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Aesthetic Zoning: A Current Evaluation of the Law

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NOTES

AESTHETIC ZONING: A CURRENT EVALUATION OF THE LAW

Whether by special legislative act or by the general enabling acts in effect in all states, municipalities may use their police power to pass and enforce zoning ordinances of various types.[1] Since 1926, when the United States Supreme Court first upheld a comprehensive zoning ordinance in *Village of Euclid v. Ambler Realty Co.*,[2] there has been no doubt that the police power could constitutionally be utilized to restrict the use of an individual's property for the benefit of the community in general. This community benefit has been referred to by the courts as "the general welfare" or sometimes "the public welfare." It is essential to an understanding of the subject area developed in this note that the nebulous quality of the term "the general welfare" be fully understood.

There are four universally accepted purposes that justify any use of the police power: the promotion of health, safety, morals, and the general welfare.[3] Of these four purposes, promotion of the general welfare is the most pliable because it is not susceptible to an adequate definition, or even delimitation. The promotion of health, safety, and morals will provide justification for only a primitive type of zoning; thus, comprehensive ordinances must rest upon the use of the police power to promote the general welfare. The Supreme Court acknowledged this fact in *Euclid* saying: "The ordinance under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare."[4]

Before examining the general welfare, a brief consideration of the nature of the police power is necessary, since this is the power under which all zoning is accomplished. The police power of municipalities is delegated by the state and, in the absence of a contrary constitutional provision, the power exercised by the municipality cannot exceed that which the state could exercise. It must be used to promote the health, safety, morals, or the general welfare of the people within the corporate limits. Furthermore, any exercise of such power must be constitutional *and* reasonable in actual operation.[5] If the use of the police power is within the four accepted purposes and meets the tests of constitutionality and reasonableness, it will serve as the basis of regulation or prohibition of activities within the city. Although these two functions overlap to some extent, regulation is thought to

1. *E.g.*, FLA. STAT. §§176.01-.24 (1963).
2. 272 U.S. 365 (1926).
3. Blitch v. City of Ocala, 142 Fla. 612, 623, 195 So. 406, 410 (1940).
4. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).
5. See Gundling v. City of Chicago, 177 U.S. 183, 187 (1900).

be less harsh, more comprehensive, and broader in scope than prohibition. Because of these qualities, a regulatory ordinance is usually more vulnerable to an attack upon its reasonableness than upon its constitutionality. Prohibition has the opposite characteristics: harshness, simplicity, and limited use. It is the type of brute force measure that is circumscribed by the federal and all state constitutions. Prohibitory ordinances are frequently subject to charges that they either deprive an individual of life, liberty, and property without affording him due process of the laws or that they deny an individual the equal protection of the laws. A comprehensive zoning ordinance is usually considered to be primarily regulatory, but it nearly always embodies some prohibitive provisions.

Until the *Euclid* decision, the constitutional limitations alone were sufficient to thwart the best laid zoning ordinances of city councils; but in that case the Supreme Court introduced — without quite admitting it — the element of utilitarianism, that is, the weighing of the individual interest against the community interest.[6] The Court pointed out the desirability of a comprehensive zoning ordinance and discussed the sundry benefits to the entire community, repeatedly stressing that such ordinances could not operate without a certain amount of prohibition on individual property utilization.[7]

In addition to the utilitarian argument, two more secure havens exist in the sea of multifarious restrictions that apply to the use of the police power for zoning. One is the doctrine that a court will not review the judgment of a city council as to the necessity for passage of a particular ordinance.[8] The second is the "fairly debatable test," which requires the court to uphold an ordinance unless reasonable men would agree that the ordinance is unreasonable. Hence, as long as reasonable men could differ as to the reasonableness of the ordinance, it is allowed to stand.[9]

The propositions of the Supreme Court in the *Euclid* decision have been echoed by most state tribunals. Among the leaders has been the Florida Supreme Court, which gave complete approval of *Euclid* in *City of Miami Beach v. Ocean & Inland Co.*, saying:[10]

> 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 pre-

6. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).
7. *Id.* at 389.
8. Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 788 (1945) (Black, J. dissenting).
9. See Radice v. New York, 264 U.S. 292, 294 (1924).
10. 147 Fla. 480, 486, 3 So. 2d 364, 366 (1941).

sumed valid . . . and that the legislative intent will be sustained if "fairly debatable."

Before *Euclid,* a plaintiff who could show deprivation of property without compensation or a denial of equal protection, even to the slightest degree, could cause the invalidation of a zoning ordinance. Since that decision, the importance of the constitutional objections has declined for two reasons: (1) the plaintiff's burden of proof has been increased so that he must demonstrate that the damage to his interests exceeds the benefit to the public interests, which the ordinance was designed to engender, and (2) the case law has been sufficiently developed so that the constitutional issues are fairly well settled. For this latter reason, cities that are unwilling to risk their zoning ordinances in the face of adverse precedent often will allow the property owner a variance or will even spot zone his property.

There are two ways by which a property owner can show that an ordinance is unreasonable: (1) demonstrate that the means adopted by the ordinance are neither suitable nor likely to attain the objectives of the ordinance or (2) demonstrate that the classifications within the ordinance are arbitrary. Courts often list arbitrariness and unreasonableness as distinct features that will cause the invalidity of a zoning ordinance.[11] Although this practice has the desirable effect of emphasizing the importance of arbitrariness, it blurs the role of arbitrariness as proof of unreasonableness. Lawsuits contesting the reasonableness of zoning ordinances have been greatly discouraged by the "fairly debatable test" and the doctrine that the court will not substitute its judgment for that of the city council. Such suits, when successful, have usually involved cases in which the ordinance in question was clearly arbitrary and therefore without reasonable classification.[12]

The *Euclid* decision did not furnish adequate guidelines for the courts that followed it. The Supreme Court merely stated that the validity of the use of police power for zoning *must* rest upon the vague concept of promoting the general welfare.[13] There was no attempt to define the scope of the general welfare. Nor have the state courts provided any meaningful definition; rather, they have spoken of what is included in general welfare in the broadest of terms.[14] The result of the uncertainty of the scope of the general welfare was an avalanche of litigation. From the sheer volume of cases, a common

11. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); City of Jackson v. McPherson, 162 Miss. 164, 177, 138 So. 604, 605 (1932); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 529 (1916).

12. See Eskind v. City of Vero Beach, 159 So. 2d 209, 212 (Fla. 1963).

13. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

14. See Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424 (1952).

law of general welfare has begun to evolve and precedent has become a vital part of the law of zoning.

Two concepts have emerged that are widely recognized as being embraced by the term "general welfare": economic well-being and spiritual comfort. The most important facet of spiritual comfort is aesthetic zoning.

Aesthetic zoning is zoning that is intended to promote, preserve or restore beauty, and to remove or hide eyesores. Hence, the law of zoning is being utilized to achieve for the sense of sight what the law of nuisance has achieved for the senses of hearing and smelling. Viewed in a less favorable light, aesthetic zoning is the exercise of police power to deprive the individual of the unrestrained use of his property so that the community might have the *luxury* of gazing upon pleasant surroundings. The problem facing the courts with respect to aesthetic zoning is: does the benefit to the public, which has traditionally been thought of in terms of need, but *never* luxury, outweigh the damage to the individual? When the courts in the early part of the present century applied the balance, the result was uniform; luxury (aesthetics) was one of the lightest elements to be found upon this planet. As the Florida Supreme Court put it in *Anderson v. Shackleford*:[15]

> [T]he sign was neither dangerous to persons using the streets nor to adjacent property, nor offensive to their morals, although the words, design, and coloring of the siign [*sic*] might offend the *aesthetic tastes* of some of the citizens.
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> ....
>
> [B]ut to attempt to exercise the power depriving one of the legitimate use of his property merely because such use offends the aesthetic or refined taste of other persons is quite another thing and cannot be exercised under the constitution forbidding the taking of property for a public use without compensation.

This case is representative of the distrust with which all courts viewed aesthetic zoning at that time.

The first concession to aesthetic zoning was to allow city councils to consider aesthetics and attempt to achieve aesthetic objectives, but the ordinance was upheld only if it could be sustained, in its entirety, upon nonaesthetic grounds.[16] Approximately three-fourths of the states went along with this concession.

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15. 74 Fla. 36, 41-43, 76 So. 343, 345 (1917). (Emphasis added.)
16. City of Jackson v. Bridges, 139 So. 2d 660, 664 (Miss. 1962).

Although courts repeatedly spoke of the expansion of the scope of general welfare, it was not until 1954, in *Berman v. Parker*,[17] that the United States Supreme Court specifically included aesthetics. *Berman* involved the condemnation of private property under the District of Columbia Redevelopment Act of 1945. The issue was whether this use of the police power was justified. The Court held that the appellants' property, which was neither slum nor blighted area, could be appropriated to develop a more attractive community. The Court said:[18]

> 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.

This decision, as was expected, had a considerable impact in the state courts.[19] Approximately one-fourth of the states — notably Wisconsin[20] — have been enthusiastic in approving this decision. At least two state courts that rejected the result reached in *Berman* apparently felt obligated to discuss it in their opinions.[21]

No real difficulty was encountered by the state courts in applying *Berman* to municipal zoning, in spite of obvious differences:

> (1) In *Berman* the Court was dealing with the exercise of the power of eminent domain; whereas state courts would be dealing with the power to zone.
>
> (2) In *Berman* the Court was dealing with an act of Congress, albeit acting as the governing body of the District of Columbia in passing the act; whereas state courts would be dealing with the ordinances of a less potent city council.
>
> (3) In *Berman* the Court was dealing with the fifth amendment; whereas state courts would be dealing with the fourteenth amendment and the provisions of the state constitutions.

The few courts that did discuss these differences had no trouble reconciling them satisfactorily.[22]

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17. 348 U.S. 26 (1954).

18. *Id.* at 33. (Emphasis added.)

19. Agnor, *Beauty Begins a Comeback: Aesthetic Considerations in Zoning*, 11 J. PUB. L. 260, 278 (1962).

20. State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 271, 69 N.W.2d 217, 222 (1955).

21. Farley v. Graney, 146 W. Va. 22, 41, 119 S.E.2d 833, 845 (1960); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 416, 389 P.2d 13, 17 (1964).

22. Oregon City v. Hartke, 400 P.2d 255, 261-62 (Ore. 1965); City of Phoenix v. Fehlner, 90 Ariz. 13, 17, 363 P.2d 607, 609-10 (1961).

Although *Berman*, and its subsequent approval by some state courts, has undoubtedly placed promotion of aesthetic considerations irretrievably within the scope of promotion of the general welfare, the anticipated acceptance of aesthetics as the *sole* basis for municipal zoning has, for the most part, failed to materialize.

It is doubtful that many state tribunals have grasped the meaning of "aesthetic" or of "aesthetic zoning."[23] Evidence of this judicial confusion is provided by the numerous cases that purport to uphold zoning solely upon the basis of aesthetics, but mention another basis: economic well-being.

The inclusion of economic well-being within the scope of the general welfare has proceeded quietly and has found wide acceptance among the courts. As a concept, it is less radical and more easily understood than aesthetics. Furthermore, it has the virtue of measurement by the everyday standard of dollars and cents; it is impossible to measure accurately the "irritation value" of an eyesore. For these reasons, many courts have talked blandly about the validity of aesthetic zoning, and then pointed out that the ordinance in question protected property values. Even in the heralded case of *State ex rel. Saveland Park Holding Corp. v. Wieland*,[24] which allegedly followed the *Berman* ruling, the Wisconsin Supreme Court based its decision upon both aesthetics and the protection of property values. Yet this case is frequently cited as being based solely upon aesthetic considerations.

At least one court has given recognition to the existing confusion regarding aesthetic zoning. The New Jersey Supreme Court said in *United Advertising Corp. v. Borough of Metuchen*:[25]

> Much is said about zoning for aesthetics. If what is meant thereby is zoning for aesthetics as an end in itself, the issue may be said to be unexplored in our State, but if the question is whether aesthetics may play a part in a zoning judgment, the subject is hardly new. There are areas in which aesthetics and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound. We refer not to some sensitive or exquisite preference but to concepts of congruity held so widely that they are inseparable from the enjoyment and hence the value of property.

The factor of economic well-being is brought into some decisions by means other than the protection of property values. The other

23. *Contra*, Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 So. CAL. L. REV. 149, 151 (1954).

24. 269 Wis. 262, 69 N.W.2d 217 (1955).

25. 42 N.J. 1, 5, 198 A.2d 447, 449 (1964).

favorite of the courts has been the promotion of tourism. This has been treated in two different ways by the states involved. The first method, of which New Hampshire[26] and Florida[27] cases are representative, treats certain portions of the state as areas that have an economic dependence upon the tourist industry, which the court assumes is enriched by the aesthetic appeal of the area. Thus, the Florida Supreme Court said in *City of Miami Beach v. Ocean & Inland Co.*: "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 travelers."[28]

The second approach to the use of tourism for including an economic benefit in the decision is confined to small areas that attract tourists because of their historical significance.[29] Louisiana[30] and Massachusetts[31] have employed this approach to preserve the character of Vieux Carre and Nantucket, respectively.

In 1963, the New York Court of Appeals decided *People v. Stover*,[32] and became the first high state court to uphold a zoning ordinance solely upon aesthetics. This landmark case concerned an ordinance prohibiting the maintenance of clotheslines in a front or a side yard abutting a street. The clotheslines of those attacking the ordinance had been erected five years before its passage as a protest against the high municipal taxes. The court based its decision on *Berman* and did not mention the need to protect property values.[33] Indeed, only one vague allusion to economic well-being was made:[34]

> Consequently, whether such a statute or ordinance should be voided should depend upon whether the restriction was "an arbitrary and irrational method of achieving an attractive, efficiently functioning, prosperous community — and *not* upon whether the objectives were primarily aesthetic."

Although the decision did rest solely upon aesthetic grounds, the court was careful to make it clear that "cases may undoubtedly arise . . . in which the legislative body goes too far in the name of aesthetics . . . but the present, quite clearly is not one of them."[35]

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26. Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961).
27. City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941).
28. *Id.* at 487, 3 So. 2d at 367.
29. Comment, 29 FORDHAM L. REV. 729 (1961).
30. City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953).
31. Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E. 2d 557 (1955).
32. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963).
33. *Id.* at 467, 191 N.E.2d at 275, 240 N.Y.S.2d at 738.
34. *Ibid.* (Emphasis by the court.)
35. *Id.* at 468, 191 N.E.2d at 275, 240 N.Y.S.2d at 738-39.

In 1965, the Oregon Supreme Court, in *Oregon City v. Hartke*,[36] upheld an ordinance that totally excluded automobile wrecking yards from the city, saying:[37]

> It must be conceded that authority for the validity of zoning for aesthetic purposes only is scant. People v. Stover . . . is most directly in point with the instant case. . . .
>
> We join in the view "that aesthetic considerations alone may warrant an exercise of the police power."

This case is the strongest to date from a state court in support of aesthetic zoning, in view of the fact that the ordinance completely prohibited a particular use of private property.[38]

Thus far, only three jurisdictions have upheld the use of the police power solely for promotion of aesthetic purposes: The District of Columbia, New York, and Oregon.[39]

There are ten other jurisdictions that speak of the promotion of aesthetics alone as a valid basis for zoning, but have yet to issue a decision in which the aesthetic purpose is not buttressed by the promotion of economic well-being. These include: Arizona, Arkansas, Connecticut, Florida, Kentucky, Massachusetts, New Hampshire, New Jersey, Pennsylvania, and Wisconsin.[40] As previously pointed out, New Jersey has given judicial recognition to the confusion of aesthetics with economics, but the New Jersey court has not taken steps to redefine its position in conformity with its recognition of the confusion.[41] The other nine jurisdictions boldly purport to recognize the validity of aesthetic zoning, but never fail to give their decisions a firm basis in economic well-being. A prime example of this type of maneuver was given by the Florida Supreme Court in *Merritt v. Peters*:[42]

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36. 400 P.2d 255 (Ore. 1965).

37. *Id.* at 262.

38. *Id.* at 263.

39. Berman v. Parker, 348 U.S. 26 (1954); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963); Oregon City v. Hartke, 400 P.2d 255 (Ore. 1965).

40. City of Phoenix v. Fehlner, 90 Ariz. 13, 363 P.2d 607 (1961); Bachman v. State, 235 Ark. 339, 359 S.W.2d 815 (1962); Franklin Builders, Inc. v. Sartin, 25 Conn. Supp. ___, 207 A.2d 12 (1964); Eskind v. City of Vero Beach, 159 So. 2d 209 (Fla. 1963); Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964); Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955); Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961); United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964); Bilbar Constr. Co. v. Easttown Township Bd. of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955).

41. United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964).

42. 65 So. 2d 861, 862 (Fla. 1953).

> We have no hesitancy in agreeing with [the plaintiff] that the factors of health, safety and morals are not involved in restricting the proportions of a sign board, but we disagree with him in his position that the restriction cannot be sustained on aesthetic grounds alone.

The court, however, went on to apply the principle of the *Ocean & Inland* case, in which tourism is the dominant factor in upholding a zoning ordinance.

One can hardly blame the courts in these ten jurisdictions for wishing to find a more solid foundation for their decisions than aesthetics standing alone can offer; but on the other hand, one must recoil from the confusion caused when the courts purport to accept a concept, but then treat it as if it were inadequate.

There are at least eighteen jurisdictions in which the concept of zoning based *solely* upon the promotion of aesthetic objectives has been specifically rejected by the courts. These jurisdictions are: California, Delaware, Illinois, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Ohio, Tennessee, Texas, Washington, and West Virginia.[43] In a great many of these jurisdictions the promotion of aesthetics may be taken into consideration in the enactment of ordinances, and aesthetic considerations may even provide the motivation for the enactment, but there must be some other purpose served by the ordinance if it is to be upheld.

The remaining jurisdictions within the United States, consisting mainly of the sparsely populated states, have made no mention of the validity of zoning for aesthetic purposes. It is likely that the issue has not been before the courts in most of these states because of the lack of comprehensive zoning plans.

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43. National Advertising Co. v. County of Monterey, 211 Cal. App. 2d 375, 27 Cal. 136 (1st D.C.A. 1962); Papaioanu v. Commissioners of Rehoboth, 25 Del. Ch. 327, 20 A.2d 447 (1941); Trust Co. of Chicago v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951); Stoner McCray Sys. v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956); City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953), Grant v. Mayor, 212 Md. 301, 129 A.2d 363 (1957); Hitchman v. Township of Oakland, 329 Mich. 331, 45 N.W.2d 306 (1951); Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962); City of Jackson v. Bridges, 139 So. 2d 660 (Miss. 1962); Miller v. Kansas City, 358 S.W.2d 100 (Ct. App. Mo. 1962); City of Milford v. Schmidt, 175 Neb. 12, 120 N.W.2d 262 (1963); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); Little Pep Delmonico Restaurant, Inc. v. City of Charlotte, 252 N.C. 324, 113 S.E.2d 422 (1960); Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 192 N.E.2d 74 (Ct. App. 1963); City of Norris v. Bradford, 204 Tenn. 319, 321 S.W.2d 543 (1959); Niday v. City of Bellaire, 251 S.W.2d 747 (Tex. 1952); Lenci v. City of Seattle, 63 Wash. 2d 664, 388 P.2d. 926 (1964); Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960).

The confusion surrounding the law of aesthetic zoning has been caused by those decisions that mingle economics with aesthetics in such a manner that it is almost impossible to extract meaningful delineations. Florida has been doing this longer than any other jurisdiction,[44] and is showing no signs of changing its course. Moreover, the Florida courts have been adding to the class denominated as tourist areas — once the exclusive bailiwick of Miami Beach — at every turn. Daytona Beach,[45] Sarasota,[46] and Vero Beach[47] have been specifically included during the past decade. With Florida's vast number of tourist accommodations, it seems that many more cities would qualify as tourist areas.

As the nationwide trend toward allowance of aesthetic zoning increases, the Florida Supreme Court will come under considerable pressure to allow aesthetic zoning throughout the state. There are two simple ways by which the court could accomplish statewide aesthetic zoning: (1) declare the entire state a tourist area, thereby perpetuating the confusion of aesthetic and economic bases or (2) abandon the present link between aesthetics and tourism.[48] The first alternative seems more likely to occur because of the numerous beaches and resorts in Florida that could be used to justify such a decision and also because declaring the entire state a tourist area would avoid judicial retreat from the established position.

But complete abandonment of the the tourist-aesthetic basis should not be ruled out as a possibility, for Florida has a great deal of case law that *declares* that aesthetic purposes alone are sufficient to invoke the police power.

This latter position represents the desirable approach to aesthetic zoning for several reasons. It removes the stress on the economic aspects of a pleasant community, and it admits that residents have as much right to pleasant surroundings as do tourists.

Adoption of the position by Florida would have nation-wide impact and perhaps would speed the demise of the aesthetic-economic befuddlement existing in other states, eliminating the use of fictitious tourists and doubtful historical areas in the courts. The law itself would be benefited by such a forthright approach.

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44. City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941).
45. Abdo v. City of Daytona Beach, 148 So. 2d 598, 602 (1st D.C.A. Fla. 1962).
46. Sunad, Inc. v. City of Sarasota, 122 So. 2d 611, 614 (Fla. 1960).
47. Eskind v. City of Vero Beach, 159 So. 2d 209, 211 (Fla. 1963).
48. State v. Moore's Estate, 153 So. 2d 819, 821 (Fla. 1963) (dictum).