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Zoning Under the Florida Law

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ZONING UNDER THE FLORIDA LAW

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HISTORICAL BACKGROUND

Zoning[1] is a rather recent innovation in American jurisprudence.[2] However, it has now approached a state of almost universality in the urban areas of Florida and most of the other states of the Union. In developing zoning laws and applying the restrictions contained therein to varied circumstances, the legislature, courts, and municipalities have been confronted with a dilemma. On the one hand, there reposed, embedded in the civil and legal philosophies of the democratic way of life of every citizen, an extensive aggregate of "vested" property rights and personal freedoms which had been judicially recognized and meticulously safeguarded. "Bills of rights," "liberty," "freedom," and "due process of law" were topmost among these basic political concepts, and the two pillars supporting these concepts of freedom most relied upon were the Fourteenth Amendment of the

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1. "Zoning" is often distinguished from "City Planning." The latter has been referred to as including "the entire complex or urban problems" while the former embraces "the machinery by which part of the plan can be accomplished." Note, 6 MIAMI L. Q. 135, 138, n. 25 (1951).

"Planning was designed to promote the making of a general scheme for the future physical development and growth of the municipality," while "the zoning ordinance has for its purpose the regulation and restriction of property in particular zones so as to protect such zones for the present and during the transition periods in connection with further development of areas concerned." RATHKOPF, THE LAW OF ZONING AND PLANNING, 2-3 (1949).

However, the distinction does not seem to be too significant; it is largely a matter of choice of nomenclature. In English terminology "City Planning" is used, while in American legal parlance, "Zoning" is the term commonly employed.

2. Zoning regulations were common in European countries much earlier than in the United States.

"As in the preceding year, the outstanding activity in local regulations of building during 1923 was the adoption of zoning regulations by municipalities. Eighty-one new ordinances affecting about 8,000,000 people brought the total of zoned cities, towns, and villages in the United States to 221, with more than 22,000,000 population. Of the municipalities zoned in 1923, 33 had less than 10,000 inhabitants, 27 had between 10,000 and 50,000, and 21 had more than 50,000 according to the 1920 census." COMMERCE YEARBOOK, 267 (1923).

The first zoning case to come before the United States Supreme Court was Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926). It was about this same year that zoning ordinances began to appear in Florida. The first comprehensive zoning ordinance to be adopted in this country, however, was enacted in New York City in 1916. But once the zoning concept took hold in this country its development was rapid. This was particularly true in this state. By the close of 1933, thirteen Florida municipalities had enacted comprehensive zoning ordinances. Wilson, *Zoning and the Florida Courts*, 8 FLA. L.J. 17 (1934). The movement soon spread to cities throughout the State.

Federal Constitution and the organic law of the respective state.[3] On the other hand, an effort to develop legal formulas necessary in establishing an effective municipal zoning scheme must, by necessity, run counter to these entrenched constitutional guarantees. To achieve an effective zoning set-up meant a shattering of long-recognized vested rights, while a preservation of such freedoms would make any zoning endeavor futile.

Increasing urban congestion, accompanied by its "blighted areas" and over-all incongruities, gradually awakened a sense of social consciousness, prompting Mr. Citizen to realize—although he was far from willing to indiscriminately "cast to the wind" his cherished personal freedoms—that certain group benefits, resulting from limited restrictions, might outweigh in personal social values the privileges he would be required to relinquish. Zoning is an outgrowth of that awakening.

Upon the development of a conscious need, coupled with a desire to accomplish this coveted end, the question as to how the purpose could be accomplished without effecting a drastic revision of our legal structure presented itself. For logical reasons, "police power" was selected as the legal instrumentality for accomplishing the desired end. This avoided the injection of an alien concept into our legal system, while requiring only a slight revision of our established concepts of "vested" and "inalienable" personal and property rights, but still retaining the bulk of our freedom. That is, this compromise promised personal benefits through group rewards which were much more important than the individual rights to be surrendered. No complete abandonment of constitutional guarantees was intended; the results were to be attained by slightly shifting a portion of the emphasis from the rights of the individual, as such, to the rights attained by the individual through the advantages acquired by the group by reshaping the aim and slightly retracting our constitutional safeguards.

Under this revised concept, added authority was not extended directly to the municipalities;[4] the power is retained by and limited to the state legislature, while at the same time extending to the legislature the authority to delegate some of the powers to municipalities. The organic law of Florida restricts police and other municipal powers which may be conferred upon municipalities.[5] However, it is recognized that statutes may confer upon municipalities any powers not conflicting with constitutional provisions.[6] The exercise of delegated police power is subject to the organic law, which is designed to conserve private rights. Thus, such delegated

3. Florida organic law consists of nearly 200 pages of Volume 25, Florida Statutes Annotated setting out the Preamble and Declaration of Rights (and case annotations thereon) of the present Florida Constitution.

4. There are some exceptions. For instance, Ohio provides for a dual delegation. The Ohio Constitution delegates directly to its municipalities such power to adopt zoning regulations, while such authority may also be delegated by the legislature. State *ex rel.* Gulf Refining Co. v. De France, 89 Ohio App. 1, 100 N.E.2d 689 (1950).

5. Maxwell v. City of Miami, 87 Fla. 107, 100 So. 147 (1924).

6. City of Lakeland v. Amos, 106 Fla. 873, 143 So. 744 (1932).

power can be exercised by municipal corporations in conserving such rights, but not in impairing them.[7] It is to be remembered that municipalities have limited governmental authority; they are not subdivisions of the State as are counties.[8]

It would be hard to imagine a city charter being so limited that some general police power would not impliedly be delegated to the municipality. No statutory delegation of authority is necessary for municipalities to exercise normal police power. Such implied powers are generally exercised upon some form of nuisance theory.[9] Under such implied powers, funeral homes may be restricted to specified areas.[10] But a municipuality cannot declare a business a nuisance if it is not a nuisance in fact.[11] However, the Florida Supreme Court has pointed out that, although the municipality is proceeding under a duly-enacted zoning ordinance, the trial court may still inquire into the question of the reasonableness of the use of the property as to the particular location.[12] Practicing medicine is not a nuisance, nor can it be treated as a "trade" and be regulated as such under a zoning ordinance.[13]

Chief Justice Chapman summarized the powers of Florida municipalities as follows:

> This Court in the case of Blitch v. City of Ocala, 142 Fla. 612, 195 So. 406, 407, when considering the prerequisites of a fire ordinance enacted by the City of Ocala, in part said:
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> "Ordinances such as the one here under consideration are enacted under the general police power, and 'they must not (1) infringe the constitutional guarantees of the nation or state by (a) invading personal or property rights unnecessarily or unreasonably, (b) denying due process of law, or (c) equal protection of the laws, or (d) impairing the obligations of contracts; (2) must

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7. Maxwell v. City of Miami, *supra* note 5. Chief Justice Brown, in quoting from the opinion of Justice Whitfield, in Cawthon v. Town of De Funiak Springs, 88 Fla. 324, 102 So. 250, 251 (1924), said: "The Legislature can legally authorize the exercise of the police power only for proper purposes and only to the extent that it is necessary to conserve the public welfare in the premises." City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So.2d 364, 370 (1941).

8. Justice Whitfield, in City of Miami v. Rosen, 151 Fla. 677, 10 So.2d 307, 309 (1942), remarked: "Municipalities in Florida are not subdivisions of the State as are counties. Secs. 1, 2, 3, Art. VIII, Constitution. Municipalities are established in separately described areas containing inhabitants whose interests require special local governmental activities not afforded by State and county units. Municipalilties have limited governmental authority and may have corporate functions under statutory regulations. See sec. 8, Art. VIII, sec. 34, Art. V. Upon appropriate statutory authority, municipalities may by ordinances duly adopted provide municipal governmental regulations, define municipal offenses and prescribe penalties by fine and imprisonment for violations of city ordinances and regulations. Such ordinances generally have the force of law within the limits of statutory and applicable organic limitations."

9. Hunter v. Green, 142 Fla. 104, 194 So. 379 (1940). See FLA. STAT. § 165.19 (1951).

10. Knowles v. Central Allapattae Properties, 145 Fla. 123, 198 So. 819 (1940).

11. City of Miami Beach v. Texas Co., 141 Fla. 616, 194 So. 368 (1940); S. H. Kress Co. v. City of Miami, 78 Fla. 101, 82 So. 775 (1919).

12. City of Miami Beach v. Texas Co., *supra* note 11.

13. Yocum v. Feld, 129 Fla. 764, 176 So. 753 (1937).

not be inconsistent with the general laws of the state, including the common law, equity and public policy, unless exceptions are permitted; (3) must not discriminate unreasonably, arbitrarily or oppressively; and (4) must not constitute a delegation of legislative or executive or administrative power.' McQuillin, Municipal Corporations, 2nd Ed., page 119."[14]

This implied power authorizes a municipality to incorporate by reference into an ordinance the federal law if such law is not in conflict with the laws of the state.[15]

In exercising, by means of a zoning ordinance, powers delegated to a municipality, the municipality must follow the precise requirements as to the adoption of such ordinance.[16] Prior to the adoption of the Florida General Zoning Statute in 1939,[17] general zoning ordinances in this state were required to be authorized by special legislative acts, and in the absence of such special delegation of authority any attempt to zone or adopt regulations in abrogation of common law was void.[18] Such power must be authorized, and the municipality can only act in so far as clearly within its delegated powers.[19] But, when duly authorized by a special statute, a

14. Blitch v. City of Ocala, 142 Fla. 612, 195 So. 406, 407 (1940). *See also* Miami Shores Village v. Wm. N. Brockway Post No. 124 of American Legion, 156 Fla. 673, 24 So.2d 33, 35 (1945).

15. Wright v. Worth, 83 Fla. 204, 91 So. 87 (1922).

16. State *ex rel.* Shad v. Fowler, 90 Fla. 155, 105 So. 733 (1925).

17. Fla. Laws 1939, c. 19539; FLA. STAT. c. 176 (1951). In the early twenties, the Advisory Committee on Zoning of the Department of Commerce released the Standard State Zoning Enabling Act, which had been prepared by the Division of Building and Housing. (1924, iv, 12 pp.) See Monthly Catalogue of U. S. Public Documents, July, 1923, to June, 1924, p. 515.

"The legal status of zoning received a great deal of attention during 1923. The results of a considerable number of court decisions, some adverse and some favorable to zoning, emphasized the need of proper state legislation as a basis for local ordinances. At least 15 states enacted state zoning legislation and 11 of these made use, in a large part, of the Department of Commerce Standard State Zoning Enabling Act, permitting cities to zone." COMMERCE YEARBOOK, 267 (1923). See note 2, *supra*. The Department of Commerce Standard State Zoning Enabling Act is the source of the Florida Zoning Act of 1939. A careful checking of the statutes of the various states indicates that the Standard Act has served as a guide for much state legislation. The following states took all or a substantial portion of the provisions found in their zoning statutes from the Standard Act: Colo., 1923; N. C., 1923; Okla., 1923; Wyo., 1923; Iowa, 1924; Idaho, 1925; Utah, 1925; Va., 1926; N. J., 1928; Mich., 1929; Mont. 1929; Ala., 1935; Fla., 1939; W. Va., 1949. From the figures from the Commerce Yearbook (quoted above), it is clear that many others have taken portions from the Standard Act.

It should be borne in mind that cases from these various jurisdictions, interpreting provisions found in both the Standard Act and the Florida Act, may be used as primary authority in interpreting the Florida Zoning Law, in so far as the particular point has not already been adjudicated by the Florida Court, laying down a contrary interpretation.

18. State *ex rel.* Helseth v. Du Bose, 99 Fla. 812, 128 So. 4 (1930). Metropolis Publishing Co. v. City of Miami, 100 Fla. 784, 129 So. 913 (1930), Blitch v. City of Ocala, 142 Fla. 612, 195 So. 406 (1940); City of Hollywood v. Rix, 146 Fla. 676, 52 So.2d 135 (1951); Ellis v. City of Winter Haven, 60 So.2d 620 (Fla. 1952).

19. "Where a particular power is not expressly conferred or cannot be fairly regarded as included in or implied from powers expressly conferred, the particular power should not be exerted, and the courts will not enforce doubtful municipal powers." Whitfield, J., in State *ex rel.* Shad v. Fowler, 90 Fla. 155, 105 So. 733, 734 (1925). A municipal corporation may exercise only such powers as conferred by express or implied statutory

municipality may enact a comprehensive zoning ordinance.[20] Under an act authorizing the regulation of fire limits,[21] a municipality cannot require street set-backs.[22] When mortuaries are located in residential areas so as to constitute a nuisance, they, as a general rule, may be enjoined. However, if they are limited to specified areas, legislative authority is required.[23]

A general statute, relating to the regulation of some general business, may serve as extending to municipalities special power to zone the city into districts as to such business in carrying out such delegated authority in regulating the business within their corporate limits.[24] A municipality has general authority to zone as to liquor stores where liquor is consumed on the premises and may limit liquor sales in package stores to restricted business districts.[25] However, since a municipality has only such power respecting the regulation and control of alcoholic beverages as is given it by statute, unauthorized restraints on how the business shall be conducted cannot be imposed by ordinance.[26] And an ordinance, which vests in a municipality arbitrary discretion to grant or revoke a license to carry on an ordinary lawful business without prescribing definite rules and conditions for guidance of the municipal authorities in the execution of their discretionary power, is invalid.[27] But there is the exception to the "ordinary-lawful-business" rule: a mere privilege is granted, rather than a right, and the sale of intoxicating liquors falls within that exception category, since its character tends to be injurious. In other words, there is no inherent right to sell intoxicating liquors, either by a citizen of Florida or of the United States.[28]

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provisions; such authority can never be assumed. Waller v. Osban, 60 Fla. 268, 52 So. 970 (1910).

20. Forde v. City of Miami Beach, 146 Fla. 676, 1 So.2d 642 (1941); City of Miami Beach v. State *ex rel.* Ross, 141 Fla. 407, 193 So. 543 (1940). In City of Miami Beach v. Texas Co., *supra* note 11, it was held that a special ordinance forbidding gasoline storage within 1,000 feet of a dwelling was valid. Ord. No. 446 (1927). Likewise, in State *ex rel.* Dallas Investment Co. v. Peace, 139 Fla. 394, 190 So. 607 (1939), it was held that an ordinance preventing the location of a gasoline filling station within 350 feet of a church or 750 feet from another filling station was not void.

21. Fla. Sp. Laws 1915, c. 7196.

22. Wyeth v. Whitman, 72 Fla. 40, 72 So. 472 (1916). See also Ferguson v. McDonald, 66 Fla. 494, 63 So. 915 (1913); Malone v. City of Quincy, 66 Fla. 52, 62 So. 922 (1913); Waller v. Osban, 60 Fla. 268, 52 So. 970 (1910); State *ex rel.* Worley v. Lewis, 55 Fla. 570, 46 So. 630 (1908).

23. Hunter v. Green, 142 Fla. 104, 194 So. 379 (1940); State *ex rel.* Stephens v. City of Jacksonville, 103 Fla. 177, 137 So. 149 (1931); State *ex rel.* Skillman v. City of Miami, 101 Fla. 585, 134 So. 541 (1931). The same applies to regulation of pool halls. State *ex rel.* Luke v. City of Tallahassee, 100 Fla. 1529, 131 So. 386 (1930).

24. Ellis v. City of Winter Haven, 60 So.2d 620 (Fla. 1952).

25. Gross v. City of Miami, 62 So.2d 418 (Fla. 1953).

26. Simpson v. Goldworm, 59 So.2d 511 (Fla. 1951). This case held that the legislative grant of power to cities to "establish zoning ordinances restricting the location wherein a vendor licensed under § 561.34 may be permitted to conduct his place of business." FLA. STAT. § 561.44 (1951) could not be interpreted as authority to the cities to specify the manner in which liquor should be dispensed for consumption on the premises.

27. Permenter v. Younan, 159 Fla. 226, 31 So.2d 387 (1947).

28. *Ibid.* Associate Justice Kanner, on this point, quoted at page 389 of 31 So.2d, from 38 AM. JUR. 29, § 340, as follows:

A zoning ordinance may fail on the ground of indefiniteness as to the exercising of discretion by the municipal officers if the planning chart is not attached to the ordinance as stated in such ordinance.[29] In adopting an ordinance the municipal authorities are always burdened with the duty of ascertaining what statutory provisions are mandatory. If the statutory stipulations are mandatory they must be followed, while, if only directory, the ordinance may be valid although the provisions are not met.[30] If an ordinance is illegal, its validity may be attacked by a writ of habeas corpus.[31]

Upon the Legislature's adoption of the general zoning law in 1939,[32] a new era in the zoning of municipalities was ushered in. This new Municipal Zoning Act extended to all Florida municipalities the power, subject to the terms and conditions set forth therein, to enact comprehensive zoning ordinances. This general law terminated the need for further zoning authorization by special acts and, in adopting more recent zoning ordinances, municipalities have relied upon it for the necessary delegated powers.[33] Prior thereto Florida municipalities received their general zoning authority from special statutes. Most of the larger Florida municipalities had adopted zoning ordinances prior to the passage of the general zoning law of 1939 and, as a result, most Florida zoning cases relate to ordinances adopted under authority granted by special acts. In recapitulating it can be said that some

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"A majority of the cases passing upon the problem have concluded that an arbitrary discretion as to the granting of licenses may lawfully be delegated to municipal officials without prescribing definite rules of action in the licensing ordinances, where the discretion relates to a business the carrying on of which is a mere matter of privilege because of a character tending to be injurious, rather than an ordinarily lawful business the carrying on of which creates a property right or vested interest. * * *"

Justice Kanner, further on in the case, stated: "There is the further modification to the ordinary-business rule that it is not necessary to prescribe specific rule of action where the discretion relates to matters within police regulation and is necessary to protect the public health, safety, morals and general welfare. 'An ordinance which imposes upon an administrative officer as a prerequisite to the issuance of a license, the duty of ascertaining facts relating to public health, safety, welfare, etc., does not confer legislative power upon such officer in a constitutional sense. In such case, resort may be had to the courts, if his conduct should prove to be arbitrarily exercised or palpably unwarranted.' 38 AM. JUR., p. 27, Sec. 337."

29. Moon v. Smith, 138 Fla. 410, 189 So. 835 (1939).

30. *Ibid.*

31. Pounds v. Darling, 75 Fla. 125, 77 So. 666 (1918). Justice Ellis observed "that *habeas corpus* will not lie to test the guilt or innocence of one who is charged with an offense under a valid act or ordinance, but it does not follow that the court will not in such a proceeding inquire into the facts to ascertain whether under the circumstances the act or ordinance in question is a valid exercise of legislative power." *See also* Hunter v. Green, 142 Fla. 104, 194 So. 379, 382 (1940).

32. FLA. STAT., c. 176 (1951). Section 176.02 provides: "For the purposes of promoting health, safety, morals or the general welfare of the communities and municipalities of the State of Florida, said municipalities may regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land and water for trade, industry, residence, or other purposes.

"Wherever the governing body of any municipality shall elect to exercise any of the powers granted to it under this chapter, said powers shall be exercised in the manner hereinafter prescribed and in accordance with the charter of such municipality."

33. City of Hollywood v. Rix, 52 So.2d 135 (Fla. 1951).

of the special acts concerned only zoning;[34] some acquired their power from a special act concerning the general governmental authority relating in each instance only to the particular city, which special act contained special provisions authorizing zoning regulations;[35] while in others the municipality gained its power from provisions in the chartering act.[36] In many instances the delegation of authority was contained in general statutes relating to the regulation of some particular business;[37] or from the charter act or some other special act concerning only that particular municipality and the issues in the question involved conferred power authorizing the regulating of the particular business although not granting general zoning authority to the municipality;[38] and still other cases relate to statutes delegating general powers as to regulatory matters to all Florida municipal corporations;[39] and, finally, a case may involve only the general police power, often erroneously referred to as being an "inherent" or "common law" power. Thus, a city can zone out *nuisances*.[40] But such powers are not *inherent*; they are powers

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34. Forde v. City of Miami Beach, 146 Fla. 676, 1 So.2d 642 (1941), Fla. Sp. Acts 1923, c. 9837; Ellis v. City of Winter Haven, 60 So.2d 620 (Fla. 1952).

35. State *ex rel.* Landis v. Valz, 117 Fla. 311, 157 So. 651 (1934). Fla. Sp. Acts 1923, c. 9783.

36. Waller v. Osban, 60 Fla. 268, 52 So. 970 (1910) (Titusville); State *ex rel.* Shad v. Fowler, 90 Fla. 155, 105 So. 733 (1925) (Jacksonville); Orr v. Quigg, 135 Fla. 653, 185 So. 726 (1939) (Miami); Miami Shores Village v. Wm. N. Brockway Post No. 124 of American Legion, 156 Fla. 673, 24 So.2d 33 (1945).

37. Ellis v. City of Winter Haven, 60 So.2d 620 (Fla. 1952). In this case, a special act, relating only to Winter Haven and granting to it the power to enact a zoning ordinance, had been enacted. Fla. Sp. Acts 1939, c. 20202. But, in adopting its ordinance limiting the areas in which beverages might be sold, the municipality did not comply with the requirements stipulated in the special act. However, the court upheld the ordinance on the ground that ample power to enact and enforce it was granted by the State Beverage Act of 1935, FLA. STAT. §§ 561.44, 562.45 (1951), and the general statute relating to police power of municipalities to regulate public amusements, hotels, public vehicles, etc., FLA. STAT. § 168.07 (1951). This latter statute dates back to Fla. Laws 1879, c. 3163, § 1.

38. Wyeth v. Whitman, 72 Fla. 40, 72 So. 472 (1916). In this case the Legislature had adopted an act concerning the regulation of erection of buildings for fire protection. Fla. Sp. Acts 1915, c. 7196. This statute applied only to Miami. It provided that "The City Council shall have the power to fix and establish a fire limit within said city, and to prescribe rules and regulations for the erection and repair of buildings in said city." The Court held that that did not authorize the adoption of an ordinance requiring a set-back of 15 feet from the street in erecting new structures. A municipality having authority to adopt a comprehensive zoning plan may fix set-backs in general at a reasonable distance from the streets while further providing that the set-back in a particular block may be determined by the set-back of existing buildings in the block. But "existing building" must be construed to mean "existing" at the time of the adoption of the ordinance. Fortunato v. City of Coral Gables, 47 So.2d 321 (Fla. 1950).

39. Moon v. Smith, 138 Fla. 410, 189 So. 835 (1939). The facts in this case set out that the City of Orlando had adopted a comprehensive zoning ordinance. No mention is made that any authority had been delegated to the municipality by any *special* act of the Legislaure. The case turned on the question of the validity of the ordinance, and the Court held that the ordinance was invalid because the zoning map was not attached to it, and, therefore, it must fail on the grounds of *indefiniteness*. The basis of the holding was that in adopting the ordinance the general statutes had not been complied with. Fla. Comp. Gen. Laws of 1927, § 2945; Acts of 1871, c. 1855, § 2.

40. See Knowles v. Central Allapattae Properties, Inc., 145 Fla. 123, 198 So. 819 (1941), and other Florida public nuisance cases in general.

implied from special and/or general grants of legislative authority.[41] Such authority may be implied from an act creating the corporation or authorizing its creation.

In a few instances the Legislature has enacted special acts excluding specific businesses from certain areas in a particular municipality. This method of state zoning of specified municipalities has been upheld by the Florida Supreme Court, and such restrictions are paramount to regulations provided in any ordinance enacted by the municipality. In the case of *Texas Co. v. City of Tampa*,[42] the Texas Company filed a suit in the Federal District Court seeking to enjoin the City of Tampa from enforcing an ordinance forbidding the operation of gasoline filling stations in a certain area. The trial court held in favor of the city, sustaining the ordinance. On appeal, the holding was affirmed on the ground that the Legislature had adopted a statute prohibiting the erection, maintenance, or operation of any gasoline filling stations, public garage, or mercantile establishment in the certain section of Tampa and that the plaintiff was excluded by force of the statute.[43]

Although the legislative authority of a municipality is the exercise of a power delegated by the Legislature, it does not follow that such municipality may re-delegate such power. Justice Terrell, in *State* ex rel. *Taylor v. City of Tallahassee*,[44] stated "it is equally as well settled that when a law is made, its execution may be made to depend on a condition precedent, that is to say, on a vote of a certain portion of the people or on approval of the lot owners in a given area. The Legislature can also make a law and incorporate in it a state of facts on which its execution depends, but its execution cannot be made to depend on the unbridled discretion of a single individual or an unduly limited group of individuals."

However, the leaving of establishing the limits of a regulated area to the whims and caprice of property owners is often considered as an illegal delegation of the zoning powers and therefore is frowned upon. The exercise of such a power by individual property owners would lead to "spot" zoning which is rapidly becoming taboo.

Mr. Rathkopf expresses the disfavor relating to spot zoning in these words:

> Spot zoning, or, as it is sometimes called, piecemeal zoning, may be regarded as the enemy of zoning. It runs in direct opposition to the purposes of zoning, namely, it is not according to a comprehensive plan, nor within the spirit and intent of the zoning ordinance that the same should be enacted to serve the public health, safety and general welfare of the community. It is in

41. City of Miami v. Rosen, 151 Fla. 677, 10 So.2d 307, 309 (1942).
42. 100 F.2d 347 (5th Cir. 1938). Statutes will prevail over ordinance provisions when they are in conflict, and the Supreme Court will take judicial notice of statutes while it will not as to municipal ordinances. Miami Shores Village v. Bessemer Properties, Inc., 54 So.2d 108 (Fla. 1951).
43. Fla. Sp. Acts 1937, c. 18943.
44. 130 Fla. 418, 177 So. 719, 721 (1937).

> disregard of the rights of others similarly situated or the effect which such spot or piecemeal zoning has on property values in the district or upon the future orderly development of the municipality as a whole. Generally speaking, spot zoning or piecemeal zoning is the result of effort on the part of some individual owner to benefit himself at the expense of the general public and sometimes as a result of spite on the part of the legislative body toward a particular owner. Spot zoning is based upon privileges granted, or restrictions imposed, without regard for a unified plan.[45]

Zoning implies that the entire municipality is to be divided into logically classified districts so as to accomplish a comprehensive plan of regulation which will encourage systematic growth and development.[46] Chief Justice Davis, in *State* ex rel. *Henry v. City of Miami* stated:

> Therefore in order to be constitutional under the due process clause of the Fourteenth Amendment to the Federal Constitution, zoning ordinances must be passed in aid of some "plan" that is general and comprehensive in character when they undertake not only to regulate temporary uses of property but the manner of permanent construction of the buildings erected on affected property. . . . A zoning ordinance enacted simply as a piece of guesswork, with no attempt to study the city's problems and no effort to accomplish some general plan adapted to the city's needs in the way of health, safety, prosperity, welfare, and the like, and attended by no surety of the existing situation to which it applies is generally unsustainable as a reasonable or valid police regulation. Metzenbaum, Law of Zoning, page 130.[47]

The usual procedure in the more fully-developed cities is to divide the city into "Use" Districts and into "Area and Structure" Districts.[48] Such procedure generally implies a dual classification. That is, the entire city is divided into *use* areas set out on a map, which map is made a part of the

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45. RATHKOPF, LAW OF ZONING AND PLANNING 66-67, § 7A (1949). See also annotations, 128 A.L.R. 740; 165 A.L.R. 823.

46. FLA. STAT. § 176.03 (1951).

47. 117 Fla. 594, 158 So. 82, 84 (1934).

48. A good example is Ordinance No. 289 of Miami Beach, usually referred to as the "Zoning Ordinance of Miami Beach." The entire city is divided into ten general classes of Use Districts, as follows:

1. RAA, RA, RB, and RC Estate Districts.
2. RD Single-Family District.
3. RDD Modified Single-Family District.
4. RDE Restricted Multiple-Family District.
5. RE Multiple-Family District.
6. BAAA, BAA, BA, BB, BC, BD, BE, BF, and BG Business Districts.
7. Cabana and Swimming-Pool District.
8. Two-Story Cabana District.

The ordinance further lists in detail the types of uses permitted in each district, each such district making up multiple isolated areas scattered over the entire city. Then, the entire city is also divided into 50 Area Districts, which are superimposed upon the Use Districts, but the boundaries and scope of the two types of districts are not identical. The restrictions on the use in the Use District and on the area and structure in the repective Area Districts are fully specified. Maps designating the Use Districts and the Area Districts are attached to and made a part of the Ordinance, which also contains other features. See FLA. STAT. §§ 176.02, 176.03, 176.04 (1951).

ordinance. Then the city is again zoned into *area and structure* districts. The areas zoned for the one purpose, superimposed upon use districts as they are, are not necessarily congruous with the areas zoned for the other purpose. Of course, the zoning processes must be limited to the scope of police power in all regards.

"Police power" has been variously defined. Justice Chapman, speaking for the Florida Supreme Court, remarked: "It is difficult and practically impossible to give an exact definition of the police power. The expression 'police power', in a broad sense, included all legislation and almost every function of civil government."[49] The regulation may be so foreign to the exercise of police power, such as requiring off-street parking space as a condition precedent in erecting a house of worship or other place of assembly, as to be illegal and void.[50]

There is a distinct space between the common law police power concept and the scope of extended zoning police power. Many zoning restrictions may be proper when exercised by a municipality under duly delegated authority which could not be enforced under any general common law theory of implied police power. Under the Florida Municipal Zoning Law, a municipality "may regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land and water for trade, industry, residence, or other purposes," subject to the limitations that such powers must be exercised "for the purpose of promoting health, safety, morals, or the general welfare" of the community, municipality, or State, and in the manner prescribed in the Act, and in accordance

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49. Hunter v. Green, 142 Fla. 104, 194 So. 379, 380 (1940). Justice Chapman further elaborates on the meaning of the phrase by saying: "The police power is treated by 11 Am. Jur. par. 247, pages 972, 973, thusly:

'Blackstone defines police power as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." Many cases employing the language of Chief Justice Shaw define it as "the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same." Judge Cooley says that the police power of a state "embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others," and the courts have quoted this definition with approval many times. Finally, it has been said that by means of this power the legislature exercises a supervision over matters involving the common welfare and enforces the observance, by each individual member of society, of the duties which he owes to others and to the community at large.' "

50. State *ex rel.* Tampa, Florida, Company of Jehovah's Witnesses, North Unit. Inc. v. City of Tampa 48 So.2d 78 (Fla. 1950).

with the charter of the municipality.[51] The Zoning Act further provides that the governing body of the municipality "may divide the corporate area of the said municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this chapter; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts."[52] The Act further provides that the "regulations shall be made in accordance with *a comprehensive plan* and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, *among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout said municipalities.*"[53]

A zoning restriction may be declared invalid if any of these statutory requirements are not met, or the procedures set out in the Act in adopting the zoning ordinance or in administering the execution thereof are not fully conformed with.

Much confusion, concerning the presumption of the validity of a municipal ordinance as to its adoption, validity of its operation, etc., has crept into the Florida cases. A gross miscarriage of justice could easily arise if our courts become enmeshed in this maze of incongruities. This was demonstrated in the relatively recent *Firestone Case*.[54] To clarify the issues involved, it will be necessary to briefly outline the facts and procedure in the case. From the three opinions written, it is a little difficult to discover just what the pertinent facts were. But with a personal knowledge of the particular area involved and the assistance of copies of the zoning maps attached to Ordinance No. 289, little difficulty is encountered in gaining a clear understanding of pertinent facts.

First, the Firestone Estate is made up of slightly over 8 acres of waterfront property, consisting of 700 feet of ocean frontage on Miami Beach. It makes up the southern end of an RAA[55] Use District, and an expensive mansion was built on the south portion of the land in 1916. That RAA Use District is made up entirely of oceanfront property running from West 44th Street on the South (this street only runs one block east from Collins

51. FLA. STAT. § 176.02 (1951)
52. FLA. STAT. § 176.03 (1951).
53. FLA. STAT. § 176.04 (1951). Italics supplied.
54. City of Miami Beach v. First Trust Co., 45 So.2d 681 (Fla. 1950).
55. See note 48 *supra* as to these classifications in Ordinance No. 289.

Avenue, or about half the distance to the shoreline; thus, the west half of the district abuts on West 44th Street and the east or ocean-front half abuts directly on the RE Use District to the South) to a line extended from West 55th Street (which is not cut through between Collins Avenue and the ocean). The entire districts abuts on Indian River on the west and Collins Avenue extends along the east bank of the river. None of the district has any streets running through it (except Collins Avenue which runs along its western boundary and West 44th Street which marks the west half of its southern boundary); that is, it is not divided into blocks. The entire use district is about two blocks wide, from east to west, and about 15 normal-length blocks along. The streets indicate that it is only 11 blocks in length, but the blocks are unusually long where the streets are cut through west of Indian River.

The entire area along the west bank of Indian River, directly across the river from the Firestone Estate, is zoned for single-family residences, so no problem is presented there. For about nine normal-length blocks from the north end of this district, north along the ocean front, the area is placed in an RB Use District, and from the north end of this district on farther north the area is zoned for apartments and hotels (RE). The southern end of this RE District is something like two miles north of the Firestone Estate, so this factor is only remotely significant. Thus, the whole problem hinges almost entirely on matters south of the Estate. As above mentioned the southern boundary of the Firestone Estate, which is also the southern boundary of the RAA Use District, abuts on an RE Use District. This district runs south along the ocean front, between the Ocean and Indian River about 15 normal-length city blocks, where it abuts a district zoned for business. The north end of this RE Use District is now crowded with hotels and apartment houses. There is no intermediately-zoned "buffer" area between the Firestone property and the RE zone. In fact, one hotel is located within 125 feet from the boundary.

The other important facts and factors might be listed as follows:

1. The population of Miami Beach has increased nearly six-fold, between the date of the adoption of the zoning ordinance and the filing of the suit;

2. The owners of the Estate desired to abandon it as such and dispose of the land for building sites for hotels and apartments;

3. The then present value of the land as zoned was $400,000, but if rezoned would be worth $1,750,000;

4. The ad valorem taxes on Lot A, where the dwelling is located, were high ($8,338.88 for the year of 1946);

5. The then present annual rental value of the Estate was only $10,000;

6. The area had been developed into a congested hotel and apartment house region;

7. West 41st Street, lying across Indian River and only three blocks to

the south, had been rezoned into a business district, which was being rapidly built up;

8. The Use District where the Estate was located, owing to the burdensome restrictions, had never been developed, and had little prospects of being developed until rezoned;

9. The mushroomed changes could not have been anticipated at the time the zoning ordinance was adopted;

10. The element of aesthetics had no weight, as the sudden contrast in moving from the RE area into the RAA district, without a "buffer" zone intervening, would do violence to any sense of aesthetics; and

11. There was no dispute as to the facts.

In this case, the master's conclusion did not conform to his finding of facts; moreover, none of the three cases which he cited as governing his decision favored the plaintiff as strongly as do the facts in the case at hand, while the *Forde Case*,[56] on which he relied, had actually held *contra*.

The final opinion in the *Firestone Case* is sound and well-supported by law and the facts. The court, through the influence of the dissenting opinion and a reconsideration of the facts on rehearing by the other justices, corrected the fallacies in the earlier procedure.

The first fallacy was the conclusion of law rendered by the master. No stretch of the imagination could justify his decision as being supported by the facts or the holding in the *Forde Case*. The trial judge, in his decision, justifiably corrected that unfounded conclusion. Then, the Florida Supreme Court majority was misled by a fallacious presumption—that presumption being that the judgment of the city council and the conclusion of the master (unsupported as it was by undisputed facts and prior Supreme Court decisions) were conclusive. In his opinion upon rehearing, Justice Terrell said:

> When the case was before us initially the proposition that got the ear of the Court was the insistence by appellant that the *ordinance was presumptively valid, that if fairly debatable the action of the city in passing it should be upheld and the Court should not substitute its judgment for that of the City Council*. An opinion based on this theory was prepared by Mr. Justice Thomas and was agreed to by a majority of the Court I was one of those subscribing to this opinion, but on thorough review of the case on petition for rehearing, *I am convinced* that our judgment was erroneous.[57]

Since the earliest history of American jurisprudence, a presumption has been held to stand only until proof to the contrary is presented.[58] It has been said that "*Presumptions . . . may be looked on as the bats of*

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56. Forde v. City of Miami Beach, 146 Fla. 676, 1 So.2d 642, (1941).

57. City of Miami Beach v. First Trust Co., 45 So.2d 681, 688 (Fla. 1950). Italics supplied.

58. Miller v. The Ship Resolution, 2 Dall. 19, 23, 1 L. Ed. 271 (Fed. Ct. App. 1781).

the law, flitting in the twilight, but disappearing in the sunshine of actual facts."[59]

The Florida Supreme Court has engaged in the expression of two adverse lines of *presumptions*. These conflicting conclusions are difficult to reconcile. The one view is expressed by Mr. Yokley as follows:

> Zoning ordinances, being in derogation of common law and operating to deprive an owner of property of a use thereof which would otherwise be lawful, are to be strictly construed in favor of the property owner.[60]

One line of Florida decisions emphasizes this principle. In the case of *Nash v. Vaughn*, Justice Brown said: "It is a familiar rule of law in this State that any fair and reasonable doubt concerning the existence of a power which encroaches upon the liberty of the citizen is resolved against the municipal corporation. (Citations omitted.) And courts will not enforce a doubtful municipal power. (Citation omitted.) This rule would be all the more applicable if the particular power claimed by the city would infringe upon the common rights of the citizen theretofore existing and long recognized."[61]

Justice Ellis, in *Anderson v. Shackelford*, states the rule in even broader terms, thusly: "It is a *fundamental and universal* rule that any ambiguity or doubt as to the extent of a power attempted to be exercised by a municipality out of the usual range, or which may affect the common-law right of a citizen or inhabitant, should be resolved against the municipality. 1 Dillon on Municipal Corp. (4th Ed.) § 91."[62]

Justice Chapman, in a 1950 zoning case, stated the rule in these words:

> Ownership of property is guaranteed by our State and Federal Constitutions. If a doubt exists as to the power attempted to be exercised by a municipality, then it is the duty of the courts to resolve that power against the municipality.[63]

Justice Terrell, in the recent *Firestone Zoning Case*, further remarked: "When, 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."[64]

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59. Bradley v. S. L. Salvidge, Inc., 123 P.2d 780, 785 (Wash. 1942).
Justice Simpson further stated: "That presumptions have no place in the presence of actual facts."

60. YOKLEY, ZONING LAW AND PRACTICE § 3 (1948).

61. 133 Fla. 499, 182 So. 827, 829 (1938).

62. 74 Fla. 36, 76 So. 343, 345 (1917). Italics supplied.

63. City of West Palm Beach v. Edward U. Ruddy Corporation, 43 So.2d 709, 710 (Fla. 1950). The rule is fully pronounced in many other Florida cases and various treatises. Ehinger v. State *ex rel.* Gottesman, 147 Fla. 129, 2 So.2d 357, 359 (1941); *Ex parte* Wise, 141 Fla. 222, 192 So. 872, 875 (1940); State *ex rel.* Shad v. Fowler, 90 Fla. 155, 105 So. 733, 734 (1925); Pounds v. Darling, 75 Fla. 125, 77 So. 666, 668 (1918); Malone v. City of Quincy, 66 Fla. 52, 62 So. 922, 924 (1913); Hardee v. Brown, 56 Fla. 377, 47 So. 834, 836 (1908); State *ex rel.* Ellis v. Tampa Waterworks Co., 56 Fla. 858, 47 So. 358, 360 (1908).

64. City of Miami Beach v. First Trust Co., 45 So.2d 681, 688 (Fla. 1950).

In the above quotation from *Nash v. Vaughn*,[65] the Court specifically says that "Courts *will not* enforce doubtful municipal power." Municipal power is exercised only through authority gained from statutes or validly-adopted municipal ordinance. Thus, it would be assumed that the Court would not enforce doubtful municipal ordinances. Where doubt prevailed as to the validity of such ordinance, the burden would be on the city to overcome such doubt by positive evidence. If that be true, there would be a *presumption against the validity or reasonableness of a municipal zoning ordinance*, especially if such ordinance derogates from the common law, as zoning ordinances generally do.

Now let us examine the contrary presumption. Justice Terrell, in *State v. Daytona Beach*, stated:

> The city may exercise all reasonable means to protect the health and morals of its people and is usually the *sole judge of the means to be employed*. When the city, as in this case, is authorized to adopt and enforce such ordinances their acts will be upheld unless shown to be arbitrary and unreasonable.[66]

In *State* ex rel. *Office Realty Co. v. Ehringer*, Justice Sebring put it this way: "In case an ordinance *dealing with property zoning* is the subject of dispute, *the court will not substitute its judgment for that of the municipality*, but will sustain the legislative intent of the ordinance *if the matter is 'fairly debatable'*."[67] Justice Thomas, in his withdrawn opinion in the *Firestone Case*,[68] recorded a similar statement.

In *Blitch v. City of Ocala*, Justice Brown stated: "In order to render a zoning ordinance invalid, it *must affirmatively appear that the restriction is clearly arbitrary and unreasonable and without substantial relation to the public safety, health, morals or general welfare*."[69]

In examining these cases, we find the view that the city council is usually to be the sole judge of the *means* to be used in exercising its police power in zoning cases to protect public health and morals, and the acts of the municipal officers in executing zoning ordinances are *presumed to not be arbitrary* (*Daytona Beach Case*). In the next two cases, referred to above, the opinion is expressed that in the event the matter is "fairly debatable" the court cannot question the judgment of the city officials in zoning matters, while in the *Ocala Case*, it was presumed that the zoning

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65. See note 61 *supra*.

66. 160 Fla. 204, 34 So.2d 309, 311 (1948). Italics supplied. Chief Justice Brown, in City of Miami Beach v. Ocean and Inland Co., 147 Fla. 480, 3 So.2d 364, 370 (1941), in quoting from State *ex rel.* McAuley v. York, 90 Fla. 625, 106 So. 418, 419 (1925), stated: " 'When an ordinance is within the grant of power to the municipality, the presumption is that it is reasonable, unless its unreasonable character appears on its face, and the person attacking it as unreasonable or unjustly discriminatory must assume the burden of affirmatively showing that as applied to him it is unreasonable, or unfair and oppressive.' "

67. 46 So.2d 601, 602 (Fla. 150). Italics supplied.

68. City of Miami Beach v. First Trust Co., 45 So.2d 681, 684 (Fla. 1949).

69. 142 Fla. 612, 195 So. 406, 410 (1940).

ordinance in its operation was not arbitrary or unreasonable or without a substantial relation to public safety, etc.

It is clear that the view expressed in these cases is diametrically *contra* to that pronounced in the other Florida opinions discussed earlier. Moreover, it is suggested that they are unsound. It is equally clear than when these presumptions are to be deemed conclusive and beyond examination by the courts, they should be discarded. Overindulgence is unnecessarily resorting to presumptions as the basis for a legal opinion evidences intellectual indolence.

The Florida courts apparently have been misled by the remarks of Justice Sutherland in the *Euclid Case*, where he stated that before a zoning ordinance could be declared unconstitutional it must be shown that its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[70] In testing the constitutionality of a state or municipal regulation in determining whether or not it violates the Fourteenth Amendment, such a rule may be correct. If a property owner is contending that an ordinance is violative of the Federal Constitution, he must face such an adverse presumption. But such a presumption is a mere presumption of law and is universal in its scope.[71] The rule is well-founded, when limited to problems relating to the question of whether or not state legislation is within Federal constitutional limitations.

Our next problem concerns the *presumption* that a city ordinance is valid when it appears regular on its face. Justice Buford, in *Moon v. Smith*, concludes: "It is well settled that where an ordinance appears regular on its face the burden is upon him who denies its validity to show irregularity

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70. Village of Euclid v. Ambler Realty Company, 272 U. S. 365, 395 (1926). Chief Justice Brown, in City of Miami Beach v. Ocean and Inland Co., 147 Fla. 480, dicta 3 So.2d 364, 370 (1941), cited the Euclid Case and quoted from the opinion of Justice Sutherland, as follows: " 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.' " Also, after citing several decisions of the Supreme Court of the United States, Chief Justice Buford, in State *ex rel.* Skillman v. City of Miami, 101 Fla. 585, dicta 134 So. 541, 545 (1931), stated that "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."

71. In State *ex rel.* Helseth v. Du Bose, 99 Fla. 812, 128 So. 4, 7 (1930), where an assault on the ordinance was based on broad constitutional grounds, Chief Justice Terrell, in discussing the Euclid Case, remarked:

"That is to say, when such validity is challenged on the broad grounds as therein stated, but in the case at bar the ordinances brought in question is not so challenged. Here it is contended that a concrete application of the provisions of the ordinance to the premises of appellant amounts to an unconstitutional, an arbitrary, and an unreasonable exercise of legislative power. Before this contention can be upheld, it must be shown that the provisions of the ordinance as applied to the locus in question are clearly arbitrary and unreasonable, and have no substantial relation to the public health, safety, morals, or general welfare."

in its enactment."[72] Circuit Judge McCord, in *Standard Oil Co. v. City of Tallahassee*, adds to this by saying: "The courts have generally recognized that they should not inhibit a reasonable exercise of the zoning power of a municipality carried out pursuant to legislative grant by the state. Moreover, it has been held that a presumption of validity attends the enactment of such zoning ordinances."[73]

If the ordinance is attacked on the ground that it is violative of the Federal Constitution, such presumption of law cannot be questioned. The courts have applied this general rule of law in zoning cases. But when such principle is applied to zoning ordinances, the presumption becomes very thin and limited. If the implication is that an ordinance valid on its face is presumed to have been validly adopted, little complaint can be entered as zoning ordinances, like other ordinances, must meet certain procedural requirements in order to be validly enacted. But such a presumption does little more than to place on the party attacking the validity of the ordinance the *burden of going forward with the evidence* in establishing the facts alleged.

On the other hand, when *probative value* is attached to a presumption concerning the *means* employed in executing powers authorized by an ordinance in determining the *reasonableness* of the operation of the ordinance under particular circumstances, it is a different matter. Such a presumption cannot be treated as a *presumption of fact* and weighed as evidence in favor of the municipality. In such cases, the *"bats of the law"* take on the qualities of the *vampire species*. Neither do they confine their "flitting" to the "twilight" or disappear "in the sunshine of actual facts." They then serve rather as an *eclipse of the sun, dispersing the sunlight*.[74]

Justice Thomas, in his withdrawn opinion in the *Firestone Case*,[75] erroneously allowed these *bats of the law* to eclipse the sun, cutting off the light of actual facts. He and the master extended to this assumed presumption a probative value. This application tended to make the judgment of the city council conclusive, barring any review by the courts.

Zoning ordinances must be strictly construed in favor of the property owner, in so far as they derogate from the common law, by extending the concept of police power.[76] Never should any presumption in matters falling within this extended area of police power in zoning cases be given probative value in the municipality's favor. *Reasonableness* and *means* attained and employed in the execution of zoning ordinances certainly should not be construed against the property owner. Matters of reasonableness and means

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72. 138 Fla. 410, 189 So. 835, 837 (1939).
73. 183 F.2d 410, 412 (5th Cir. 1950), *aff'g* 187 F. Supp. 145 (N.D. Fla. 1950), *cert. den.* 340 U. S. 892 (1950).
74. See note 59 *supra*.
75. See note 68 *supra*.
76. Justice Sutherland, in Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 390 (1926), refers to this "broader view" of police power when applied in zoning cases.

employed are presented where the zoning ordinance is operating in an area outside of the realm of common law, in a field which the municipality has no right to invade except under delegated zoning authority.

In a zoning case, the burden of going forward with the pleading and presentation of evidence rests on the person contesting the validity of a zoning ordinance, but thereafter the *burden of proof* of the reasonableness of the means employed and the reasonableness of the effect on the plaintiff's property rights rests on the city. In other words, the municipality has the burden of clearly proving that it is acting within the authority delegated to it by the state as to matters extending into the field outside the common law range. If the plaintiff raises the question of Federal constitutionality, he must show in what manner the ordinance is unconstitutional. On the other hand, there is no presumption that the State intended to grant unconstitutional powers to the municipality. Certainly, the conclusion drawn by Chief Justice Buford, in *State* ex rel. *Spillman v. City of Miami*, cannot be sustained. He stated as follows:

> The ordinance by its own terms declares the same to be an emergency measure. Therefore in this case the question as to whether or not it was an emergency measure is eliminated from consideration because this question is one which rests primarily in the judgment and discretion of the city commission for determination.[77]

Such a rule would give unlimited authority to cities under a pretense of "an emergency", and no relief would be afforded by the courts.

Rule of Reasonableness

A zoning ordinance is open to attack on many different grounds. It may be claimed (1) that it is violative of the Federal Constitution by being discriminatory, confiscatory, arbitrary, or in violation of the "due process" clause; (2) no power has been granted by the State to the municipality authorizing it to exercise such usurped authority; (3) the statutory mandatory procedures were not met in its adoption; and (4) the regulations imposed are unreasonable in their operation. The element of reasonableness is only important in so far as it affects the particular property involved.

The ordinance may meet all of the other requirements for its validity, and be valid as to its operation as to all other properties except the particular piece of property in question but be void as to that. It may be unreasonable in its operation as to the particular piece of land at the time of the adoption of the ordinance, but more often, it may have been reasonable and valid as to the particular property at the time of enactment of the ordinance, but, owing to changed conditions, become unreasonable as to present effects upon such property.

On the one hand, the court must consider the benefits[78] which accrue

77. 109 Fla. 385, 134 So. 541, 543 (1931).

78. Justice Thomas, in a relatively recent zoning case, referred to this method of balancing benefits as the "pivotal point, in this, as in other similar cases—namely, the extent to which appellant suffers in relation to the benefits redounding to the com-

to the community by placing or retaining the contemplated or existing zoning restrictions on the area in question. That is, the court must estimate the difference in the advantages to be enjoyed by the community with the restrictions existing in the area and the resulting community benefits with the restrictions removed or changed. The court must then evaluate the damage or hardship which will be forced upon the individual property owner in that area which he would be required to bear if the restrictions are placed upon or retained against his property as compared with conditions if the area were not zoned or the restrictions reduced.

The "rule of reasonableness" implies that the benefits inuring to the community by the force of the zoning restrictions are placed on one side of the scales, and the detriments inflicted on the individual property owner by force of the restrictions are placed on the other side. The way the scales tip will determine if the restrictions are reasonable. If the scales do not appreciably tilt either way, the restrictions should be deemed unreasonable. That is, the municipality failed to present evidence to overcome the presumption of facts that the regulation was unreasonable. Many factors go to make up the aggregate of community benefits, such as freedom in receiving light, air, and breezes, and against view obstructions, fire-hazards, heavy traffic, parking problems, general congestion, and other elements affecting public health, morals, safety, peace, and general welfare of the community, including the factor of aesthetics.

The main factor favoring the property owner is the impairment of the enjoyment of his property — if he contemplates retaining it, and the reduction in value, if he desires to sell it — resulting from the imposing or retaining of the zoning restrictions as to his particular property. He may further advance the social element of shortage of housing units if his aim is to secure a limitation upon the restrictions so as to allow multiple-unit dwellings in place of single-family residences.[79] The major portion of the balance of this article will be confined to the development of the "rule of reasonableness" by examining these various factors.

Set-back lines, side lines, rear yard lines, and height of buildings, are

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munity." Stengel v. Crandon, 156 Fla. 592, 23 So.2d 835, 837 (1945). Moreover, Justice Thomas, in City of Miami Beach v. Ocean and Inland Co., 147 Fla. 480, 3 So.2d 364, 366 (1941), stated: "It is fundamental that one may not be deprived of his property without due process of law, but it is also well established that he may be restricted in the use of it when that is necessary to the common good. So in this case we must weight against the public weal plaintiff's rights to enjoy unhampered property acquired since the enactment of the ordinance."

79. The element of shortage of housing has been considered an important factor in some cases. City of San Diego v. Van Winkle, 69 Cal. App. 237, 158 P.2d 774 (1945); Wilkins v. City of San Bernardino, 29 Cal.2d 332, 175 P.2d 542 (1946). In the Wilkins Case, Chief Justice Gibson of the California Supreme Court, at page 551 of 175 P.2d, remarked:

"The fact that there is a housing shortage might justify the city, or perhaps even the court, under proper conditions, in temporarily suspending the operation of the zoning ordinance during an emergency . . ."

subject to regulations under a comprehensive zoning ordinance.[80] A zoning ordinance may permit an existing building to remain without conformance with set-back requirements, while providing that such non-conformance must cease upon "structural alterations" to the building being made.[81] A set-back zoning regulation constitutes an exercise of police power rather than a "taking" of the set-back space by eminent domain.[82]

Front, side, and rear-yard set-backs from streets and party boundaries have a substantial relation to health and safety. They contribute to public health by supplying more air, breezes, and sunlight. Street set-backs also contribute to traffic safety by reducing the obstruction of view. They also have some relationship to personal and property safety by minimizing fire hazards. But the Florida Supreme Court has held that a municipality, under power granted to it by statute, could not require a minimum street set-back of 15 feet under expressed authority "to prescribe rules and regulations for the erection and repair of buildings" in fixing the fire limits within the city.[83]

Hospitals, funeral homes, pool halls, gasoline filling stations, liquor stores, trailer camps, etc., may be restricted to certain areas in the protection of health and safety. A business hazarding public health or safety, although established in an area, may be forced to discontinue the business at that location.[84]

The provisions of Sections 176.02, 176.03, and 176.04, of the Florida Zoning Act are very broad in extending powers to municipalities in regulating height, size, location, and structure of buildings, the position of the buildings on the lots, and the uses of such building. These regulations must be uniform and must be incorporated into a comprehensive zoning plan designed to protect public health, morals, safety, and the general welfare. They must be reasonable and aimed at conserving property value, while at the same time, encouraging the most appropriate use of land throughout the municipality. Many of the specific regulations, if attempted in an isolated instance, would not have a significant relation to public health, etc., and therefore, would fail.[85] But taking other regulations as a whole, they do have a very substantial relation to the public health, morals, safety,

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80. Goodson v. Town of Surfside, 150 Fla. 614, 8 So.2d 497 (1942).
81. City of Miami v. McCrory Stores Corporation, 181 F.2d 368 (5th Cir. 1950).
82. City of Miami v. Romer, 58 So.2d 849 (Fla. 1952).
83. Wyeth v. Whitman, 72 Fla. 40, 72 So. 472 (1916).
84. Standard Oil Co. v. City of Tallahassee, *supra* note 73; City of Miami Beach v. State *ex rel.* Patrician Hotel Co., 145 Fla. 716, 200 So. 213 (1941). It is possible to require the discontinuance of a gasoline filling station on the nuisance theory without resorting to the power of eminent domain. Adams v. Housing Authority of Daytona Beach, 60 So.2d 663 (Fla. 1952).

Regulation of trailer camps and tent cities may be exercised as a restraint in protection of sanitation, health, and safety under police power, in addition to regulatory authority exerciseable by the State Hotel Commission. Egan v. City of Miami, 130 Fla. 495, 178 So. 132 (1938).

85. A good example is State *ex rel.* Tampa, Florida, Company of Jehovah's Witnesses, North Unit, Inc., v. City of Tampa, 48 So.2d 78 (Fla. 1950).

and public welfare when incorporated into a comprehensive plan. That is the gist of a model, comprehensive zoning scheme. Thereby, municipal congestion may be avoided, along with the prevention of traffic hazards, and the like. An over-all benefit to the community results by conserving property values and, at the same time, not unreasonably denying to the individual property owner the right to put his property to the most appropriate use for complete and mutual enjoyment.

Aesthetics.

The element of aesthetics is an important element in such a plan. That is particularly true in resort cities and villages. Justice Thomas, in *City of Miami Beach v. Ocean & Inland Co.*, relates:

> In the Wisconsin case[86] it is further pointed out that aesthetic considerations have also been recognized and we think what is said in the opinion is particularly relevant to the community of Miami Beach because of its general character which we have briefly described. It is difficult 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.
>
> In the Wisconsin case reference is made also to the many benefits which may spring from zoning such as the attraction to select citizenship, civic pride, the happiness and contentment of the citizens and the stabilization of the value of the property and general peace and good order. All of these elements are especially appropriate in connection with the City of Miami Beach.[87]

Justice Thomas, in speaking further for the court in the preliminary opinion (which was withdrawn upon rehearing), in *City of Miami Beach v. First Trust Co.*, reaffirmed the Court's former view, as follows:

> Summarizing, we believe, as we did when we adopted the opinion in City of Miami Beach v. Ocean & Inland Company, *supra*, 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.[88]

However, the Florida Supreme Court has held that a zoning ordinance requiring completed appearance of every new building or structure in subdivisions to substantially equal that of adjacent buildings in appearance, square foot area and height was void for uncertainty and as leaving exactions to whim or caprice of an administrative agency.[89]

The Court could have well reasoned that a requirement, such as found in that ordinance, would tend to reduce the aesthetic effect, rather than

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86. State *ex rel.* Carter v. Harper, 182 Wis. 148, 196 N.W. 451, 454, (1923). It is interesting to note that the aesthetic factor was considered as significant in this opinion which was rendered by the Wisconsin Supreme Court in the early years of American zoning.

87. 147 Fla. 480, 3 So.2d 364, 367 (1941).

88. 45 So.2d 681, 684 (Fla. 1949).

89. City of West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 30 So.2d 491 (1947).

enhancing it. At least, the beneficial aesthetic appearance could be doubtful. A variety of architectures may well be more aesthetic in appearance than a strict uniformity. It is very evident that the Florida Supreme Court has committed itself to the principle that aesthetics is an important element in a comprehensive zoning plan. Especially is that true in resort municipalities. "Sight aesthetics" implies that a view should result in an optical stimulus that is in pleasant harmony with mankind's psychological artistic taste. In architecture, this effect is accomplished by a blending of symmetrical lines and harmonious colors. The composite must be made up so as to form a complex of straight lines and artistic curves, accompanied by a harmonious color effect. Contrasts that are drastic and shocking to the artistic sense of beauty are to be avoided.

The aim of the city planner should be to effect an over-all harmonious effect. Thus, in designing a city-wide plan, the aim should lead to a blended, harmonious panorama. There should be no drastically sudden shifts at boundaries separating different districts. By the use of "buffer" areas, abrupt breaks in the over-all panorama can be avoided. In each instance, there should be a gradual shading-off from the more highly-restricted areas to the districts less regulated. In no case should a district classified for most-highly-restricted single-family estates abut directly against a business district, or even an area zoned for hotels and apartment houses, as was the situation presented in the *Firestone Case*. These matters are subject to the same objections as those advanced against "spot" zoning.

Economic considerations.

In viewing the matter from the individual property owner's standpoint, the *value* element becomes very significant. This value may be a *use* (or *utility*) value or a *market* value. If the property owner plans to retain the property, the problem is largely a matter of enjoyment in the property use. The owner's enjoyment may be affected by the restrictions, or lack of restrictions, placed on surrounding property, or it may concern the restrictions enforced against the specific property. The owner may be harmed in his property enjoyment by the effect of having a hotel, business, or industry on adjoining land. Or he may object to being denied the privilege of operating a hotel, business, or industry on his own land. Most zoning disputes arise when the property owner claims that the zoning regulations deny to him the right to exploit his own property to a degree comparable with the rights enjoyed by the owners of property in immediate surrounding areas. It must be borne in mind that a line must be drawn somewhere[90] and wherever it is placed it may be discriminatory. But such discrimination

90. Justice Thomas, in the original *Firestone Case* (City of Miami Beach v. First Trust Co., 45 So.2d 681, 684 [Fla. 1949]), said: "As we have written before in City of Miami Beach v. Ocean & Inland Company, *supra* [note 78], a line must be drawn somewhere, and wherever it is placed it is bound to have the appearance of arbitrariness."

will not be considered abritrary to a degree of illegality, if the classification is reasonable. Restrictions may be burdensome, yet not unreasonable.[91]

If a general attack is made on a zoning ordinance — such attack being based on the ground that it is void *in toto* by being so arbitrary, discriminatory, and confiscatory in that it conflicts with the Fourteenth Amendment — value alone may not be conclusive.[92] However, the ordinance might get over the constitutional hurdle, but still might be invalid if the diminution in value resulting from the zoning restriction established that the owner was being denied the rights afforded him by the Florida Zoning Act, which provides that "Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of the buildings and encouraging the most appropriate use of land throughout said municipalities."[93]

However, under Florida law, financial property loss alone will not bar a valid exercise of police power.[94] The validity is measured by the element of reasonableness of the regulations.[95] Any restrictions, which fall within the extension of common-law police power effected by a zoning ordinance, result in a degree of confiscation of a particular property when they cause a material reduction in its value. If that reduction in value is not more than offset by general benefits to the community, the restrictions must fail. In several cases the Florida Supreme Court has held that the loss in property values was so pronounced that the zoning provisions were constitutionally invalid as to the particular property.

In *Ehinger v. State* ex rel. *Gottesman*,[96] the Court required the area to be rezoned from a single family residential district to an apartment house district, upon it being shown that the value would be increased from $10,000 to $75,000 or $100,000. The same result was decreed in *City of Miami Beach v. First Trust Co.*[97] where the value of the property when in an RAA, highly restricted single-family "Estates" District was $400,000, but would be $1,750,000 for erection of hotels and apartments, while, in *Town of Surfside v. Normandy Beach Development Co.*,[98] the Court required the municipality to issue the owner a permit to erect a gasoline filling station on property located in an area zoned for single and two-family dwellings.

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91. City of Miami Beach v. Rosen, 151 Fla. 677, 10 So.2d 307, 310 (1942); Siegel v. Adams, 44 So.2d 427, 429 (Fla. 1950) (Justice Thomas dissenting).

92. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386, (1926); Siegel v. Adams, *supra* note 91.

93. FLA. STAT. § 176.04 (1951). In Forde v. City of Miami Beach, 146 Fla. 676, 1 So.2d 642, 645 (1941), Chief Justice Brown remarked: "The object of all use zoning, in a measure at least attainable, should be to put the land to the use or uses to which it is best adapted, and the result will normally be to increase values."

94. See note 73 *supra*.

95. City of Miami Beach v. Rosen, *supra* note 91.

96. 147 Fla. 129, 2 So.2d 357 (1941).

97. 45 So.2d 681 (Fla. 1950)

98. 57 So.2d 844 (Fla. 1952).

As a site for duplexes the property had practically no value, while it was worth $20,000 for business use. In the case of *Miami Shores Village v. Bessemer Properties, Inc.*,[99] the property was worth ten times as much for business use as for residential purposes for which it was zoned. Justice Terrell, speaking for the Court in striking down the restrictions remarked: "The change will injure no one and will greatly benefit appellee and the municipality."[100] But the mere fact that particular property would be worth double its present value if rezoned into the district across the street is not conclusive that the district lines should be changed.[101]

The effect the zoning classification may have on the value of a portion of land in a certain area is often an important element to be considered, but the fact that a piece of land would be worth more if used for some other purpose, does not mean that the area is improperly zoned. An owner of vacant lots in the center of a large section devoted to expensive single-family homes could not justify that he should be allowed to establish a hotel, store, or filling station upon such lots by showing the value for such business purposes would be more than when used for a purpose like that of other property in the area. He would be urging "spot" zoning.

Value can only become an element when the zoning regulation works a discrimination against the owner of property by denying him the right to a reasonable use of his property as compared with the use enjoyed by owners of surrounding property, or when the restrictions affect the value to an extent which would be confiscatory under the Fourteenth Amendment.

The Court in *Ex parte Wise*[102] states a rule, which has been set out in many Florida cases, as follows:

> It is well settled law that when a Zoning Ordinance in its application has the effect of completely depriving an owner of the beneficial use of his property, the ordinance should be altered or amended so as to prevent a confiscation of property without compensation.[103]

The tax burden being borne by property has also been considered as an element where the owner is seeking to have the property placed in a less restricted classification.[104] This is a hardship that should be taken into

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99. 54 So.2d 108 (Fla. 1951).
100. *Id.* at 110.
101. State *ex rel.* Townsend v. Farrey, 133 Fla. 15, 182 So. 448 (1938).
102. 141 Fla. 222, 192 So. 872, 875 (1940).
103. In Forde v. Miami Beach, 146 Fla. 676, 1 So.2d 642 (1941), annual taxes and assessments exceeded $500 per lot while the lots remained idle and worthless for single-family estates use for which they were zoned.
104. In the Ehinger Case, *supra* note 96, the annual ad valorem tax was $1,600, on property valued at $10,000 while remaining under the zoning restrictions. Almost identical figures apply to value and taxes on two vacant lots in Miami Beach now involved in a zoning case in the Dade County Circuit Court, Sol H. Leslie v. City of Miami Beach, No. 125,976C, wherein the owners are seeking to have made a slight change in the zoning boundary so as to shift their two lots from an RC Single-Family Residential Estates District into the adjoining apartment zone. Since the lots were purchased,

consideration as it is a factor which is controlled by the municipality imposing the restrictions. Many cities have collected exorbitant taxes upon properties which, but for the zoning restrictions, would be very valuable, thus requiring them to remain in an unimproved state until the owner elects to go to the heavy expense of having the restrictions modified by court action. Municipal officials are too often guided by the *bats of the law*,[105] refusing to give due consideration to facts offered by the property owner showing that the property is approaching confiscation.

Examples of unreasonable restrictions.

In the following cases the Florida Supreme Court found, upon balancing the hardships imposed upon the property owners by force of the zoning restrictions against the benefits accruing to the community by having the restrictions retained, that the restrictive provisions were unreasonable.

In *State* ex rel. *Helseth v. Du Bose*,[106] the county commissioners desired to erect a county jail. The municipality had a population of 2,500, and the *locus* of the jail was to be in an undeveloped part of the city within a distance of between 600 feet and 1,000 feet of a school. The question of the effect on traffic about the school was raised, but was not considered significant.

In *City of Miami Beach v. State* ex rel. *Lear*[107] it was held unreasonable to exclude a private school from a zoned area allowing public schools.

It was held, in *Ex parte Wise*,[108] that a license to pack and sell citrus fruits in a residence, although located in an area zoned for residential uses, was not invalid. The Court stated that the city ordinance was valid, but in its application to the particular building it was unreasonable and unenforceable. The property was located nearly two miles from the center of the city, and there was a filling station a short distance away, and two tourist camps, a store, restaurant, dance hall, curio shop, other business properties, a public school, and the Ringling Art School in the same general community.

In *City of Miami Beach v. Texas Co.*[109] the company constructed a bulk storage and sales petroleum plant at a huge cost on one of the islands making up the area of the city. In doing so the company secured a permit and otherwise fully complied with the requirements of the city zoning ordinance. After the plant had been in operation several years, the city adopted an ordinance preventing the storage of more than 6,000 gallons of petroleum within 1,000 feet from any residence. The company's tanks had

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a portion of the immediate area has been rezoned, placing West 41st Street in a business district only a half-block from the lots and the intervening half-block is zoned for hotels and apartments.

The ad valorem tax in 1946 on the one lot where the dwelling was located in the Firestone Case, 45 So.2d 681 (Fla. 1950), was $8,338.88.

105. See note 59, *supra*.
106. 99 Fla. 812, 128 So. 4 (1930).
107. 128 Fla. 750, 175 So. 537 (1937).
108. 141 Fla. 222, 192 So. 872 (1940).
109. 141 Fla. 616, 194 So. 368 (1940).

a capacity of 42,000 barrels, but the plant was well constructed for safeguarding against fire hazards. Moreover, no dwelling was located very close to the plant. The Court held that the ordinance was valid in general, but void as to the particular property of the company. The small fire hazards, compared with the extreme hardship that would be inflicted on the company if the ordinance were enforced against it, resulted in the restrictions being unreasonable and confiscatory.

In *Forde v. City of Miami Beach*[110] the property involved consisted of a single-family estates district consisting of about 1,500 feet of ocean-front property just south of the property involved in the *Firestone Case*. There was one long block, zoned for and occupied by hotels and apartments, separating the two estates districts. On the south this district abutted on another hotel and apartment-house district. At this point Collins Avenue divided the strip between Indian River and the ocean into two strips, each a block in width. So the lots in question extended from the ocean to Collins Avenue and were located at the north end of the estates district next to the hotel and apartment-house district to the north. Across the line in that district was an apartment house and next to it on the north was a large hotel and health resort. The plaintiffs had bought the lots in 1938, eight years after the area had been zoned. Before 1926 the east and west length of the lots was great enough to be suitable for single-family estates, but hurricane storms cut back the ocean front, reducing the length of the lots from 240 feet to 60 or 70 feet. Other elements were the greater difference in value when used for hotel and apartment-house purposes and the heavy tax burdens. As zoned the property was quite certain to remain unimproved indefinitely. The plaintiffs made much of the fact that the hurricane had cut away the shoreline, but that was not material as it came about before the adoption of the zoning ordinance and long before the plaintiffs purchased the lots (unless some weight could be given to the possible expense necessary in reclaiming the land from the ocean by filling in the space). But, disregarding those elements, the Court justifiably required that the lots be rezoned for hotel and apartment-house uses.

In *Ehinger v. State* ex rel. *Gottesman*[111] the Court held it would be confiscatory to keep the plaintiff's property zoned for residential purposes when it was surrounded by business property, which, with its heavy traffic, made the land unfit for residential use and required it to remain unimproved.

In *Daoud v. City of Miami Beach*[112] the Court ruled that it was unreasonable to restrict auction sales to specified areas and not allowing them to be conducted in other business areas if the restrictions had no substantial

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110. 146 Fla. 676, 1 So.2d 642 (1941).
111. 147 Fla. 129, 2 So.2d 357 (1941).
112. 150 Fla. 395, 7 So.2d 585 (1942). *Accord*: City of Miami Beach v. Perell, 52 So.2d 906 (Fla. 1952).

relation to public health, morals, safety, or general welfare. The defendant was held to be entitled to the benefit of a non-conforming use.

In *City of Miami v. Lithgow*[113] it was held that, where the plaintiff built a mortuary in an area zoned for that purpose, and then, after it had been in operation for six months, the city passed an ordinance limiting the operation of mortuaries to cemeteries, the restriction was unreasonable and confiscatory. The Court held that intervening property owners would have the burden of proving that the operation of the mortuary detracted from the value of their property.

It was held in *City of Jacksonville v. State* ex rel. *Mann*[114] that where a district was not zoned against a factory building, and the city had issued a permit to erect the factory building in such district, whatever power the city possessed was exhausted, and city was without power to revoke the permit on the ground that a type of business would be conducted in the building which would constitute a nuisance.

In *City of West Palm Beach v. State* ex rel. *Duffey*[115] it was held that a zoning ordinance requiring uniformity of architecture, structure, and appearance of buildings in the same subdivision was unreasonable and void.

In *Frink v. Orleans Corporation*[116] it was held that the city would be required to rezone an area, including an island artificially built-up by dredging to allow the use of the island as an airplane and sea-plane base. The Court concluded that the restriction was discriminatory and had no relation to public morals, health, safety, or general welfare.

In *State* ex rel. *S. A. Lynch Corporation v. Danner*[117] it was held that the burden was on the owners of surrounding property to establish that the use of the premises would have a substantial relation to public morals, health, safety and public welfare before a permit erroneously issued for such non-conforming use, or a variance granted for such use, could be cancelled. This is particularly true when the neighbors failed to take an appeal to the zoning board as to issuing of the permit or granting of the variance.

The case of *Wheeler v. Lautz*[118] reached a result apparently contrary to the preceeding case. Owing to the businesses conducted in the adjoining business district, the apartment house in question appeared to be reasonably located. A concurring opinion to the denial of a petition for rehearing, justified the holding in part on the ground that there was not an ample hearing by the board of adjustment before it reversed the holding of the zoning board and issuing the variance. It is suggested that the case is unsound. As it was an equity action, the Court should have given more

113. 152 Fla. 394, 12 So.2d 380 (1943).
114. 158 Fla. 98, 27 So.2d 727 (1946).
115. 158 Fla. 863, 30 So.2d 491 (1947).
116. 159 Fla. 146, 32 So.2d 425 (1947).
117. 159 Fla. 874, 33 So.2d 45 (1947).
118. 160 Fla. 826, 36 So.2d 915 (1948).

attention to the matter of reasonableness before restricting the use of the property to a single-family use in a location adjoining a business district where a grocery store, drug store, etc., were operating and the alley was lined with unsavory garbage cans.

In *City of West Palm Beach v. Edward U. Roddy Corporation*[119] the municipality was enjoined from enforcing an ordinance which purported to rezone an area, changing it from a former industrial district to a residential zone. The Court appeared to assume that leaving the property in an industrial zone would afford a more appropriate use of the land while not substantially harming the community.

In *Siegel v. Adams*[120] the property owner did not attack the validity of the Miami Beach Zoning Ordinance on the ground that the zoning regulations as to his property were unreasonable at the time the ordinance was adopted, but he contended that the area had changed in nature until the classification of the area would be unreasonable unless rezoned from an estates district into a hotel and apartment-house area. That is, the plaintiff wanted it changed from an RC Use District to an RE Use District.[121] The property in question is located south of the Venetian Causeway on Belle Isle. This circular-shaped island is located in Biscayne Bay a few hundred feet west of the Miami Beach mainland. The causeway divides it, leaving about one-third of the area on the north and two-thirds on the south of the causeway. The north part of the island was then zoned for RE Uses. There had been no appreciable change in the area, except increased traffic on the causeway and business development along the west shore of the mainland. All of this development on the mainland had taken place some distance to the south and on north from the causeway. Just south of the causeway on the mainland there was an RD Use District, and immediately south of that was an RAA District, and then a narrow RE District, the business district coming next. The zoning ordinance was reinforced by restrictive covenants incorporating its provisions into them by reference. The surrounding property was purchased subject to both types of restrictions, and both were eliminated by the decree, although a group of property owners intervened and bitterly contested the case.[122] This case went a long way in

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119. 43 So.2d 709 (Fla. 1950).

120. 44 So.2d 427 (Fla. 1950).

121. See note 48 *supra*, for the zoning classifications under the Zoning Ordinance of Miami Beach.

122. A motion was filed, attacking the pleading on the ground that there was a misjoinder of causes of action, in that the effort to have the restrictions removed was against the surrounding property owners, while the assault on the Zoning Ordinance was against the City. Circuit Judge Holt overruled the motion. However, Circuit Judge Carroll has since sustained a like motion in a similar Miami Beach case. See note 103 *supra*.. On changed conditions justifying the removal of restrictive covenants, see Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933), and the annotations in 88 A.L.R. 405.

striking down zoning and covenant restrictions. It was a four-to-three decision and should be classed as a border-line case.

The next case in chronological order was the *Firestone Case*[123] which already has been fully analyzed.

In *Troup v. Bird*[124] the plaintiff owned an eighty-acre suburban tract of wild and unimproved land surrounded by lands similar in character. Close by there were some open, unsightly rock pits. The land was located in the county, outside of any urban area. Under the Dade County Zoning Ordinance,[125] the area was zoned into special one-acre estates. The plaintiff applied to the zoning commission for a permit to beautify and improve the land by developing it into a scenic residential area surrounding a lake, which lake was to be created by removing and selling the rock. The zoning commission recommended to the board of county commissioners that the necessary variance and the permit be denied. The commissioners followed the recommendations of the zoning commission. The plaintiff then appealed to the board of adjustment, which granted him a variance. The circuit court held that the board of adjustment did not have the jurisdictional authority necessary for granting the variance. On appeal, the Florida Supreme Court reversed the decision of the circuit judge. The Court was of the opinion that the undertaking would benefit the community, and would serve as "an incentive to other people to beautify their property in that area," while removing unnecessary hardship from the plaintiff. Certainly, the change had no substantial adverse relation to public health, morals, safety, or public welfare.

The Florida Supreme Court, in *Miami Shores Village v. Bessemer Properties, Inc.*,[126] held that properties, which were within a limited business zone and interspersed among properties zoned for business purposes, and which fronted on a heavily traveled street in an area where everything else was business property, and which were separated from business property on the north and south by streets, were primarily desirable for business purposes; and an ordinance which rezoned the corporate owner's properties from business to residential purposes without relation to public health, safety or welfare was unconstitutional.

In *Town of Surfside v. Normandy Beach Development Co.*[127] the Court held that, where land was zoned for single and two-family dwellings

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123. City of Miami Beach v. First Trust Co., 45 So.2d 681 (Fla. 1950).

124. 53 So.2d 717 (Fla. 1951). See also Tau Alpha Holding Corporation v. Board of Adjustments of City of Gainesville, 126 Fla. 858, 171 So. 819 (1937); Wheeler v. Lautz, 160 Fla. 826, 36 So.2d 915 (1948).

125. The ordinance was adopted by the Dade County Board of Commissioners under legislative authority granted to it by Fla. Laws 1937, c. 17833, which provided (§ 7, subd. 3) that the Board of Adjustment could grant variances "as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions . . . will result in unnecessary hardship."

126. 54 So.2d 108 (Fla. 1951).

127. 57 So.2d 844 (Fla. 1952).

and was surrounded by a six-story hotel on the east, a main thorough-fare on the south, vacant property (zoned for hotels and apartments) on the west, and apartments on the north, it should be rezoned so as to permit the erection of a gasoline filling station, since it had remained unimproved and was of little value as a duplex site but would be worth $20,000 as a location for a filling station.

Examples of reasonable restrictions.

In *State* ex rel. *Skillman v. City of Miami*[128] it was held that the city, under duly delegated legislative authority, could by ordinance restrict mortuaries to specified areas.

In *State* ex rel. *Stephens v. City of Jacksonville*[129] it was held that the city had ample delegated authority to adopt an ordinance restricting mortuaries to specific areas, although the Court held that the restrictions in this particular case were invalid since the ordinance was not enacted in a statutory manner. It is implied from the mortuary cases that the question of reasonableness cannot be raised if sufficient duly-distributed areas for mortuary locations are provided.

State ex rel. *Henry v. City of Miami*[130] held that zoning so as to deny the construction of a hospital in an area was not unreasonable, even though the ordinance classifying the area into a residential district was adopted after the hospital was planned and a contract let for its construction. A similar rule was applied to tourist courts, in *Egan v. City of Miami,*[131] and in *Hunter v. Green,*[132] which involved a mortuary.

In *City of Miami Beach v. Ocean & Inland Co.*[133] the plaintiff sought to have the business zone on Lincoln Road extended east some two blocks or so to the ocean so he could use lots there held by him for business purposes. The oceanfront was zoned for hotels and apartments, but the business district had pushed eastward on Lincoln Road until the entire area had taken on the nature of a business district. Since there were many business shops then vacant on Lincoln Road, the Court denied the relief sought. However, the opinion suggested that future developments might warrant such a change, and insinuated that the city might later rezone the area for business, should conditions warrant.

In *Godson v. Town of Surfside*[134] it was held that a restriction against allowing hotels to be built within 40 feet of the ocean high-water mark had a substantial relation to public health and safety and would therefore be upheld. The Court also ruled that a permit issued by a mistake of fact could be revoked in spite of financial hardship on the property owner.

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128. 101 Fla. 585, 134 So. 541 (1931).
129. 103 Fla. 177, 137 So. 149 (1931).
130. 117 Fla. 594, 158 So. 82 (1934).
131. 130 Fla. 465, 178 So. 132 (1938).
132. 142 Fla. 104, 194 So. 379 (1940).
133. 147 Fla. 480, 3 So.2d 364 (1941).
134. 150 Fla. 614, 8 So.2d 497 (1942).

In *Miami Shores Village v. Wm. N. Brockway Post No. 124 of American Legion*[135] it was held that a restriction preventing an American Legion Home in a residential area was reasonable and valid. The Court also held that where the village council had rezoned the area so that the Home could be located as desired and granted a permit, and thereafter a newly-elected council repealed the ordinance passed, the town was not estopped from revoking the permit, although the Legion had gone to a heavy expense in buying the lot and proceeding with the construction. The Court emphasized the fact that the Legion went forward when it was aware of the political opposition of citizens of the community.

In *State* ex rel. *Dixie Inn, Inc., v. City of Miami*[136] the Florida Supreme Court ruled that the municipality could restrict the location of a retail liquor store within 2,500 feet from another retail liquor store. The Court said there was a substantial relation to public health, morals, safety, and general welfare to make the restriction reasonable.

It was held in *State v. Wilson*[137] that under a statute authorizing board of county commissioners of any county having a population of not less than 180,000 to regulate height and size of buildings, etc., in rural areas, density of population, and use of buildings and land, the county commissioners had no authority to zone any area for occupancy on the basis of race or color.

In *State* ex rel. *Office Realty Co. v. Ehinger*[138] a property owner filed a mandamus suit to compel the issuance of a permit for the erection of an apartment house on land zoned for single-family dwellings. The relief was denied in spite of the fact that there was a municipal beach across the street from the property, heavy traffic on the street, the value of the property was greatly depreciated by effects of the restrictions, and noncontiguous property in the general area was zoned for apartment houses. The Court refrained from discussing the matter of reasonableness or the relation of the restrictions to the public health, morals, safety, or public welfare, and treated the proceedings as a general assault upon the validity of the ordinance. Is it possible that a different result would have been reached if the plaintiff had sued in equity.

In *Perkins v. City of Coral Gables*[139] it was held that a municipality may require the discontinuance of a store, operated under a non-conforming use in a restricted area, upon its becoming a nuisance.

The final case holding in favor of the ordinance is *Ellis v. City of Winter Haven*[140] which has been fully discussed heretofore.

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135. 156 Fla. 673, 24 So.2d 33 (1945).
136. 156 Fla. 784, 24 So.2d 705 (1946).
137. 156 Fla. 342, 25 So.2d 860 (1946), Fla. Laws 1937, c. 17833, §§ 1, 12.
138. 46 So.2d 601 (Fla. 1950).
139. 57 So.2d 663 (Fla. 1952).
140. 60 So.2d 620 (Fla. 1952).

Conclusion

The decisions in a majority of this array of Florida zoning cases hinged on the so-called "Rule of Reasonableness." The court in each instance was called upon to balance the advantages of the individual property owner against the benefits of the community. Moreover, one important factor—often the controlling element—in these cases was the requirement that the zoning restriction *must have a substantial relation to public health, morals, safety, or public welfare,* if the restrictions were to be upheld. Furthermore, by actual count, the odds are against the restrictions in the ordinance applying to the particular property under the particular circumstances when an assault is made upon them. It does not seem to make much difference whether the proceeding is by quo warranto,[141] mandamus,[142] a

141. State *ex rel.* Landis v. Valz, 117 Fla. 311, 157 So. 651 (1934).

142. Mandamus has been the procedure employed in many Florida zoning cases. Justice Buford, in City of Miami Beach v. State *ex rel.* Lear, 128 Fla. 750, 175 So. 537, 539 (1937), stated: "That mandamus may be invoked in cases like this is reflected by the opinion and judgment in the case of State *ex rel.* Shad v. Fowler, 90 Fla. 155, 105 So. 733."

In City of Coral Gables v. State *ex rel.* Worley, 44 So.2d 298, 300 (Fla. 1950), the Court further remarked:

"Counsel for respondents-appellants contend that mandamus was not the proper remedy to test the constitutionality of the Ordinance complained of as it applied to the property owner by the appellees but the invalidity thereof should have been raised by them in an equitable proceeding. We have heard many zoning cases in this Court and have approved the equitable remedy, but our holdings disclose that it was not exclusive."

Mandamus will lie to compel an administrative board to act, but it will not serve to control its discretion. City of Miami Beach v. State *ex rel.* Ross, 141 Fla. 407, 193 So. 543 (1940).

Although the Court has often spoken of the alternate methods of procedure, the writ of mandamus has its limitation, especially where the reasonableness of the restrictions is involved. In State *ex rel.* Henry v. City of Miami, 117 Fla. 594, 158 So. 82, 85 (1934), Justice Brown stated:

"Mandamus is wholly inappropriate as a remedy to determine rights resting on a showing of particular factual conditions, therefore it was properly denied. So I concur in affirmance of the judgment, but only on the ground that injunction and not mandamus is the appropriate remedy to reach an alleged unconstitutional deprivation of property which can only be decided in the light of the surrounding facts and circumstances that pertain to the particular property in controversy."

In the Worley Case, *supra,* the Court dealt with this matter at length. There it was stated:

"In the case of State *ex rel.* Dixie Inn, Inc., v. City of Miami, 156 Fla. 784, 24 So.2d 705, 706, 163 A.L.R. 577, we in part said:

'It is well established that mandamus is a legal remedy which is not awarded as a matter of right but in the exercise of sound judicial discretion, and then only when based upon equitable principles. It is not used to enforce or determine equitable rights. State *ex rel.* Perkins v. Lee, 142 Fla. 154, 194 So. 315. It may issue to coerce the performance of official duties where officials charged by law with the performance of a duty refuse or fail to perform the same. Overstreet v. State *ex rel.* Carpenter, 115 Fla. 151, 155 So. 926. Th relator must establish a clear right to its issuance and further show that no other adequate remedy exists. State *ex rel.* Ellis v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L.R.A., N.S. 320, 12 Ann. Cas. 359.'"

"We in part said, text 148 Fla. 257, 4 So.2d 117:

'The only question before us is whether mandamus is the proper remedy. The scope and purpose of mandamus has many times been defined by this Court, hence we need not go elsewhere for guidance. Mandamus lies to enforce a ministerial act. A ministerial act is distinguished from a judicial act in that in the former the duty is clearly prescribed by law, the discharge of which can be performed without the exercise of discretion. If the discharge of the duty requires the exercise of judgment or discretion

bill seeking an injunction,[143] a declaratory judgment,[144] or certiorari.[145]

The Florida Court has established the rule that where a property owner attacks an ordinance on the ground that it is invalid in relation to his own particular piece of property, he must first exhaust the administrative remedies afforded him by the zoning set-up in the municipality before he can resort to the courts.[146] But this is not so when a general assault upon the validity of the ordinance is made.[147] However, the issue must be presented before the trial court. Otherwise, it cannot be raised on appeal.[148]

Certainly, if the case goes up under a writ of certiorari, as provided by statutes,[149] the plaintiff would be required to exhaust his administrative remedies before he could seek relief through the courts. But, under the other methods of procedure he should not be required to do so. Section 176.24 of the Zoning Act provides that the powers granted by the Act are

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the act is not ministerial and mandamus will not lie. Mandamus will not issue in case of doubt. The relator's right must be clear (Citing many cases).

'Mandamus does not ordinarily lie where relator has another adequate remedy. This Court has held in State *ex rel.* [Allen] v. Rose, *supra* [123 Fla. 544, 167 So. 21 (1936)]:

'"* * * But mandamus should not be resorted to when there is another adequate remedy. And when it comes to the matter of restraining the enforcement of a statute, ordinance, or an administrative rule or order, claimed to be illegal, and to threaten irreparable injury to the complainant, the remedy by injunction is ordinarily appropriate and adequate. * * *"'

"Mandamus is a legal remedy which is not awarded by the court as a matter of right but only in the exercise of sound judicial discretion, and then only when based on equitable principles. For example, if, upon an examination of the ordinance and the charter of the City of Coral Gables, it should appear that the charter of the city and the applicable general law did not permit or authorize the enactment of Ordinance No. 271, then the ordinance on its face would appear invalid and the issuance of the desired permit may be controlled in an appropriate action of mandamus. Mandamus may be the appropriate remedy perhaps under certain conditions and circumstances. But we have here an entirely different picture when the ordinance on its face appears valid and the taking of testimony is required to establish facts showing Ordinance No. 271 to be unreasonable, arbitrary or unconstitutional in its application to the property of the relators-appellees. If the evidence adduced so justifies, a court of equity may permanently restrain or enjoin the enforcement of the unreasonable, arbitrary or unconstitutional odinance.

"The City of Coral Gables, by motion to dismiss contended that mandamus was not the proper remedy but the court below overruled and denied the motion and this ruling is argued here on appeal and many of our adjudications cited to sustain the contention. It is our conclusion that the ruling was erroneous."

143. This procedure is most commonly used in Florida and other states. However, in Egan v. City of Miami, 130 Fla. 495, 178 So. 132 (1938), such a bill was rejected, on the ground that the plaintiff had an adequate remedy at law. The holding in this case is out of line with other Florida decisions.

144. Miami Shores Village v. Bessemer Properties, Inc., 54 So.2d 108 (Fla. 1951); City of Miami Beach v. Perell, 52 So.2d 906 (Fla. 1951).

145. This procedure is provided for in FLA. STAT. § 176.17 (1951). This procedure has been employed to a degree in other states, but it has been used very little, if at all, in Florida.

146. De Carlo v. Town of West Miami, 49 So.2d 596 (Fla. 1950).

147. City of Miami Beach v. Perell, *supra* note 144.

148. Town of Surfside v. Normandy Beach Development Co., 57 So.2d 844 (Fla. 1952); Miami Shores Village v. Bessemer Properties, Inc., *supra* note 144.

149. FLA. STAT. § 176.17 (1951).

"supplemental and cumulative." Thus, if the plaintiff would have a remedy under the Florida law if the Act were non-existent, he can pursue the same remedy today. Certainly, he would not be required to exhaust his administrative remedies under a non-existing Act. To hold otherwise would do violence to the provisions in Section 176.24 of the Act. These decisions destroy the statutory mandate that the powers afforded by the Act are "supplemental and cumulative." It is suggested that the Florida Supreme Court's contrary decisions in this regard are unfounded and should be reversed. This conclusion is doubly true, if the proceeding is by means of a bill in equity seeking a declaratory judgment. In such a case, there unquestionably would be a "controversy."