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City Of Coral Gables v. Wood, 305 So. 2d 261 (Fla. 3d Dist. Ct. App. 1974)

Richard Bryce Hadlow

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ourselves to be "law and order" exponents—constitutional guarantees to the contrary notwithstanding.

DEBORAH MILLER

Zoning Ordinance—ENHANCEMENT OF AESTHETIC VALUES ALONE NOT SUFFICIENT BASIS FOR EXERCISE OF POLICE POWER IN FLORIDA.—*City of Coral Gables v. Wood*, 305 So. 2d 261 (Fla. 3d Dist. Ct. App. 1974).

William L. Wood stored his camper-type vehicle in his backyard. After a neighbor complained to the police, Wood was issued a citation for violating a Coral Gables zoning ordinance. The ordinance provided that such vehicles, if kept on private property, must be stored inside garages.¹ The trial court found Wood guilty and fined him \$15. On appeal to the circuit court, the judgment was reversed on the grounds that the ordinance was "facially overbroad, unconstitutionally vague and violative of the guarantees of the first, fifth and fourteenth amendments to the United States Constitution."² In reversing the circuit court, the Third District Court of Appeal stated that aesthetic considerations have been held to be valid basis for zoning in Florida.³ The court added that "the Coral Gables ordinance is aimed at preventing unsightly appearances and diminution of property values which obtain when camper-type vehicles are parked or stored out of doors in a residential area of the community."⁴ Several authorities, including the United States Court of Appeals for the Fifth Circuit, have announced that aesthetic considerations alone will support a zoning

73. 311 So. 2d at 111-12.

1. CORAL GABLES, FLA., CODE § 4.09(a) (1974), provides:

No House Car, Camp Car, Camper or House Trailer, nor any vehicle, or part of vehicle, designed or adaptable for human habitation, by whatever name known, whether such vehicle moves by its own power or by power supplied by separate unit, shall be kept or parked on public or private property within the City, except if enclosed within the confines of a garage, and unoccupied; or parked upon a duly licensed or legally operating parking area, which is not a concomitant and required under the zoning—or other—ordinance of the City.

2. 305 So. 2d 261, 263 (Fla. 3d Dist. Ct. App. 1974).

3. *Id.*

4. *Id.*

5. See Masotti & Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URBAN L. 773,

ordinance in Florida.⁵ As this case demonstrates, however, while Florida courts have accepted aesthetics as partial justification for zoning, no Florida court has upheld such an ordinance solely on aesthetic grounds.

In *Village of Euclid v. Ambler Realty Co.*,⁶ the United States Supreme Court upheld a comprehensive zoning ordinance and set limits on the states' police powers. The Court stated that it is within the police power of the state to zone for the improvement of "public health, safety, morals, or general welfare."⁷ The Florida Supreme Court has stated that while zoning ordinances are presumed valid, they also must operate reasonably as applied to the factual situation in question.⁸ It has further held that enforcement of an ordinance that operates unreasonably, or is not within the limits of the police power, constitutes a taking of property without due process of law.⁹

Despite the judicial solicitude toward zoning in general, there are several reasons why courts have been reluctant in zoning cases to accept aesthetics alone as sufficient justification for the exercise of the police power. This reluctance stems primarily from the belief that aesthetic considerations are not within the limits of the police power as established in *Euclid*.¹⁰ Additionally, aesthetic standards employed in drafting legislation as well as the standards used by courts have been inexact if not indefinable.¹¹ Because of these imprecise guidelines, the

776 (1969); Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1440 (1973).

In *Stone v. City of Maitland*, 446 F.2d 83 (5th Cir. 1971), the Fifth Circuit took the position that aesthetics alone would sustain a zoning ordinance in Florida.

6. 272 U.S. 365 (1926).

7. *Id.* at 395.

8. *City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364 (Fla. 1941).

We will determine the reasonableness of the regulations as applied to the factual situation meanwhile keeping before us the accepted rules that the court will not substitute its judgment for that of the city council; that the ordinance is presumed valid . . . and that the legislative intent will be sustained if "fairly debatable."

Id. at 366. (citation omitted). Similar language can be found in decisions from many other jurisdictions. See, e.g., *Baum v. City & County of Denver*, 363 P.2d 688, 694 (Colo. 1961); *State v. Diamond Motors*, 429 P.2d 825, 829 (Hawaii 1967); *Palazzola v. City of Gulfport*, 52 So. 2d 611, 613 (Miss. 1957).

9. *City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364 (Fla. 1941).

10. 272 U.S. 365 (1926). See, e.g., *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 62 A. 267 (N.J. App. 1905).

Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.

Id. at 268; accord, *City of Youngstown v. Kahn Bros. Bldg. Co.*, 148 N.E. 842 (Ohio 1925).

11. See Masotti & Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URBAN L. 773, 776 (1969).

opportunity for discriminatory enforcement is great.¹² Finally, diversity of taste is a major problem in zoning for aesthetics. Everyone has different tastes and different concepts as to what is beautiful or aesthetically appealing.¹³ As one court noted, an "ordinance conforming to the tastes and ideas of beauty passed by the body of lawmakers who enact it might and probably would in most instances be distasteful to the majority of the people of the city"¹⁴

Increasing development manifested the need to preserve the environment, and a few courts began to uphold zoning legislation primarily intended to protect aesthetic values. They did so, however, on traditional grounds.¹⁵ Other courts took a more direct approach and began to recognize aesthetic enhancement as part of the general welfare concept and therefore as a legitimate justification for the exercise of the police power. One court stated:

There is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations. . . . Such legislation is merely a liberalized application of the general welfare purposes of state and federal Constitutions.¹⁶

Nevertheless, the vast majority of jurisdictions refused to accept aesthetically-based legislation unless it could be justified on other traditional grounds, *i.e.*, health, safety or morals.¹⁷

12. See, *e.g.*, *Eskind v. City of Vero Beach*, 159 So. 2d 209 (Fla. 1963), in which an ordinance prohibiting signs advertising motel rates was held invalid as arbitrary and discriminatory. *Accord*, *Abdo v. City of Daytona Beach*, 147 So. 2d 598 (Fla. 1st Dist. Ct. App. 1962). See also Steinbach, *Aesthetic Zoning: Property Values and the Judicial Decision Process*, 35 Mo. L. REV. 176, 177 (1970).

13. Several studies have been conducted to demonstrate that there *can* be general agreement among the members of the public in aesthetics. See Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1442-47 (1973).

14. *St. Louis Gunning Advertisement Co. v. City of St. Louis*, 137 S.W. 929, 961 (Mo. 1911). See also Annot., 72 A.L.R. 465, 477-79 (1931).

15. See notes 17, 25, 28-31 and accompanying text *infra* for cases and the various nonaesthetic grounds for upholding them.

16. *Ware v. City of Wichita*, 214 P. 99, 101 (Kan. 1923) (citation omitted). The same year the Louisiana Supreme Court stated:

If by term "aesthetic considerations" is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of general welfare.

State ex rel. Civello v. City of New Orleans, 97 So. 440, 444 (La. 1923).

17. A survey taken in 1969 showed that three jurisdictions had accepted zoning based solely on aesthetics. Masotti & Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URBAN L. 773, 776 (1969). By 1973, the number had apparently risen to 14 (different standards were used in arriving at that figure, however). Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1440 (1973).

For a number of years Florida followed a traditional approach toward aesthetic zoning. The Supreme Court of Florida reflected a typical sentiment in *Anderson v. Shackelford*.¹⁸

[T]o attempt to exercise the power of depriving one of the legitimate use of his property merely because such use offends the aesthetic or refined taste of other persons . . . cannot be exercised under the Constitution, forbidding the taking of property for a public use without compensation.¹⁹

Florida's increased dependence on tourism led to a re-evaluation of the rigid stance taken in *Anderson*. In *City of Miami Beach v. Ocean & Inland Co.*,²⁰ the Supreme Court of Florida upheld a zoning ordinance and stated: "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."²¹ Similarly, in *Sunad, Inc. v. City of Sarasota*,²² the court followed the *Ocean & Inland* rationale and adopted the view of the lower court that "aesthetic considerations could be just cause for regulating signs in Sarasota inasmuch as the city was of the same character as Miami

In *Berman v. Parker*, 348 U.S. 26 (1954), the United States Supreme Court upheld the use of eminent domain in the District of Columbia to promote a more attractive community. The Court stated:

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

Id. at 33 (citation omitted). Although *Berman* was decided in 1954, it has not been the trendsetter in aesthetic zoning that it would appear to be. First, *Berman* was decided under federal jurisdiction and dealt with the powers of eminent domain; state cases deal with the exercise of the police power. Second, state courts scrutinize police power legislation more closely under the fourteenth amendment than the Supreme Court views the right to eminent domain under the fifth amendment, even though both powers are weighed against due process considerations. Comment, *Zoning, Aesthetics, and the First Amendment*, 64 COLUM. L. REV. 81, 85 (1964). As evidence of this fact, the majority of states have either not accepted aesthetic zoning alone as sufficient justification for exercise of the police power or have not yet addressed the issue in their courts.

18. 76 So. 343 (Fla. 1917).

19. *Id.* at 345.

20. 3 So. 2d 364 (Fla. 1941).

21. *Id.* at 367. For the view that this case does not stand for the proposition that aesthetics alone will justify the exercise of the police power, see *Merritt v. Peters*, 65 So. 2d 861, 863 (Fla. 1953) (Barns, J., dissenting).

22. 122 So. 2d 611 (Fla. 1960).

Beach”²³ Although the ordinances involved in these cases increased the aesthetic appeal of the respective communities, the court used an economic rationale focusing on maintenance of tourist revenue as partial justification for the ordinance. Since these ordinances protect tourism, they commensurately maintain economic prosperity and are thus in the general welfare.²⁴

The vast majority of aesthetic zoning litigation in and out of Florida has centered on several specific areas of regulation. While these areas of regulation all deal with ordinances that affect aesthetics, they have been upheld at least partly on economic grounds or traditional grounds such as health and safety. The most important area involves commercial signs. As Florida's tourist trade grew, tourist-oriented businesses erected such a multitude of signs that the state's prominent resort areas assumed an amusement park appearance. Responding to this problem, the state, as well as its municipalities, enacted laws regulating billboards and other signs. Most Florida aesthetic zoning litigation has arisen in this area.²⁵ Although these regulations have generally been upheld, the decisions have been justified, to a large degree, on nonaesthetic grounds. For example, in *Hav-A-Tampa Cigar Co. v. Johnson*,²⁶ a sign statute was upheld on safety grounds. The court pointed out that signs located near the public highways distracted the attention of drivers, thereby increasing the hazards of public travel.²⁷

Another area in which litigation with an aesthetic impact has been sustained for nonaesthetic reasons is architectural control. A large number of municipalities have adopted ordinances which provide that building plans be approved by an architectural review board before a building permit is issued. The purpose of such review is to minimize either excessive similarity or dissimilarity in a given neigh-

23. *Id.* at 614. Another case that follows the same rationale and is also cited in *Coral Gables* is *Rotenberg v. City of Fort Pierce*, 202 So. 2d 782 (Fla. 4th Dist. Ct. App. 1967).

24. The United States Court of Appeals for the Fifth Circuit provided this explanation in *Stone v. City of Maitland*, 446 F.2d 83, (5th Cir. 1971).

25. *See, e.g.*, *Eskind v. City of Vero Beach*, 159 So. 2d 209 (Fla. 1963); *Sunad, Inc. v. City of Sarasota*, 122 So. 2d 611 (Fla. 1960); *Dade County v. Gould*, 99 So. 2d 236 (Fla. 1957); *Merritt v. Peters*, 65 So. 2d 861 (Fla. 1953); *Abdo v. City of Daytona Beach*, 147 So. 2d 598 (Fla. 1st Dist. Ct. App. 1962).

Often the ordinance is upheld on purely safety grounds. *See, e.g.*, *Hav-A-Tampa Cigar Co. v. Johnson*, 5 So. 2d 433 (Fla. 1941); *John H. Swisher & Son, Inc. v. Johnson*, 5 So. 2d 441 (Fla. 1941); *State ex rel. Boozer v. City of Miami*, 193 So. 2d 449 (Fla. 3d Dist. Ct. App. 1967).

26. 5 So. 2d 433 (Fla. 1941).

27. *Id.*

borhood.²⁸ Although the purpose of architectural control is largely aesthetic, courts and legislative bodies have consistently required that the aesthetic incongruity of a proposed structure threaten surrounding property values before architectural control can be invoked.²⁹ Thus courts rely on economics (maintenance of property values) to uphold architectural control ordinances.

Finally, ordinances requiring minimum lot sizes and mandatory setbacks have also been upheld for reasons other than aesthetics.³⁰ For example, in *Garvin v. Baker*³¹ the Supreme Court of Florida upheld a minimum lot size requirement, stating that,

[i]t is the duty of public authorities in municipalities to protect the safety, the health and the general welfare of the citizens. This duty involves sanitary and health regulations, the number of septic tanks in a given area, sewerage disposal, the elimination of fire hazards, and many other activities. The size of lots upon which a one-family, two-family, or four-family, building may be erected is a subject for police regulation and when not unreasonable, such regu-

28. Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1454 (1973).

29. Although there are no Florida decisions that make this point, *State ex rel. Saveland Park Holding Corp. v. Wieland*, 69 N.W.2d 217 (Wis. 1955), is representative of the decisions in other states. There a building inspector refused to issue a permit to erect a house in a residential area because the proposed residence did not, in the view of the village board, qualify under an ordinance that would not allow a house to be built if the "exterior architectural appeal and functional plan" of the proposed structure would be so at variance with the existing structures "as to cause a substantial depreciation in the property values." *Id.* at 219.

See also *Reid v. Architectural Bd. of Review*, 192 N.E.2d 74 (Ohio Ct. App. 1963), in which the plaintiff sought a building permit for a home that was of substantially the same size and value as the surrounding homes. Because of its unorthodox architectural design the board rejected the application for a permit because it did not qualify under an ordinance which required that the proposed structure "maintain the high character of community development . . ." 192 N.E.2d at 75. The court, however, would not rest its decision solely on aesthetic grounds; instead, the board's decision was upheld because, *inter alia*, the proposed house would be likely to depreciate the value of the adjacent lots. *Id.* at 77, 78.

One of the major problems that face the boards of architectural review is the lack of definite and objective standards to guide the board members in their decisions. In *City of West Palm Beach v. State ex rel. Duffey*, 30 So. 2d 491 (Fla. 1947), the Florida Supreme Court struck down a portion of an ordinance that required "the completed appearance of every new building or structure must substantially equal that of the adjacent buildings or structures . . . in appearance, square foot area and height." *Id.* at 492. In striking the ordinance the court pointed out that the uncertainty of the standards left the decision "to the whim or caprice of the administrative agency . . ." *Id.*

30. See, e.g., *Gorieb v. Fox*, 274 U.S. 603 (1927); *Garvin v. Baker*, 59 So. 2d 360 (Fla. 1952).

31. 59 So. 2d 360 (Fla. 1952).

lations do not deprive a person of his property without due process of law.³²

The Fifth Circuit stated in *Stone v. City of Maitland*,³³ that Florida has recognized enhancement of the aesthetic appeal of a community as a proper basis for exercise of the police power.³⁴ Though Florida courts have upheld legislation which results in aesthetic enhancement, this approval has been both limited to specialized areas of regulations and based at least partially on nonaesthetic grounds.

When dealing with regulations involving commercial signs, minimum lot size requirements, and mandatory set backs, courts have had little problem in upholding the respective ordinances on traditional grounds. A problem arises, however, in cases involving architectural control and land use restrictions where there is no public health, safety, or morals question. In sustaining these ordinances, courts must rely on the general welfare basis for the police power which concept appears to encompass economics. Courts have upheld architectural control ordinances when a proposed structure threatens to depreciate the value of surrounding property. Furthermore, in resort cities such as Miami Beach and Sarasota, aesthetic regulations have been sustained to insure a constant flow of tourist revenue. Finally, like architectural control ordinances, the Coral Gables ordinance at issue here was in part upheld on the ground that it was "aimed at preventing . . . diminution of property values . . ." ³⁵

These cases demonstrate that ordinances primarily aesthetic in nature will be upheld. But contrary to the proclamation of the Fifth Circuit and legal commentators, Florida's courts have not accepted aesthetic considerations alone as a sufficient justification for the exercise of the police power. To uphold an aesthetic-based ordinance that cannot be sustained on health, safety, or morals grounds, it would appear from case law that the ordinance must pass two tests: first, it must be determined that the land use in question is unaesthetic and therefore

32. *Id.* at 364, 365.

33. 446 F.2d 83 (5th Cir. 1971).

34. *Id.* Another specialized area of regulation which has emerged in other states in recent years is the preservation of historic districts. The area is noteworthy in that, unlike architectural control, it often can be based on well-defined architectural standards. A leading case is *Opinion of Justices to the Senate*, 128 N.E.2d 557 (Mass. 1955), in which the Supreme Judicial Court of Massachusetts approved an act establishing an historic districts commission for the town of Nantucket. The stated purpose of the act was to preserve the historical buildings, places and districts. While the court found it necessary to mention the economic value of tourism, it principally relied on aesthetic considerations, which were based on the historic character of a particular district with very definite architectural character.

35. 305 So. 2d 261, 263.

worthy of regulation; second, the land use must cause economic harm either to the community as a whole or at least to surrounding property owners. If aesthetics alone were a valid basis for zoning, as has been claimed, the second test would be unnecessary.

Although the *Coral Gables* decision was partially justified on economics (maintenance of property values), the primary justification was aesthetics. In fact the decision rests on a dubious economic assumption—that a camper-type vehicle parked outside a resident's garage results in a loss of value to surrounding property. This assumption raises two questions: what land uses do in fact affect neighboring property values, and how much diminution in land values is enough to trigger the police power? The erection of a monstrous and unorthodox home in a neighborhood of colonial homes could conceivably reduce the value of one of the adjacent houses. It is questionable, however, whether a camper left in a homeowner's driveway, even for an indefinite period of time, will have any effect on the value of neighboring land. No proof was offered that a camper does in fact have a detrimental effect on the value of surrounding property. Therefore, the *Coral Gables* court seems to have sustained an aesthetic-based ordinance, while paying only lip service to the question of economic harm.

Since aesthetic grounds provide the only plausible support for the *Coral Gables* decision, it would be tempting to report that the decision marked the end of Florida's refusal to sustain zoning on an exclusively aesthetic basis. Such a conclusion would be mistaken. The fact that the *Coral Gables* court felt compelled to justify its decision on other grounds indicates that the judges were not prepared to take that step. Zoning draftsmen would still be well advised to write ordinances with non-aesthetic grounds as support.

RICHARD BRYCE HADLOW