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# LEGAL PROBLEMS IN FLORIDA MUNICIPAL ZONING*

ERNEST R. BARTLEY

Modern American man is terrifyingly dependent upon his fellows. For the most part he no longer produces even the basic necessities of his daily existence — the food he eats, the clothes he wears, or the house he lives in. Our modern man has tended to move into urban areas, increasing further his dependence upon others to supply his necessary and luxury demands. With this greatly accelerated migration to the city, the already involved structure of modern society has become even more incredibly complex. The inevitable result has been the necessary imposition of a burden of governmental regulation of, or interference with, persons and property never envisioned by the founders of this republic.

Government regulation by districts, under the police power, of height, bulk, and utilization of buildings, the uses to which land may be put, and the density of population — that is, zoning[1] — is but one dramatic manifestation of the growth of governmental authority resulting from increased urbanization. The requirement that owners of property conform to the broad plans for a community's development has meant, in many cases, the subordination of personal interests to what has been deemed to be the public interest.

Few states have had to face in such large measure the problem of urban growth, with all its attendant difficulties, as has the State of Florida. One hundred sixty-seven areas in the United States are classed by the United States Bureau of the Census as "metropolitan." Miami, Orlando, Tampa-St. Petersburg, and Jacksonville rank fourth, tenth, twenty-first, and thirty-first respectively in percentage of growth among those 167 metropolitan areas for the period 1940 to 1950. Metropolitan Miami had a phenomenal 84.9 per cent growth rate during that ten-year span.[2] Only the State of California has so many metropolitan areas ranking as high in percentage rate of growth as Florida.

*The writer records his debt to Mr. William W. Boyer, Jr., with whom he is co-author of MUNICIPAL ZONING: FLORIDA LAW AND PRACTICE. This 100-page monograph, published in 1950 by the University of Florida Public Administration Clearing Service, formed a point of departure for this article.

[1]BASSETT, ZONING 45 (1940); 8 MCQUILLIN, MUNICIPAL CORPORATIONS §25.01 (3d ed., Smith, 1950).

[2]STATISTICAL ABSTRACT OF THE UNITED STATES 1952, 16, 17. The State of Florida

Bartley: Legal Problems in Florida Municipal Zoning

Florida municipalities have seen the capacities of utility systems outstripped by a mass influx of population never contemplated in the halcyon days of the great boom. In the last few years practically every Florida city has been forced to expend considerable sums of money in expanding sewage, water, light, and transportation facilities. The increase in population has forced some municipalities to take on added functions not traditionally classified as governmental in character. Municipal business is big business in the Sunshine State.

Florida cities today realize the necessity of presenting a clean and orderly appearance to the tourist and the new resident. Tourism, the state's most important "industry," is hurt by dirty and ill-planned cities. Parks, recreation facilities, neat residential areas, correctly placed industrial activities — these and many other facets of a well-conceived and well-executed city plan are fundamental to the continued growth and progress of Florida.

This article is not concerned with the broad topic of "city planning."[3] Rather this discussion is devoted to a consideration of some of the legal problems arising from comprehensive municipal zoning in Florida. Contrary to impressions still held in many quarters, "zoning" and "planning" are not interchangeable words and do not cover identical fields of municipal endeavor. Zoning is the tool by which many of the objectives of city planning may be implemented, the machinery by which a part of the city plan may be carried out.

The technique of zoning is one which is a twentieth-century development. Comprehensive zoning — that is, an over-all city zoning plan — had its genesis in the City of New York in 1916, when the first comprehensive zoning ordinance in the United States was passed. This ordinance, drawn after a number of years of study and research, established a zoning pattern for the entire nation. By 1921 approximately 100 American cities had adopted fairly complete zoning schemes.

It is true that restrictions which were the forerunners of present-day zoning existed prior to 1916. Through the utilization of what Dean Jefferson B. Fordham has called the "nuisance technique"[4] many undesirable activities were restricted to particular areas of a city.[5] In addition to regulations based on the nuisance technique,

grew 46.1% in this period, a rate surpassed only by California, Arizona, and Nevada.

[3]Today this term is generally conceded to embrace the entire group of complex urban problems — physical, social, economic, and governmental.

[4]LOCAL GOVERNMENT LAW 836 (1949).

[5]Livery stables were barred, for obvious reasons, from particular areas of

restrictions on the use of property were passed which were based on one or more of the ideas of sanitation and health,[6] police and fire protection,[7] or the protection of public safety through the regulation of building and construction practices.[8] None of these types of restrictions were or are, properly speaking, comprehensive zoning.

The legality of comprehensive municipal zoning is today firmly established; dispute as to its general validity is past history.[9] Yet many problems dealing with statutory interpretation and application of zoning ordinances remain. It is with some of these problems, as they have arisen in Florida, that this article is concerned. The discussion will be confined in the main to municipal zoning, but recognition should be taken of the fact that county zoning is of great importance in certain sections of Florida and that the legal problems of county zoning for the most part are not basically dissimilar to those encountered by municipalities.

Under the American federal system, the power to control local government is reserved to the states. Cities are creatures of the states; and, subject to the limitations imposed by the federal and state constitutions, a state legislature holds plenary power over the municipal corporations which it creates. Powers are granted to or withheld from municipal corporations at the option of the legislature. The

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many 19th and early 20th century cities. Reinman v. Little Rock, 237 U.S. 171 (1915); St. Louis v. Russell, 116 Mo. 248, 22 S.W. 470 (1893). One of the earlier ordinances of this general type in Florida restricted the erection of billboards. Anderson v. Shackleford, 74 Fla. 36, 76 So. 343 (1917).

[6]The United States Supreme Court in the famous case of Hadacheck v. Sebastian, 239 U.S. 394 (1915), held valid, as a proper exercise of the state's police power to protect public health, an ordinance prohibiting the operation of brickyards in certain portions of Los Angeles.

[7]This ground was used to sustain regulation of laundries operated by Orientals in West Coast cities. *Ex parte* Quong Wo, 161 Cal. 220, 118 Pac. 714 (1911); *In re* Hang Kie, 69 Cal. 149, 10 Pac. 327 (1886). A San Francisco ordinance restricting the hours during which laundries might be operated was sustained as a fire protection measure in Barbier v. Connolly, 113 U.S. 27 (1885).

[8]A recent case, but one illustrative of reliance on this rationale, is Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946).

[9]The basic case establishing the constitutionality of comprehensive zoning is Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). State supreme courts, in notable decisions prior to the *Euclid* case, had set the stage for the national high tribunal's opinion: Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381 (1925); Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925); State *ex rel.* Civello v. New Orleans, 154 La. 271, 97 So. 440 (1923).

Supreme Court of the United States has stated the principle in this fashion:[10]

> "In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of a self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will."

The state, which holds the police power, grants a portion of that power to the city in order better to safeguard public health, morals, safety, public order, and welfare. Accordingly, cities are not inherently empowered to zone. The power of a Florida city to adopt and enforce a zoning ordinance, it may be stated categorically, exists only by virtue of delegation from the State of Florida. Article VIII, Section 8, of the Constitution empowers the legislature to establish and abolish municipalities and to prescribe municipal jurisdiction and powers. In Florida, prior to 1939, delegation to municipalities of the power to zone was accomplished through many special legislative acts.[11] In that year, however, the Florida Legislature adopted a gen-

[10]Trenton v. New Jersey, 262 U.S. 182, 187 (1923). Similar statements are found in Hunter v. Pittsburgh, 207 U.S. 161 (1907); Atkin v. Kansas, 191 U.S. 207 (1903); Laramie County v. Albany County, 92 U.S. 307 (1875).

In People v. Hurlbut, 24 Mich. 44 (1871), Judge Cooley enunciated the doctrine of an inherent right of local self-government. The doctrine has had a limited currency, *e.g.*, Montana *ex rel.* Kern v. Arnold, 100 Mont. 346, 49 P.2d 976 (1935). Authorities generally, however, do not recognize an inherent right to local self-government.

The Florida Supreme Court has spoken of "powers inherent in municipal corporations." In holding valid a St. Petersburg ordinance regulating the sale of liquor the Court stated that "a municipality exercising the powers inherent in municipal corporations may reasonably regulate the sale of intoxicating liquors . . . and also may prohibit the sale of liquors within certain zones." State *ex rel.* Floyd v. Noel, 124 Fla. 852, 854, 169 So. 549, 550 (1936). Florida practice has not, however, been aligned with this dictum. Fleeman v. Vocelle, 160 Fla. 898, 37 So.2d 164 (1948), held that a municipality has only such powers respecting regulation and control of alcoholic beverages as are granted by the legislature.

[11]So far as Florida counties are concerned, there are approximately 30 special acts. There are in addition seven general acts empowering counties to zone. These acts are based on population classifications long since out of date, Bair, Planning Newsletter 2, Dec. 1952 (published by Fla. State Imp. Comm'n).

eral zoning enabling act[12] patterned after the standard state enabling act drafted in 1926 by an advisory committee appointed by Secretary of Commerce Herbert Hoover. This 1939 act constitutes the most important piece of zoning legislation on the Florida statute books today.

THE PRESUMPTIVE VALIDITY OF ZONING ORDINANCES

Restrictions by Florida municipalities on the use of land were not uncommon prior to the decision of the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*[13] These restrictions utilized the nuisance technique or were based on the idea of protecting health or safety. The Florida Supreme Court during the late nineteenth and early twentieth centuries interpreted strictly the legislative grants of power to municipalities to enact the ordinances.

More frequently than not these ordinances were declared invalid under the generally accepted doctrine of the strict construction of municipal powers.[14] The Florida high tribunal, in passing on city enactments regulating the use of land, frequently used the phrase, "If reasonable doubt exists as to a particular power of a municipality, it should be resolved against the city," or words to that effect.[15] There was no presumption of validity[16] favoring the ordinance during these

[12]Fla. Laws 1939, c. 19539, now FLA. STAT. §176 (1951). Florida was the last state to pass such general enabling legislation. FLA. STAT. §167.71 (1951) authorizes municipal corporations to zone when necessary to cooperate with the Federal Housing Administration.

[13]272 U.S. 365 (1926); see note 9 *supra*.

[14]The rule applicable to construction of municipal powers generally is well stated by Dillon in MUNICIPAL CORPORATIONS §237 (1881): "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

[15]See, *e.g.*, Wyeth v. Whitman, 72 Fla. 40, 41, 72 So. 472, 473 (1916); Malone v. City of Quincy, 66 Fla. 52, 56, 62 So. 922, 924 (1913); Ellis v. Tampa Waterworks Co., 56 Fla. 858, 864, 47 So. 358, 360 (1908); *cf.* Pensacola v. Fillingim, 46 So.2d 876 (Fla. 1950); St. Petersburg v. Florida Coastal Theatres, 43 So.2d 525 (Fla. 1949).

[16]Mr. Chief Justice Hughes has stated the modern doctrine of presumption in this manner: "When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it,

early years. One who attacked the ordinance did not have to prove beyond reasonable doubt that the enactment was invalid. Rather the burden was on the city to demonstrate express municipal authority to enact the measure.

This attitude of the judiciary toward ordinances restricting land use alleged to be enacted ultra vires is typically demonstrated in *State* ex rel. *Shad v. Fowler.*[17] The charter of the City of Jacksonville expressly provided that the municipality should have the following powers:[18]

> ". . . 'To make regulations to secure the general health of the inhabitants and to prevent and remove nuisances,' 'To provide for the cleaning and keeping in good sanitary condition any and all premises within the limits of the city.' 'To pass all ordinances necessary for the health, convenience and safety of the citizens.'"

Pursuant to these provisions the city adopted an ordinance providing, in part,

> ". . . no permit shall be issued . . . for any building to be erected within the territory described . . . which is to be used for any

there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary." Borden Farm Products Co. v. Baldwin, 293 U.S. 194, 209 (1934).

The doctrine is based upon three pertinent and interrelated principles: (1) that judicial inquiry is not concerned with the accuracy of a legislative finding but only with the question of whether the legislative action so lacks reasonable basis as to be arbitrary, Bordens Farm Products Co. v. Ten Eyck, 297 U.S. 251, 263 (1936); (2) that the adoption of one standard rather than another is a legislative rather than a judicial choice and constitutionality is not to be determined by having the judiciary weigh the merits of the legislative effort and reject it if the weight of evidence presented in court appears to favor a different standard, South Carolina Highway Dep't v. Barnwell Brothers, 303 U.S. 177, 191 (1938); (3) that it is not the function of the judiciary to substitute its judgment for that of the legislature, else the legislature becomes a forum for the formulation of hypothetical propositions which can become imperative only in case courts conclude that the facts on which their applicability depend actually exist, Bordens Farm Products Co. v. Ten Eyck, 11 F. Supp. 599, 600 (S.D.N.Y. 1935).

[17]90 Fla. 155, 105 So. 733 (1925).

[18]*Id.* at 158, 105 So. at 734. In Metropolis Pub. Co. v. Miami, 100 Fla. 784, 129 So. 913 (1930), a zoning ordinance was held inapplicable because no legislative authority empowering the city commission to zone the city was shown.

> purpose other than that of a residence . . . . [I]t shall be unlawful for any person or persons, firm or corporation to establish or engage in any grocery, meat, fruit or other line of mercantile business of whatsoever kind or nature, within the boundaries of the territory designated."

The owner of a lot within the restricted area sought a writ of mandamus to compel the building commissioner to issue to him a permit to construct a two-story building, the first floor to be used for a grocery store and the second for a residential apartment. Upon answer by the city the alternative writ was quashed and dismissed. On writ of error the owner claimed, inter alia, that the charter did not authorize adoption of the ordinance.

The Supreme Court declared the ordinance invalid, reasoning that there was nothing in the law or within the general scope of knowledge that made such a building a nuisance, and stating that the courts will not enforce doubtful municipal powers. The Court thus based its decision upon the concept that there was nothing within the law or the general scope of knowledge that made such a building, *per se*, a nuisance. The Court, in substance, said that the city has the burden of proving the authority to enact the ordinance, that there is no presumption of validity favoring the ordinance, and that any doubt should be resolved against the city.

Within a year after the *Fowler* case the epoch-making *Euclid* decision made available a legal tool for the regulation of land by municipalities. In the years following the *Euclid* case several Florida cities, among them Fort Lauderdale in 1926, Palm Beach in 1929, and Miami Beach in 1930, not only adopted comprehensive zoning ordinances but, in the absence of any general Florida enabling act, patterned these ordinances after the United States Department of Commerce standard state enabling act for municipal zoning mentioned above. The ordinances adopted by these Florida cities were, of course, passed pursuant to special legislative grants of power in each case.

In recent years the Florida Court has shifted away from its earlier position placing the burden upon the municipality to prove the validity of its ordinances to the doctrine that a presumption of constitutionality attaches to municipal ordinances enacted under the power delegated by the state legislature. The corollary of this doctrine, that the burden of proof rests upon the challenger of a zoning ordinance, has also been maintained by the Court.

Referring to the burden of proof required by the presumption doctrine, Mr. Chief Justice Buford noted in *State* ex rel. *Skillman v. Miami:*[19]

> ". . . the validity of ordinances dividing the city into districts and limiting the use of real estate within such districts to certain purposes has been sustained, it being held that in order for such ordinance to be declared unconstitutional it must affirmatively appear that the restriction is clearly arbitrary and unreasonable and has not any substantial relation to the public safety, health, morals, comfort or general welfare."

The basic importance of the presumption doctrine can best be emphasized by observing what may happen when the city fails to invoke the presumption in defense of its zoning ordinance against private attack. Thus it does not appear, from a careful analysis of the facts, that the city relied upon the doctrine of presumptive validity in *Miami Beach v. Ocean and Inland Co.*[20] The two parties appeared again as litigants later in the same year. The two cases are separate and distinct, but the facts are essentially the same. In the second case[21] the company filed suit to enjoin the city from enforcing a zoning provision affecting two company-owned lots that restricted the use of the area to hotels and apartment hotels. The company charged that the character of the surrounding property had so changed since the establishment of the initial zoning classification that no longer could there be found "a substantial relationship to public safety, welfare, morals, or health in the continuance of the zoning restrictions now in force."[22]

In the first case the Supreme Court's decision was against the city. In the second the city, appealing from a decree granting the relief prayed for, apparently changed its grounds from those given in the first case. Emphasis was placed on the presumption of constitutionality that attaches to zoning ordinances. In finding for the city in the

[19]101 Fla. 585, 594, 134 So. 541, 545 (1931). In State *ex rel.* Office Realty Co. v. Ehinger, 46 So.2d 601 (Fla. 1950), the Court held that a regularly enacted municipal ordinance will be presumed valid until the contrary is shown; the party seeking to overthrow the ordinance has the burden of proof of establishing the invalidity of the ordinance.

[20]146 Fla. 145, 200 So. 402 (1941).

[21]147 Fla. 480, 3 So.2d 364 (1941).

[22]*Id.* at 483, 3 So.2d at 365.

second case, Mr. Justice Thomas, speaking for the Court, observed:[23]

> "We do not find in the ordinance[,] meanwhile conscious of the presumption of the correct exercise of the discretion of the city council to deal with zoning within their jurisdiction, the earmarks of arbitrariness and unreasonableness which would justify judicial interference."

The assailant of a zoning ordinance must prove more than the fact that depreciation in the value of his property will result from the enforcement of the ordinance. Clear proof must be presented that the zoning restrictions bear no valid relationship to the police power before the courts can accord his contention favorable consideration.

Possibly the most important recent case in this regard is *Standard Oil Co. v. Tallahassee*.[24] The oil company, owner and operator of a filling station across the street from the state capitol, brought an action to enjoin enforcement of a Tallahassee zoning ordinance that would compel the service station to discontinue permanently its operations. The ordinance was held valid and enforceable by the United States District Court for the Northern District of Florida.[25]

In the oil company's appeal to the United States Court of Appeals for the Fifth Circuit the city first argued the principle of the presumption of validity surrounding such ordinances. To rebut this presumption the company argued that it had spent considerable sums of money in the construction, operation, and maintenance of the service station. It further contended that the enforcement of the ordinance would greatly depreciate the value of its property and would be tantamount to depriving it of its property without due process of law. The city did not dispute the charge that enforcement would result in depreciation of the value of the company's property but contended that the ordinance was a reasonable exercise of the municipality's power to zone and that "every presumption is in favor of the validity of the ordinance."[26]

The Court of Appeals agreed with this point of view. Pointing

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[23]*Id.* at 487, 3 So.2d at 367; *accord,* Glackman v. Miami Beach, 51 So.2d 294 (Fla. 1951); Miami v. Rosen, 151 Fla. 677, 10 So.2d 307 (1942); State *ex rel.* Dallas Inv. Co. v. Peace, 139 Fla. 394, 190 So. 607 (1939).

[24]183 F.2d 410 (5th Cir. 1950).

[25]87 F. Supp. 145 (N.D. Fla. 1949).

[26]Brief of Appellee, p. 32.

out that a presumption of validity attaches to zoning ordinances, Judge McCord observed that the Florida Supreme Court had repeatedly sustained legislation conferring the power to zone on Florida cities and that in such cases the courts were not permitted to substitute their judgment for that of the city council. Since the service station was near the state capitol as well as several other state office buildings, its discontinuance under the ordinance could not be viewed as having no relation to the general welfare. "[C]onsiderations of financial loss or of so-called 'vested rights' in private property are insufficient to outweigh the necessity for legitimate exercise of the police power of a municipality."[27]

The presumption of validity is, of course, rebuttable. The challenger of an ordinance has an opportunity guaranteed by the Florida general enabling act to introduce evidence in an effort to override the presumption of constitutionality.[28] The court in which the zoning

[27]183 F.2d 410, 413 (5th Cir. 1950). In Texas Co. v. Tampa, 100 F.2d 347, 348 (5th Cir. 1938), the court said, in discussing the police power relative to zoning regulation of filling stations: "The general rule appears to be that, while the courts have refused to define within precise bounds the limits of the police power of a state, their disposition and trend seems to be in favor of holding valid the laws relating to matters completely within the territory of the state enacting them. The courts reluctantly disagree with the local legislative authorities, who are primarily judges of the public welfare."

In State *ex rel.* Dallas Inv. Co. v. Peace, 139 Fla. 394, 395, 190 So. 607, 608 (1939), the Court said: "Standards of business, social and professional conduct have their variations peculiar to every community. These standards such ordinances as that brought in question are designed to regulate and the manner of their regulation is distinctly a legislative function. If the ordinance is enacted in the interest of the public and is designed to correct an evil or evils that are or may affect the public welfare, it should be upheld. The manner in which these purposes are accomplished is one in which legislative discretion has a very broad range and courts should not attempt to substitute their judgment for that of the legislature, City Commission or other legislative body created for that purpose."

It may be of interest to note that in Standard Oil Co. v. Tallahassee, 183 F.2d 410, 414 (5th Cir. 1950), Chief Judge Hutcheson dissented, saying: "I am in no doubt that in sustaining this admittedly confiscatory ordinance, a good general principle, the public interest in zoning, has been run into the ground, the tail of legislative confiscation by caprice has been permitted to wag the dog of judicial constitutional protection."

[28]FLA. STAT. §176.19 (1951) provides: "If, upon the hearing, it shall appear to the court that the testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination

ordinance is questioned may take evidence or appoint a referee to do so. The challenger of an ordinance might, for example, introduce evidence supporting a charge of discrimination or tending to show that enforcement of the zoning ordinance would depreciate the value of his property to such an extent that the action would constitute outright confiscation. In weighing this evidence the court is not precluded from upholding such charges even though the presumption has been invoked in defense of the zoning ordinance. The court would simply be declaring that the challenger of the ordinance had met the burden required to rebut the presumption.

This was the situation in the recent case of *Miami Beach v. First Trust Co.*[29] The First Trust Co., trustee of the Firestone Estate in Miami Beach, had filed a bill of complaint attacking a Miami Beach zoning ordinance. The company prayed that the city be enjoined from interfering with the rental of rooms and apartments in buildings located on the Firestone property or the construction of hotels and apartment houses thereon. It charged that enforcement of the ordinance would be "unreasonable, arbitrary, confiscatory, and invalid." A master was appointed by the chancellor to hear testimony. Over the master's recommendation that the bill of complaint be dismissed with prejudice, the chancellor held the ordinance invalid and unenforceable.

On appeal to the Florida Supreme Court the city contended that the ordinance was presumptively valid, that if it was fairly debatable it should be upheld, and that the court should not substitute its judgment for that of the city council of Miami Beach. The Court, in a five to two decision, upheld the ordinance, reversed the decree, and remanded the matter to the chancellor for review.

Upon petition for rehearing by the company the Supreme Court agreed to review the case again. Mr. Justice Terrell wrote the majority opinion, the Court splitting four to three on this occasion. He admitted that he had been one of the judges subscribing to the first opinion based on the presumption doctrine. Said the justice:[30]

"... I am convinced that our judgment was erroneous. When,

of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review."

[29]45 So.2d 681 (Fla. 1950). The opinion of the Court and the dissent in the first case are combined with the opinion of the Court on rehearing. The case was heard in the first instance in 1949 and on rehearing in 1950.

[30]45 So.2d 681, 688 (Fla. 1950).

as here, the constitutional rights of the citizen are assaulted, I do not think the Court can in the manner shown bypass its duty to adjudicate them. Most assuredly is this true when the assault is shown to have merit."

It is pertinent to inquire why the Court reversed its previous decision. Two of the judges actually shifted their positions. Careful analysis shows that a majority in the first case refused to take judicial notice of certain facts supporting the company's attack. These crucial facts were stated by Mr. Justice Terrell as follows:[31]

> "Both the Master and the Chancellor found that the zoning restrictions had reduced the value of the land of complainants by three-fourths, that as zoned for the uses indicated by the ordinance, they were worth $400,000 but if permitted to be used for apartment houses and hotels, as were the lands adjoining them, they had a value of $1,750,000."

Not a single property owner in the city, moreover, was shown to be hurt by the removal of the zoning restrictions as applied to the Firestone Estate. If they were not removed, on the other hand, they would cost the company, as trustee, more than one million dollars. "Under such circumstances," said Mr. Justice Terrell, "they amount to confiscation."[32]

Three judges remained unconvinced that the presumption had been rebutted by the evidence. Thus it may be said that, although depreciation of property values is not enough to rebut the presumption, as was demonstrated in the *Standard Oil* case,[33] still it is possible to convince the courts that depreciation can be so great as to constitute confiscation of property without due process of law. Certainly the *Firestone Estate* case illustrates how difficult it is in attacking the constitutionality of zoning ordinances to rebut the presumption of constitutionality.

In a previous case, *Snedigar v. Keefer*,[34] the Court appears to have

[31]*Ibid.* Mr. Justice Thomas, dissenting in Siegel v. Adams, 44 So.2d 427, 429 (Fla. 1950), expresses an opposite point of view: "I do not subscribe to the thinking that eventual monetary gain to complaining property holders is a determing factor in a controversy involving the propriety of zoning restrictions because, patently, in many like situations the individual might prosper by breaking down restrictions, while the community as a whole might suffer."

[32]45 So.2d 681, 688 (1950).

[33]183 F.2d 410 (5th Cir. 1950).

[34]131 Fla. 191, 179 So. 421 (1938).

regarded decrease in the value of property under the zoning ordinance as evidence of unreasonable classification. The Court upheld the master's finding that the value of the property concerned had " 'decreased to such an extent as verges on confiscation provided its utilization for legitimate business purposes is further denied.' "[35] From the given facts of the case it appears that the value of the property steadily declined after an amendment to the zoning ordinance. It is significant to note the master's finding that under the doctrine of equitable estoppel the city was estopped from interfering with the use of the property for the desired purposes.

In the *Snedigar* case the Court was of course faced with a choice between two presumptions: (1) in favor of municipal legislation and (2) in favor of the lower court's decision affirming the master's findings. It chose the latter. The statement can be made, moreover, that seldom has the Supreme Court of Florida reversed a lower court's decision which affirmed the master's findings in a zoning case.[36]

## MUNICIPAL ZONING PROCEDURE

Prior to the adoption of the Florida enabling act in 1939, the statutory prescription of procedures to be followed by the municipality in adopting and implementing zoning ordinances was accomplished either through a special act of the legislature or through the charter

[35]*Id.* at 194, 179 So. at 422. In Forde v. Miami Beach, 146 Fla. 676, 681, 1 So.2d 642, 645 (1941), the Court said: "The object of all use zoning, in a measure at least attainable, should be to put the land to the uses to which it is best adapted, and the result will normally be to increase values." Again in Ehinger v. State, 147 Fla. 129, 2 So.2d 357 (1941), one of the material factors which induced the Court to hold that the owner was being deprived of the constitutional enjoyment of his property, and to strike down a single family zoning restriction, was the fact that property had a value of $10,000 to $30,000 for single family use and of the $75,000 to $100,000 for apartment house use.

[36]The *Snedigar* case is illustrative of another limitation on the doctrine of presumptive validity. If the challenger of a zoning ordinance can introduce evidence sufficient to invoke the doctrine of equitable estoppel and thus rebut the doctrine of presumed validity before the master and the chancellor, the Florida Supreme Court may hold the presumption to be refuted. The doctrine of equitable estoppel has failed, however, to rebut the presumption in more instances than it has succeeded. Examples of Florida cases in which the doctrine of equitable estoppel has failed to rebut the presumption are Miami Shores Village v. Wm. N. Brockway Post 124, 156 Fla. 673, 24 So.2d 33 (1945), and Godson v. Surfside, 150 Fla. 614, 8 So.2d 497 (1942). *But cf.* Frink v. Orleans Corp., 159 Fla. 646, 32 So.2d 425 (1947).

incorporating the municipality. Since the passage of the 1939 act, which is applicable to all cities electing to adopt comprehensive zoning plans,[37] zoning of Florida cities must be accomplished in the manner prescribed by the act and "in accordance with the charter of such municipality."

Even though the 1939 act sets out procedures in the most general terms, strict compliance with statutory requirements must be had or the ordinance will be voidable. So long as the requirements of the statute are met, however, the establishment of the details of zoning procedure is left to the municipalities.

The zoning regulations must be made "in accordance with a comprehensive plan" designed, "with reasonable consideration," to take into account the character of the district and its peculiar suitability for particular uses. The plan must be constructed "with view to conserving the value of buildings and encouraging the most appropriate use of land throughout said municipalities." Thus the zoning plan is not only negative in the restrictive sense of its application but positive in terms of an over-all plan for the future development of the community. The zoning statute contemplates careful, serious, and intelligent preparation of zoning ordinances and many amendments enacted pursuant to them.[38]

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[37]FLA. STAT. §176 (1951).

[38]The statutory requirement that ordinances must be drafted in accord with a comprehensive plan has been ignored, on occasion, by some Florida cities. Bair, Planning Newsletter 1, Sept. 1952, states, "Comprehensive plans are a rarity in Florida . . . ."

Courts of other states with general enabling acts almost identical to that of Florida have found particular ordinances invalid because they were not made in conformity with a "comprehensive plan." In Chapman v. Troy, 241 Ala. 637, 4 So.2d 1 (1941), the court held invalid an ordinance which designated a small portion of the city as a residential district, took no account of other areas equally residential in character, and was apparently without any comprehensive plan for the general welfare of the city as a whole. *Accord,* Appley v. Township Committee, 128 N.J.L. 195, 24 A.2d 805 (Sup. Ct.), *aff'd,* 129 N.J.L. 73, 28 A.2d 177 (1942).

In Florida the rule apparently has not been held completely binding. In Ellis v. Winter Haven, 60 So.2d 620 (Fla. 1952), the Court held that the state-wide zoning law is a grant of power only and does not require that the cities to which it applies establish a comprehensive zoning system. The ruling certainly does not accord with those of the jurisdictions cited above. The *Ellis* case may not be the last word on this question. The facts there at issue were not clearly drawn on the "comprehensive plan" issue alone. From the standpoint of practical necessity, if the statement by Bair be taken as correct, the Florida Supreme Court could not afford to strike down ordinances on the comprehensive plan requirement

### *The Zoning Commission*

It is customary in zoning to provide certain guarantees of citizen participation, and the Florida enabling act is no exception. A municipality seeking to enact a zoning ordinance must establish a zoning commission, which body has the functions of investigating, making recommendations as to the various districts, and suggesting appropriate regulations. According to the statute,[39]

> "Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and the governing body of the said municipality shall not hold its public hearings or take action until it has received the final report of such commission."

The zoning commission, an advisory body, thus becomes an instrument of preliminary adjustment, for it must be appointed if the municipality is to avail itself of the power conferred by the enabling act. Property owners can make their desires known before any final action on the zoning regulations is taken by the city council. The resulting ordinance is more likely to represent a concensus of community opinion than if the city council acted without preliminary study. Omission of the zoning commission, or failure of the city council to wait for the final report of the commission before taking action, would constitute grounds for invalidation of the resulting ordinance.[40]

### *Notice and Hearing*

In Florida, according to the general act, no zoning regulation may become effective until parties in interest and citizens have an opportunity to be heard at a public hearing. Notice must be given at least fifteen days prior to the hearing. The time and place must be published in a city newspaper of general circulation, or, if no newspaper is available, by notices posted in at least three conspicuous places within the municipality.[41]

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without running the risk of creating legal chaos in the state's zoning pattern.

[39]FLA. STAT. §176.07 (1951).

[40]There are no Florida cases in point. The weight of authority in other jurisdictions is as stated. Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243 (1945), *cert. denied,* 326 U.S. 739 (1945); State *ex rel.* Westminster Presbyterian Church v. Edgecomb, 108 Neb. 859, 189 N.W. 617 (1922); BASSETT, ZONING 36, 37 (1940).

[41]FLA. STAT. §176.05 (1951). In Hollywood v. Rix, 52 So.2d 135 (Fla. 1951), the Court held that the city was not authorized by statute to enact a zoning

These provisions in the 1939 act were not new to Florida cities. City charters prior to that date, as well as special acts empowering particular cities to zone, generally had provisions requiring notice and hearing. Further, prior to 1939 the cities themselves in passing zoning ordinances usually conformed to the provisions of the standard act suggested by the Department of Commerce, among which were those for notice and hearing.

Florida cities must conform strictly to the requirements for notice and hearing set out in the 1939 enabling act or in the city charters or in special legislation granting power to zone.[42] The provisions of the general enabling act are, by inference, a part of every municipal charter, although the act does not modify special legislation. The provisions of the act relative to notice and hearing apply not only to the establishment of a comprehensive zoning ordinance but also to all amendments or changes in the zoning regulations. Allowance is made for the customary "twenty percent protest"[43] found in most

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ordinance without the notice and hearing required by the general enabling act. Although the Court did not discuss the point, there is the gravest doubt as to the constitutionality of any special act granting to a city the power to pass a zoning act without notice and hearing.

[42]In State *ex rel.* Stephens v. Jacksonville, 103 Fla. 177, 137 So. 149 (1931), the Court held invalid a zoning ordinance on the ground, *inter alia,* that the record showed that the charter requirement of notice had not been met.

Extra-jurisdictional authority is solidly behind the doctrine of strict conformance to requirements on notice and hearing. See, *e.g.,* Estabrook v. Chamberlain, 240 App. Div. 899, 267 N.Y. Supp. 425 (2d Dep't 1933); Friedlander v. 465 Lexington Ave., Inc., 222 App. Div. 689, 224 N.Y. Supp. 800 (2d Dep't 1927).

In Ellis v. Winter Haven, 60 So.2d 620 (Fla. 1952), the city had adopted an ordinance prohibiting the on-the-premises sale of nonintoxicating beer in a small area within the city limits. The city did not follow the procedure prescribed by c. 20202, Fla. Spec. Acts 1939, a special zoning law applicable only to Winter Haven. In 1935 the State Beverage Act had granted power to cities to zone liquor establishments. The Court held that the Legislature did not intend to repeal this general power by c. 20202 in so far as it applied to liquor zoning; hence the city had the power under the State Beverage Act to enact the ordinance and was not required to follow the procedure of the special zoning law. Although the case turned on statutory interpretation, it is interesting to note the careful examination given the procedural question by the Court — even in the exceptional field of liquor control.

[43]FLA. STAT. §176.06 (1951) says in this regard: "In case, however, of protest against such change signed by the owners of twenty per cent or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending five hundred feet therefrom, or of those directly opposite thereto extending five hundred feet from the street frontage of such

other jurisdictions. This machinery is designed to prevent extemporaneous or ill-considered changes in the zoning ordinance; an extraordinary majority of the governing body must act to amend or change the zoning ordinance under such circumstances.[44]

*Boards of Adjustment*

The board of adjustment, or board of appeals as it is frequently called, is an indispensable element in properly functioning zoning machinery. It is the function of this board to give the requisite flexibility to the zoning ordinance by granting exceptions, or variances as they are more commonly called, to such ordinances.[45] Resort to city ordinance for each proposed variance would be unsatisfactory; delegating power to a single official, such as a building inspector, to grant variances would be unwise.[46] By establishing a board of adjustment " a municipality furnishes a forum where an applicant can be heard who thinks he should be allowed some amelioration of the strict letter of the law."[47] The board of adjustment is an administrative agency[48] and as such is subject to the general restrictions of administrative law that apply to such discretionary activities — proper jurisdiction, adequate notice, and full and fair hearing.

A Florida municipality may, at its option, establish a five-man board of adjustment,[49] but it is not mandatory that such a board

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opposite lots, such amendments shall not become effective except by the favorable vote of three-fourths of the governing body of said municipality."

This requirement has been held valid in other jurisdictions; it has never been directly questioned in Florida. 40th St. & Park Ave., Inc. v. Walker, 133 Misc. 907, 234 N.Y. Supp. 708 (Sup. Ct. 1929); Russell v. Murphy, 177 Okla. 255, 58 P.2d 560 (1936); Holzbauer v. Ritter, 184 Wis. 35, 198 N.W. 852 (1924).

[44]See note 43 *supra.*

[45]Generally speaking, proceedings before boards of adjustment relate "to permits, certificates of approval, certificates of occupancy, special uses, variances, exceptions, marginal adjustments, nonconforming uses, changes from one nonconforming use to another, repair and restoration of nonconforming structures, extension of nonconforming uses, and the like." 8 McQuillin, Municipal Corporations §25.254 (3d ed., Smith, 1950).

[46]In many jurisdictions a grant of discretionary power to a building inspector or similar municipal official would be unconstitutional.

[47]Bassett, Zoning 121 (1940).

[48]The term is used here in its administrative law sense. An administrative agency is one which exercises quasi-legislative and quasi-judicial powers over persons and property.

[49]Fla. Stat. §§176.07-176.09 (1951).

be created.[50] The general enabling act confers upon the board the power to hear and decide appeals when administrative error is alleged, to grant special exceptions, and to authorize variances when they will not be contrary to the public interest and when literal enforcement of the zoning ordinance will result in "unnecessary hardship."[51] Appeals may be taken to the board of adjustment by any aggrieved person or by any municipal officer or department of the governing body affected by a zoning decision of the administrative officer.

The purpose of creating boards of adjustment, of course, is to provide an opportunity for resolving difficult situations without resort to the courts. Not the least of the elements favoring the board of adjustment procedure is the fact that the administrative remedy may be sought with little cost to those who feel themselves unreasonably affected by zoning regulations.

No two requests made to a board of adjustment are identical. The boards are not, therefore, bound to follow precisely an established system of precedents. Even though a noticeable similarity may be present in two given instances, that fact alone does not justify basing a decision on a prior decision. Although such an issue has not been presented to the Florida Supreme Court, courts in other jurisdictions have upheld the actions of boards when two apparently similar cases were decided differently. On occasion the premises have been viewed by the board itself; distinctions may be based on knowledge which the courts could not easily acquire.[52]

[50]In State *ex rel.* Henry v. Miami, 117 Fla. 594, 158 So. 82 (1924), a city ordinance prohibiting construction of hospital buildings in a residential district was held not invalid for failure to provide for a board of appeals as authorized by statute; the language of the act was held permissive rather than mandatory. The language of Fla. Spec. Acts 1929, c. 14234, §3, was substantially similar to that of the general enabling act of 1939 allowing a city at its option to create a board of adjustment or appeal.

[51]FLA. STAT. §176.14. The meetings and records of the board must be open to the public, *id.* §176.10.

Where zoning boards of adjustment do not exist the city council may resort to an unsound practice known as "spot zoning." Instead of a variance granted by an administrative body—with no alteration in the basic zoning plan—the city council rezones the particular area. The net result in the long run is the abandonment of any long range plan; such action sounds the death knell of comprehensive zoning. It may be added that city councils may spot zone even where zoning boards of adjustment do exist, and in Florida many city councils have done exactly that.

[52]Fandel v. Board of Zoning Adjustment, 280 Mass. 195, 182 N.E. 343 (1932);

Florida boards of adjustment, when authorizing a variance from a zoning ordinance, must conform to the basic rule of "unnecessary hardship" as stated in the general enabling act, for boards of adjustment must conform to the standards set out in the act delegating power to them. A variance granted for a lesser reason or simply because the board might feel that its action would constitute "justice" would be an invalid application of board authority. As a rule to guide conduct, this standard has been adopted generally throughout the country.[53] With the exceptions of the states of Illinois[54] and Maryland,[55] the rule has been considered adequate for the most part in all states where litigation has taken place on the point.

The Florida Supreme Court has held that the unnecessary hardship doctrine is adequate as a standard for the guidance of the discretionary exercise of authority by boards of adjustment.[56] It may be said that the Florida Supreme Court has required, in effect, that boards of adjustment must act in accordance with the binding force of the rule and must not grant variances for lesser reasons than those of "unnecessary hardship" or "practical difficulty."[57]

### *Judicial Review of Board of Adjustment Actions*

A particularly knotty problem in zoning, as well as in administrative law generally, is that of judicial review of board of adjustment actions. The Florida enabling act provides that any person aggrieved by a decision of a board of adjustment may present a verified petition to a court of record within thirty days after the filing of the decision by the board.[58] The requirement of prompt application is undoubted-

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Falkenau & Hamershlag, Inc. v. Walsh, 214 App. Div. 705, 209 N.Y. Supp. 900 (1st Dep't), *aff'd*, 240 N.Y. 688, 148 N.E. 759 (1925); BASSETT, ZONING 127 (1940).

[53]BASSETT, ZONING 142 (1940).

[54]Kirby v. Rockford, 363 Ill. 531, 2 N.E.2d 842 (1936); Reschke v. Winnetka, 363 Ill. 478, 2 N.E.2d 718 (1936). *But cf.* Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333 (1931).

[55]Sugar v. North Baltimore Meth. Prot. Church, 164 Md. 487, 165 Atl. 703 (1933).

[56]Tau Alpha Holding Corp. v. Board of Adjustments, 126 Fla. 858, 171 So. 819 (1937).

[57]For an instructive, clear, and concise opinion dealing with the meaning of "practical difficulty and unnecessary hardship" see that of Mr. Justice Cardozo in Fordham M. R. Church v. Walsh, 244 N.Y. 280, 155 N.E. 575 (1927). This opinion has been widely quoted as authority.

[58]FLA. STAT. §176.16 (1951).

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ly premised on the idea that the court may grant a restraining order that will prevent the beginning of construction, with the accompanying costs.

Under the act, standing to challenge the decision of a board of adjustment is accorded to a person or persons "aggrieved" thereby, or by "any taxpayer," or by municipal officers or boards. While the Florida Supreme Court has not, apparently, passed directly on the question of standing to challenge, it has been evident that the "substantial property right" concept has been a part of the Court's thinking on the subject. Thus in *Miami v. Rosen* the Court stated that "resort to the courts is justified only when substantial property rights have been illegally or arbitrarily invaded and municipal relief from unlawful injury has been denied."[59] Again in *Forde v. Miami Beach* the substantial property right showing as a basis for maintaining a challenge in the courts was apparent.[60]

*Exhaustion of Administrative Remedies*

A touchy phase of the problem of procedure relates to exhaustion of administrative remedies before resort to the courts. The general rule of administrative law, of course, is to the effect that judicial review will not be available until all administrative remedies have been exhausted. The rule is applied with particular strictness on the federal level.[61] The Florida high tribunal has been wrestling for the past few years with the problem as specifically applied to zoning.

In the *Rosen* case, in 1942, the Court had reasoned that judicial review is "justified only when . . . municipal relief from unlawful injury has been denied."[62] Certainly there was here an implication, albeit a tenuous one, that administrative remedies, or, to use the Court's words, "municipal relief," must first be exhausted or "denied." In other words, there might have been at this date ground for the belief that, when a municipality elected to create a board of adjustment under the Florida general enabling act, action before the board must be completed before resort to the courts could be had.

[59]151 Fla. 677, 686, 10 So.2d 307, 310 (1942).

[60]See note 35 *supra*. A purchaser of property who effects the transaction with knowledge of the applicability of zoning regulations is not precluded from challenging the validity of the ordinance. Miami Beach v. Ocean & Inland Co., 146 Fla. 145, 200 So. 402 (1941).

[61]Myers v. Bethlehem Shipbuilding Corp., 304 U.S. 41 (1938), is one of the basic cases illustrating this established federal principle.

[62]Miami v. Rosen, 151 Fla. 677, 686, 10 So.2d 307, 310 (1942).

The Florida Supreme Court apparently followed the dicta of the *Rosen* case in *De Carlo v. West Miami.*[63] Frances De Carlo sued to enjoin the town from enforcing a zoning ordinance as applied to her property. Upon the circuit court's dismissal of her action she appealed. The Supreme Court held the suit premature, since it had been filed before the plaintiff's administrative remedies had been exhausted.

The point has been raised in three later cases. In *Miami Beach v. Perell*[64] an action was brought to prevent the city from enforcing a zoning ordinance. The circuit court held for Perell and the city appealed. The Florida Supreme Court held that the evidence supported the findings of fact and that the provisions of the ordinance prohibiting operation of auction sales establishments except in certain zones were unreasonable, arbitrary, and void. The city argued that Perell had not exhausted his administrative remedies. The Court, however, distinguished the *De Carlo* case and ruled that Perell's attack was a general one. He had attacked the entire ordinance rather than limiting himself to the narrow issue of how the ordinance affected his own property; therefore, the Court said, there was no need to exhaust administrative remedies.

In *Miami Shores v. Bessemer Properties*[65] the company sought a mandatory injunction to compel the village to change the zoning of the company's property from residential to business. The circuit court rendered judgment for the company and the village appealed. The complainant challenged the zoning restrictions in the circuit court on equitable grounds, and the defendant village accepted the challenge in its answer but failed to raise the point that administrative remedies should have been exhausted. The trial court, taking cognizance of this aspect of the case, tried and disposed of the cause on its merits. The Florida Supreme Court held that under these circumstances it also would adjudicate the entire case on its merits alone. The village had lost the right to plead the defense of exhaustion of administrative remedies. There is a clear inference in the Court's opinion that it will accept the contention that administrative

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[63]49 So.2d 596 (Fla. 1951). Two judges dissented, at p. 597, arguing that any doubt as to the existence of municipal power should be resolved against the city. Further, the dissenters argued that the exhaustion doctrine should not be interposed or construed as granting to a municipality the power to adjudicate the constitutionality of its own ordinances.

[64]52 So.2d 906 (Fla. 1951).

[65]54 So.2d 108 (Fla. 1951).

remedies have not been exhausted if that contention be timely raised. On the merits the Court found that the zoning of the property in question bore no true relationship to proper zoning classification.

To the same effect is the decision of *Surfside v. Normandy Beach Development Co.*,[66] wherein the Court again ruled that failure of the town to raise the point of exhaustion of administrative remedies before appeal constituted a waiver of that defense. The Court refused to hear that issue for the first time on appeal.[67]

It apparently is clear that a city, in defending against an attack on a zoning ordinance, must present at the outset any argument based on the doctrine of exhaustion of administrative remedies. Further, the attacker of such an ordinance may still be able to avoid the effect of the doctrine by attacking the ordinance generally rather than by limiting the attack to the effect of the ordinance on the complainant's property.

### Aesthetics

Florida municipalities quite naturally have a genuine economic interest in maintaining a high level of civic development. For that reason the question of taking aesthetics into account in zoning is one that has plagued Florida city councils in recent years and will arise with increasing frequency in the future. The problem is not, of course, peculiar to Florida, but the impact on Florida cities is especially great because of the desirability of their attractiveness from a tourist standpoint.

All members of the bar are familiar with the general rule that aesthetic objectives in and of themselves cannot justify an exercise of the power to zone.[68] As the rule has been applied in other jurisdictions, a municipal ordinance cannot restrict floor area on the sole basis of aesthetic considerations;[69] aesthetic reasons have not been

[66]57 So.2d 844 (Fla. 1952).

[67]On the facts the Court held that when unplatted property was bounded by a street, a six-story hotel, vacant property zoned for apartments and hotels, and property on which was built a two-story apartment house, and the property had little value as a residential property but a business value of $20,000, a zoning restriction limiting use to one and two-family residential structures was arbitrary and unreasonable.

[68]St. Louis v. Dreisoerner, 243 Mo. 217, 147 S.W. 998 (1912). 8 McQuillin, Municipal Corporations §§25.29-25.31 (3d ed., Smith, 1950) discusses the general questions of zoning and aesthetics.

[69]Baker v. Somerville, 138 Neb. 466, 293 N.W. 326 (1940).

sufficient to sustain a prohibition of removal of topsoil near a highly restricted residential district;[70] and aesthetic taste will not sustain control of private property under the guise of the police power.[71] A classic statement of this point of view is found in the New Jersey case of *Pfister v. Municipal Council of Clifton,* wherein it was said:[72]

> "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."

This attitude toward aesthetic matters is founded upon the old common law doctrine that "the law does not give an action for matters of delight." It is true, moreover, that aesthetic considerations depend upon a wide variety of tastes and cultures; therefore, reasonable definition in the law is most difficult, if not impossible.[73] Background and practical considerations have contributed to the general rule that aesthetic objects alone are not sufficient to justify an exercise of the zoning power which restricts property rights.

Yet the courts have not been unaware of the subject of aesthetics. True, an action based on aesthetics alone would not be favorably received, but aesthetic objectives have been taken into consideration by the courts along with other relevant and proper objectives for the exercise of zoning power.[74] Courts generally have been willing to say that their decisions cannot be controlled by aesthetic considerations but that such objects may be considered in determining the reasonableness of zoning legislation.[75] Nor can the objection be raised that a zoning ordinance promotes aesthetic ends, if the legislation can

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[70]Town of Harrison v. Sunny Ridge Builders, 170 Misc. 161, 8 N.Y.S.2d 521 (Sup. Ct. 1938).

[71]MacCrae v. Fayetteville, 198 N.C. 51, 150 S.E. 810 (1929).

[72]133 N.J.L. 148, 152, 43 A.2d 275, 278 (1945).

[73]State Bank & Trust Co. v. Wilmette, 358 Ill. 311, 193 N.E. 131 (1934); Youngstown v. Kahn Bldg. Co., 112 Ohio St. 654, 148 N.E. 842 (1925).

[74]St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269 (1919); York Harbor Village Corp. v. Libby, 126 Me. 537, 140 Atl. 382 (1928); Opinion of the Justices, 234 Mass. 597, 127 N.E. 525 (1920); Frischkorn Constr. Co. v. Redford Twp. Bldg. Insp., 315 Mich. 556, 24 N.W.2d 209 (1946); Senefsky v. Huntington Woods, 307 Mich. 728, 12 N.W.2d 387 (1934), 43 MICH. L. REV. 228 (1944); Sundeen v. Rogers, 83 N.H. 253, 141 Atl. 142 (1928).

[75]Murphy, Inc. v. Westport, 131 Conn. 292, 40 A.2d 177 (1944); *In re* Appeal of Parker, 214 N.C. 51, 197 S.E. 706 (1938).

be sustained on other valid grounds. The fact that a city council considered the aesthetic value of the ordinance at the time it was passed, along with other valid grounds sufficient to sustain the ordinance, is no basis for invalidation of the restriction.[76]

The general judicial attitude is stated in *Opinion of the Justices:*[77]

> "Enhancement of the artistic attractiveness of the city or town can be considered in exercising the power conferred by the proposed act only when the dominant aim in respect to the establishment of districts based on use and construction of buildings has primary regard to other factors lawfully within the scope of the police power; and then it can be considered, not as the main purpose to be attained, but only as subservient to another or other main ends recognized as sufficient . . . ."

Yet many members of the legal profession, and even a few courts, have been unwilling to accept completely this interpretation. As far back as 1922 Henry P. Chandler could detect what he took to be evidences that judicial attitude on the subject might be changing.[78] In 1923 Judge Owen of the Wisconsin Supreme Court stated:[79]

> "It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed by the written law.

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[76]Sundeen v. Rogers, 83 N.H. 253, 141 Atl. 142 (1928).

[77]234 Mass. 597, 605, 127 N.E. 525, 529 (1920), followed in Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243 (1945). In Dowsey v. Kensington, 231 App. Div. 746, 257 N.Y. 221, 230 (2d Dep't 1931), the court stated: "Aesthetic considerations are, fortunately, not wholly without weight in a practical world. Perhaps such considerations need not be disregarded in the formulation of regulations to promote the public welfare. . . . 'Public welfare' is a concept which in recent years has been widened to include many matters which in other times were regarded as outside the limits of governmental concern. As yet, at least, no judicial definition has been formulated which is wide enough to include purely aesthetic considerations."

[78]*Attitude of the Law toward Beauty,* 8 A.B.A.J. 470. For another early statement on aesthetics as a possible consideration in zoning see BAKER, LEGAL ASPECTS OF ZONING, c. 1 (1927).

[79]State v. Harper, 182 Wis. 148, 196 N.W. 451, 455 (1923).

This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered."

Persons of the calibre of Paul Sayre of the Iowa Law School have argued cogently that the judiciary should recognize frankly that aesthetics bear a fundamental relationship to property values and that recognition of this relationship should change the usual judicial attitude toward zoning and aesthetics. It is Professor Sayre's belief that the courts are slowly but inevitably working toward this position.[80]

The power to control the erection and construction of billboards has been established for many years.[81] Though many of the cases were decided on grounds of public safety, others have at least given weight to matters of aesthetics and property values.[82] In what was obviously a decision based solely upon the desire to preserve the historical character of the New Orleans French Quarter, the Louisiana Supreme Court held that the City of New Orleans had the power to create the Vieux Carre Commission for the purpose of preserving the antique character of the French and Spanish quarters in New Orleans and that proprietors of buildings in the Vieux Carre must first obtain from the Commission permission to maintain or display advertising signs. The ordinance specified the maximum dimensions of such signs.[83]

The assertion may safely be made that the courts have been willing

[80]*Aesthetics and Property Values*, 35 A.B.A.J. 471 (1949). Among cases he cites in support of his thesis are Neef v. Springfield, 380 Ill. 275, 43 N.E.2d 947 (1942); Burlington v. Dunn, *supra* note 77; Baddour v. Long Beach, 297 N.Y. 167, 18 N.E.2d 18 (1938).

[81]One of the earlier cases is St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269 (1919).

[82]In the well-known case of General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799 (1935), zoning legislation regulating billboards was held valid, the court reasoning that the presence of the billboards might impair the scenic qualities of the area as well as depreciate the value of surrounding property.

[83]New Orleans v. Pergament, 198 La. 852, 5 So.2d 129 (1941).

to go further along the road toward recognition of aesthetics in the billboard field than in other areas. Perhaps this tendency has been aided by the undoubted safety factors involved, particularly in the regulation of billboards along scenic highways where those billboards might distract the attention of the motorist. That scenic factors happen to be coincidental is fortunate. It may also be noted that billboards are actually a phase of business operations; business itself may be zoned and signs can easily be prohibited under a similar rationalization. Decisions of the courts, however, have fairly well placed the billboard in a category by itself so far as regulation is concerned.[84]

Of greater importance to Florida cities, perhaps, are the questions involved in what is known as "architectural zoning." This term is used to denote compulsion by the municipality to secure a similarity or synonymity of structures. The practice of restricting construction in residential areas through the use of private covenants is a common mechanism. Through such covenants, control of styles of architecture, bulk and footage of buildings, and other aims may be accomplished.[85] What, however, of government action to effect the same ends?

St. Augustine and Coral Gables, Florida, and Monterey, California, have all imposed some degree of architectural control in particular sections. In none of the three instances have the ordinances been subjected to court test on the aesthetic issue. Certainly in the cases of St. Augustine and Monterey, the action might be sustained on the ground of the historic importance of the areas involved.[86]

Yet it is safe to say that architectural control regulations would find hard sledding indeed with the courts in Florida today. A 1947 ordinance of the City of West Palm Beach requiring that each new building equal substantially the building next to it in design, appearance, height, and floor footage was invalidated as leaving too much discretion to the agency charged with its administration.[87] If

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[84]Sorenson, *Architectural Control of Buildings,* MUNICIPALITIES AND THE LAW IN ACTION, Proceedings of the Nat. Inst. of Municipal Law Officers 357 (1949).

[85]Barton v. Moline Properties, 121 Fla. 683, 164 So. 551 (1935). *But cf.* Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933).

[86]Fla. Spec. Acts 1937, c. 18873; Sorenson, *supra* note 84, at 358; St. Augustine Record, July 4, 1937.

[87]West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 30 So.2d 491 (1947). Minimum footage, bulk, and height requirements have been declared unconstitutional in New Jersey, Brookdale Homes, Inc. v. Johnson, 126 N.J.L. 516, 19 A.2d 868 (1941); and footage requirements have been declared invalid in Michigan, Frischkorn Constr. Co. v. Lambert, *supra* note 74; Senefsky v. Huntington

such a municipal action would not be sustained by the courts, how may it be argued that more stringent regulations looking to general architectural control would be declared constitutional?

This is not to say that the Florida Supreme Court has not been aware of matters aesthetic. Indeed, in many respects the Court has made a considerable contribution to judicial literature dealing with the problem. In *Miami Beach v. Ocean and Inland Co.*[88] a zoning ordinance restricted the use of the area two blocks deep along the seashore to hotels and apartment hotels. Commercial enterprises were permitted to operate along streets extending at right angles to the beach, except where such streets crossed a restricted area. The Court held that, in view of the character of Miami Beach as a vacation resort, the ordinance was not so unreasonable and arbitrary when applied to property situated on an intersecting street just within the restricted area as to constitute deprivation of property without due process of law.[89] "It is difficult," said the Court, "to see how the success of Miami Beach could continue if its aesthetic appeal were ignored because the beauty of the community is a distinct lure to the winter traveler."[90]

Certainly the influence of aesthetics was present in the thinking of the Florida Court in the *Ocean and Inland* case. The Court was greatly and obviously influenced by the fact that Miami Beach is fundamentally a tourist city. Loath as the judges might be to predicate an opinion entirely on the basis of aesthetic considerations, the decision in the *Ocean and Inland* case comes very close to that rationale.[91]

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Woods, *supra* note 74; and in Nebraska, Baker v. Somerville, *supra* note 69.

Aesthetics were only incidentally a consideration in a Lake Worth ordinance providing minimum lot size and street width before approval could be gained for plats for real estate subdivisions within city limits. The ordinance was held valid in Garvin v. Baker, 59 So.2d 360 (Fla. 1952).

[88]147 Fla. 480, 3 So.2d 364 (1941). This is the second of two cases with the same name.

[89]The Florida Court has followed the rule that in a zoning ordinance the line must of necessity be drawn somewhere, else the zoning ordinance ceases to have substance and meaning.

[90]147 Fla. 480, 487, 3 So.2d 364, 367 (1941). The Court noted with approval the statement of Judge Owen of the Wisconsin Supreme Court.

[91]Though aesthetics were not directly at issue in Stengel v. Crandon, 156 Fla. 592, 23 So.2d 835 (1945), the Court in referring to the *Ocean and Inland* decision, said: ". . . we took into consideration aesthetics in connection with general welfare of a community having the characteristics and the appeal of Miami Beach." *Id.* at 596, 23 So.2d at 837.

In the recent case of *Miami Beach v. First Trust Co.*[92] the Florida Supreme Court marched up the hill of aesthetics and then down again. The facts of this case, already discussed, involved the validity of a Miami Beach zoning ordinance of 1930 as it applied to lands of the Firestone Estate in 1949.

In an opinion filed July 5, 1949, the Court, speaking through Mr. Justice Thomas, held for the City of Miami Beach. After pointing out that the line must be drawn somewhere, else the Court would be merely substituting its judgment for that of the city officials and the zoning ordinance would be dissipated by a "sort of judicial erosion," Justice Thomas said:[93]

> "We have already recognized, in City of Miami Beach v. Ocean and Inland Co., . . . the peculiar qualities of the community of Miami Beach as an attraction to visitors. That is its very *raison d'etre.* We said there that a case like this, affecting a city like that, *does not involve a matter of public morals or of public safety or of public health.* The question of general welfare obtains, and the general welfare of the city, considered in this light, is just as manifest today as it was . . . when this fabulous city was only a small town of 6,000 inhabitants.
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> "Summarizing, we believe, as we did when we adopted the opinion in City of Miami Beach v. Ocean and Inland Company, . . . that the peculiar characteristics and qualities of the City of Miami Beach *justify zoning to perpetuate its aesthetic appeal, and that this is an exercise of the police power in the protection of public welfare.*"[94]

Mr. Chief Justice Adams and Justices Terrell, Sebring, and Hobson concurred, with Justices Chapman and Barnes dissenting.

Had events stopped at this point the case would have been a significant one for those interested in promulgating the doctrine of aesthetics. The Court had tied aesthetics to the general welfare in well-nigh unmistakable fashion. It had stated expressly that, in the circumstances under which the case arose, the public health, safety, or morals were not involved.

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[92]45 So.2d 681 (Fla. 1950). Discussion of this major case as it was concerned with the doctrine of presumptive validity is found at pp. 365, 366 *supra*.

[93]45 So.2d 681, 684 (Fla. 1950).

[94]Italics added. After making these statements the Court then proceeded to

But the July, 1949, opinion was not to be allowed to stand. Upon rehearing the Court found for the trust company and against the city.[95] The shift was accomplished through a change in attitude of Justices Terrell and Hobson. Justice Terrell now ruled that a positive showing of physical, economic, or social change rather than aesthetic considerations or group caprice is necessary to justify a release from zoning regulations. The 1930 zoning restrictions preventing the use of the particular area for hotels and apartment houses should be removed because of changed conditions. The city's population had increased and the property would be worth over four times as much with the restrictions removed. The zoning plan of the city would not be jeopardized or any property owners hurt. The action of the city amounted to outright confiscation.

Thus history in the field of zoning regulations was not written. Nevertheless the opinion of Justice Thomas, dissent though it eventually turned out to be, is now spread on the reports and, taken with the *Ocean and Inland* case, may serve as precedent in the future. The inference must perforce be a cautious one in view of the strong tone of Justice Terrell's opinion on rehearing.[96]

Certainly protection against haphazard or sudden change is a basic part of any zoning plan.[97] But the plan should also be susceptible to change in the light of conditions not adequately recognized or impossible to foresee when the zoning ordinance was passed.[98] It is

invoke the presumption doctrine.

[95]45 So.2d 681, 687 (Fla. 1950).

[96]There is an interesting postscript to the *Firestone* case. After the Court had ruled for the estate on rehearing the city acted to prevent the building of hotels on adjacent properties by instituting condemnation proceedings on two choice lots with a view to making them a public park. After the action was begun the owners of the lots, relying on the *Firestone* case, sought to get their holdings rezoned for hotel purposes, not because they wished to build hotels but because the city would be forced to pay the increased value. The Florida Supreme Court, however, upheld the Miami Beach zoning ordinance and the right of the city to condemn and acquire the land for park purposes. Miami Beach v. Hogan, 63 So.2d 493 (Fla. 1953); Miami Beach v. Elsalto Real Estate, Inc., 63 So.2d 495 (Fla. 1953).

[97]Mercer Lumber Cos. v. Glencoe, 390 Ill. 138, 60 N.E.2d 913 (1945).

[98]Forde v. Miami Beach, 146 Fla. 676, 1 So.2d 642 (1941). Zoning regulations are subject to removal or change when the reason for them ceases to exist, Siegel v. Adams, 44 So.2d 427 (Fla. 1950).

One of the most interesting developments indicative of our "motor car society" has been the tendency to add to zoning ordinances requirements that places of assembly provide space for off-street parking as a condition precedent to con-

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fair to ask whether the subject of aesthetics may not be one of the changing conditions which, at some unpredictable date, Florida courts and courts generally will finally recognize.

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Such is the current status of some of the important legal problems of Florida municipal zoning. The state was the last in the Union to adopt a general enabling act for comprehensive zoning, though the lack of such action was, in part, overcome by special acts authorizing particular municipalities to zone comprehensively. There can be no argument today that adequate zoning legislation is absolutely vital to the well-being of Florida cities.

It is readily apparent that the Florida Supreme Court has been cautious as it has sought to develop doctrines capable of rationalizing the necessity for private right to yield to the exercise of police power as expressed in zoning ordinances. Older doctrines and philosophies have been gradually modified to adapt them to changing economic and social conditions. The Court has been very much aware that the balance between private right and public necessity must be accomplished gradually.

The Court is feeling its way. Though it has not yet accepted aesthetics as a sole basis for zoning legislation, it has recognized that aesthetics may properly be considered when the zoning ordinance has a basis in other valid objectives of this exercise of the police power. The Court has shifted its attitude in applying the doctrine of presumptive validity; the attacker of a zoning ordinance today carries the burden of proof, a burden which early twentieth-century attackers of such ordinances did not have to shoulder. The Court has shown signs that it may one day accept the concept that administrative remedies must be exhausted before resort can be had to court review of actions of boards of zoning appeals.

Zoning problems, and the broader problems of city planning, will become even more important in the years to come. The Florida bench and bar can be certain that when the problems raised in this article have been settled others will rise to take their places.

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struction. The issue has not yet been squarely met in Florida. However, in State *ex rel.* Tampa Co. of Jehovah's Witnesses v. Tampa, 48 So.2d 78, 79 (Fla. 1950), Justice Terrell indicated in a dictum that such a regulation as applied to places of worship has no relationship to public health, morals, safety, or welfare and that denying a permit to such a group was arbitrary.