-stability format, the instrument would focus on the underlying associations which link the citizens to the existing resources. Accordingly, the resulting data will help satisfy a key Department of the Environment mandate for conservation areas: "It will be important to see that every new building is designed, not as a separate entity, but as part of a larger whole, which has a well-established character of its own."³¹⁹ Subsequently, the local authority would utilize mini surveys³²⁰ for specific project applications, or regarding the baseline concept, as a check on the continued validity of the information gathered in the primary survey.

As a final example, suppose a survey presented residents with pictures of North Cave and corresponding stimuli depicting development alternatives. In addition to describing the relationship between a respondent's conservation focus³²¹ and the strength of their attitudes, the survey would utilize a cultural-stability approach in identi-

317. For a discussion of the baseline purpose of surveys, see *supra* notes 148-50 and accompanying text. Additionally, regarding baselines and mini surveys in environmental impact assessment, see *supra* note 242 and accompanying text.

318. HUMBERSIDE COUNTY COUNCIL, *supra* note 304, at 75.

319. DEP'T OF THE ENV'T, CIRCULAR NO. 23/77, 38 (1977), *quoted in* Mynors, *supra* note 290, at 151.

320. For a discussion of the mini survey concept, including the relevant statistical aspects, see *supra* notes 169-70 and accompanying text.

321. The Civic Trust for a very famous English conservation area summarized the three basic aspects of conservation in the urban context: "Conservation in a city like York is based on three 'scapes,' streetscape, roofscape and floorscape." YORK CIVIC TRUST, 1984-85 ANNUAL REPORT 25 (1985). A Civic Trust is "a body whose object is 'to promote beauty and fight ugliness in town, village and countryside.'" J. CULLINGWORTH, *supra* note 271, at 122.

fying the nature of the associational bonds involved. Thus, in the sequence supporting each desirability rating³²² this question might appear:

Which one of the following factors most influenced your rating:

- a) The design features of the proposed homes.
- b) The compatibility of housing with this area of North Cave.
- c) The appropriateness of any development in this location.

An "a" response indicates a visual concern primarily influenced by design specifics. If most respondents answered in this manner, the local authority might very well approve development in the target area but require that the construction satisfy unusually stringent building standards. Alternatively, the "b" selection shows a use-oriented associational bond. Thus, if citizens frequently picked this response, the decision makers would feel pressure to prohibit housing in that location regardless of design propriety. However, if "b" is a popular choice, the site remains a viable candidate for future construction or restoration which is use-compatible, such as a sympathetically designed community center near the British Legion Hall.³²³ Finally, by repeatedly picking "c" as the most influential factor, the community would stress the importance of an unwavering character for the target location. In other words, if the local authority proceeded to approve the new development knowing this fact, opponents could reasonably claim that it failed to follow the Department of Environment mandate to conserve the "familiar and cherished local scene."³²⁴

VI. THE PROPOSAL

This comment is based on the premise that the better a decision maker understands how an impact on the environment affects the public, the greater the probability of an enduring aesthetic-based decision. Correspondingly, the following proposal arises: by using citizen surveys with a cultural-stability focus, authorities can construct a useful information base which realistically assesses the community's

322. For an illustration of desirability response measurements, *see supra* examples accompanying note 173.

323. The red brick building, originally called the "Temperance Hall," was built in 1851 by William Hewson, a nearby grocer, draper, and sub-postmaster. NORTH CAVE PAROCHIAL CHURCH COUNCIL, *supra* note 303, at "Heritage Trail."

324. DEP'T OF THE ENV'T, CIRCULAR NO. 23/77 (1977).

aesthetic sentiment. Ultimately, decision makers must utilize such practical information tools in order to significantly increase the effectiveness of their aesthetic-based land use policies.

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