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Zoning

Momeier v. John McAlister, Inc.[1]

Any question as to whether the McAlister Clan involved in this litigation is of Scottish or Irish descent will be dispelled by a narrative of the background of this case. Hoot mon! It is Scottish — truly descended from the indomitable Robert Bruce — and thoroughly imbued with his legendary determination.[2]

More than twenty years ago, the Clan McAlister bought the property on the northwest corner of Smith and Wentworth streets, in the City of Charleston, the one-time mansion of the Secretary of the Treasury of the Confederacy, Christopher Gustavus Memminger, for the avowed purpose of conducting the business of a funeral home on the property. Momeier, the present plaintiff, and a nearby resident, objected, and the issues were thus drawn. On three earlier occasions the Supreme Court of South Carolina has reviewed aspects of the dispute.[3] On the last of these occasions, the Supreme Court made final an order enjoining John McAlister, Inc. from conducting a funeral home or any type of funeral activity on the subject premises. One might well conclude that the decision would have

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1. 231 S. C. 526, 99 S. E. 2d 177 (1957).

2. Robert I, "The Bruce," King of Scotland, achieved his crown and recognition after many adversities. Legend has him in hiding on the Island of Rathlin, despondent over his repeated defeats in battle at the hands of the English. Hiding out in a cave on one occasion, almost reconciled to defeat, he watched a spider in its repeated efforts to spin its web across the roof of the cave. Although failure after failure met its efforts, the spider persisted, until finally it met success. Bruce regarded the incident as an omen of good fortune and decided on a further effort — this time success rewarded him.

3. Momeier v. John McAlister, Inc., 190 S. C. 529, 3 S. E. 2d 606 (1939) — dealing with procedural aspects of a suit to enjoin the operation of the funeral home; Momeier v. John McAlister, Inc., 193 S. C. 422, 8 S. E. 2d 737 (1940), again dealing with procedural aspects of the same suit; Momeier v. John McAlister, Inc., 203 S. C. 353, 27 S. E. 2d 504 (1943), permanently enjoining John McAlister, Inc. from operating a funeral home on this location as violative of the City of Charleston's zoning ordinance.

brought about a change of heart — but not to the Clan McAlister. Thirteen years later, on July 10, 1956, they procured an amendment to the Charleston Zoning Ordinance *relating to this property only*, which now permits it to be used for a funeral home.

In the present action the plaintiff contended that the defendant should be held in contempt because it proposed to violate the order of injunction made final in the disposition of the third appeal in 1943, and asked that the amendatory ordinance be condemned as invalid spot zoning. To sustain its judgment denying relief, and in refusing to condemn the action of the City Council of Charleston as arbitrary, the lower court, whose opinion became that of the Supreme Court, pointed to many changes in conditions that had occurred in the intervening years, noting that while the Charleston zoning ordinance forbade doctors' offices in this area, some sixteen doctors maintained offices therein (presumably under permits granted by the Board of Adjustment pursuant to the justified variance clause). It also noted that while only six businesses existed at the time of the adoption of the zoning ordinance in 1931, now thirteen existed, varying from an egg market to a radio station. Both on the record and in reality conditions in this area have in fact changed. Therefore the facts of this case justify its result, but spot zoning is an ill-advised practice, always condemned by the courts. For that reason it is rather surprising that the Supreme Court issued a short per curiam order, merely affirming the judgment of the lower court and adopting it as the judgment of the Supreme Court. The lower court had not really emphasized how unusual was this case. Therefore the Supreme Court should have commented on those unusual features lest the decision become a bad precedent to sanction future spot zoning.

The key statement in the lower court finding reads:

> . . . . In my view of the matter, the action of the Council can only be, and should be upheld as a valid exercise of its power to amend . . . [its zoning ordinance] by reason of changed conditions and for the good of the general welfare.

This is, of course, the only basis for upholding any action by any municipality operating in the field of zoning amendments. But general welfare is seldom, if ever, advanced by acting only for one individual property owner.

The Supreme Court has itself condemned the type of spot zoning which results from variances permitted by a board of adjustment,[4] and to illustrate the horror with which the text writers on the general subject of zoning regard spot zoning: Yokley[5] refers to it as a vicious practice, as he apoplectically remarks:

> However, no discussion of the amendment of zoning ordinances or the right of the municipality to so amend them could be undertaken intelligently without a clear and distinct reference to a most vicious practice that has expanded almost to a point where it has become a cancerous growth on the body politic in many, many municipalities of the land, an evil generally denominated as "spot zoning" or "piecemeal zoning".

Rathkopf[6] is only slightly milder. He says:

> Spot zoning is based upon such privilege granted to benefit an individual owner at the expense of the general public.

Nevertheless, the case here is probably one of the rare cases in which an ordinance of the sort challenged can be sustained by reason of the change of conditions that had come about, but because of the rarity of such circumstances, they most certainly should be emphatically so noted.

Kerr v. City of Columbia[7] is once again a case in which the property owner is given permission to convert her property to business use in the face of neighborhood protests. Mrs. Kerr's property, on the northeast corner of North Main Street and Hyatt Avenue, is in that part of the City of Columbia that formerly constituted the adjacent municipality of Eau Claire. Mrs. Kerr's property measures 100 feet on Hyatt Avenue and 150 feet on North Main Street. Her residence faced Hyatt Avenue.

Unable to obtain a building permit enabling her to construct a filling station on the property from the City of Columbia officials, she instituted this action in equity to secure relief.

Shortly prior to the annexation of Eau Claire by Columbia in the fall of 1955, the plaintiff made what she regarded as a routine application to the Town Council of Eau Claire for a

4. Hodge v. Pollock, 223 S. C. 342, 75 S. E. 2d 752 (1953).
5. 1 YOKLEY, ZONING LAW AND PRACTICE 202 (2d ed. 1953).
6. 1 RATHKOPF, LAW OF ZONING AND PLANNING 369 (3rd ed. 1956).
7. 232 S. C. 405, 102 S. E. 2d 364 (1958).

permit to construct the filling station.[8] Her application was premised on the fact that all of North Main Street, with exceptions not pertinent here, was zoned for business and that accordingly she was entitled to a permit. Town Council nevertheless rejected her application "because the property faced Hyatt Avenue which was zoned for residents [sic] . . . ."

Two months later Eau Claire became a part of Columbia. Mrs. Kerr then made application to Columbia for a permit which was refused on the ground that Columbia regarded all newly annexed territory as residential in character. At this point Mrs. Kerr turned to the courts for mandatory injunctive relief. Avoiding the question as to whether the treatment of annexed territory by the City of Columbia was valid, the Court granted the relief sought, on the ground that the proper construction of the Eau Claire ordinance permitted the use of the property for business purposes, since it had frontage on North Main Street which was so zoned. The Court stated that the Town Council of Eau Claire should have so ruled, and that it would, as a court of equity, regard as done that which should have been done.

If the Court had contented itself with so holding, and if it had not seen fit to interject into its opinion a statement implying that Eau Claire was estopped from refusing to grant the permit because some two years earlier, when Mrs. Kerr mistakenly thought she had a lucrative filling station tenant, the town officials had told her the zoning ordinance permitted her to construct the filling station, this review could stop here. But such a statement is clearly contrary to all authorities, including Yokley[9] whose work is quoted. If statements of any city official could have the effect of amending a zoning ordinance, very little time would elapse before there would be no zoning ordinance at all. The writer feels certain that the Chief Justice, for whose unusual abilities the writer has the highest regard, but whose language is now criticized, does not really think the "assurances" of city officials that a zoning law had a particular meaning is any ground for granting a property holder permission to disregard the zoning law.

8. On an earlier occasion in 1953 when Mrs. Kerr thought she had secured a lucrative tenant for a filling station, she had discussed the matter with town officials of Eau Claire and had been assured a permit would be forthcoming.

9. 1 YOKLEY, ZONING LAW AND PRACTICE 253 (2d ed. 1953).

Municipalities function through their governing bodies and it is only by the action of the governing bodies that municipalities can be bound. They differ from private corporations which can be estopped by actions of their agents. The distinction is clearly drawn by the North Carolina Supreme Court in the case of *City of Raleigh v. Fisher*.[10] That action was instituted by the City of Raleigh on August 8th, 1949, to enjoin the defendant from conducting a commercial operation in a residential area of Raleigh. The commercial activity had been going on since 1938. Against a claim that the city was estopped to enforce its ordinance, the North Carolina Supreme Court unanimously said:

> In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. Kinney v. Sutton, 230 N. C. 404, 53 S. E. 2d 306; City of Elizabeth City v. Aydlett, 201 N. C. 602, 161 S. E. 78; State v. Roberson, 198 N. C. 70, 150 S. E. 674. The police power is that inherent and plenary power in the state which enables it to govern, and to prohibit things hurtful to the health, morals, safety and welfare of society. Drysdale v. Prudden, 195 N. C. 722, 143 S. E. 530; Skinner v. Thomas, 171 N. C. 98, 87 S. E. 976. L. R. A. 1916E, 338. In the very nature of things, the police power of the State cannot be bartered away by contract, or lost by any other mode.
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> This being true, a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past. Leigh v. City of Wichita, 148 Kan. 607, 83 P. 2d 644, 119 A. L. R. 1503, and cases noted in the ensuing annotation. See these North Carolina decisions: Jenkins v. City of Henderson, 214 N. C. 244, 199 S. E. 37; State v. Finch, 177 N. C. 599, 99 S. E. 409; Bank v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487; State v. Bevers, 86 N. C. 588; Wallce v. Maxwell, 32 N. C. 110, 51 Am. Dec. 380; Candler v. Lunsford, 20 N. C. 542.
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> Undoubtedly this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire

10. 232 N. C. 629, 61 S. E. 2d 897 (1950).

immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.

While not related to zoning, the Supreme Court of South Carolina in 1933, in the case of *Farrow v. City Council of Charleston*[11] has clearly held that municipal corporations in this State may not be estopped by unauthorized actions of their officers or agents.

The writer feels that our Court, notwithstanding the criticized passages of this opinion, would, on a proper presentation, follow the North Carolina Supreme Court and that in the final analysis the case here will not be regarded as an authority for the proposition that a municipal corporation can be estopped from enforcing a zoning ordinance because of the action or inaction of a municipal officer.

There was nothing wrong with the basic decision here. It is just most unfortunate that the Court saw fit to attempt to bolster it by referring to "the many equities which exist in favor of the respondent." In passing, may we note that somewhere along the line, some judge must heed the "many equities" of all of the other property owners whose property values depend upon unswerving enforcement of zoning laws?

Power of Mayor to Bind Municipality

City of Aiken v. South Carolina,[12] was decided on February 3rd, 1958, or exactly thirty-five days before the Court decided the case of *Kerr v. City of Columbia,* reviewed at length above. The case involves a dispute between the City of Aiken and Tatum W. Gressette as Director of the South Carolina Retirement System and State Agent for social security coverage in South Carolina. At issue was whether a contract between the City of Aiken and the South Carolina Retirement System had been lawfully amended so as to include members of the Aiken Police Department within its coverage. The original contract had been authorized by the City Council and had been executed for the city by the mayor. Without further authorization by the City Council, the mayor had signed an amendment extending coverage to the police department, notwithstanding that it had been specifically omitted from City Council's original authorization. Of course the reason for the original exclusion

11. 169 S. C. 373, 168 S. E. 852, 87 A. L. R. 981 (1933).
12. 232 S. C. 284, 101 S. E. 2d 841 (1958).

of the police department was due to the ineligibility of policemen and firemen under federal social security coverage, a situation corrected subsequent to the execution of the original contract between Aiken and the South Carolina Retirement System, and prior to the time when the amendment was executed by the mayor.

Thus the important question in the case was the power of the mayor to bind the city without action by the City Council. The Court promptly and correctly held that he had no such power. His action in signing the amendatory provision was therefore a nullity. Municipal corporations act and bind themselves only through the means of official actions of their governing bodies. They are not bound by unauthorized acts of any officials, even though the official be a mayor. Compare the result here with the statements indicating estoppel against the City of Columbia in the *Kerr* case.

Basis for Recovery Against City for Taking Property for Public Purposes Without Condemnation Proceedings

Clarke v. City of Greer[13] is disposed of when the Supreme Court sustains a demurrer to a complaint upon the ground that the two causes of action set forth in the complaint were misjoined, but it correctly reviews the basis upon which a property owner may seek redress from a municipality which, without his permission, makes use of his land for municipal purposes. In the year 1954, acting through its co-defendant, a contracting firm, the City of Greer entered the plaintiff's 50-acre tract and laid sewage disposal lines through the same. In her first cause of action, the plaintiff sought actual damages from the city because it made entry upon her lands without compensation and over her protest, and installed sewer lines in her property. In her second cause of action she sought actual and punitive damages from the contractor, alleging that it had full knowledge of the city's lack of power to make entry, but unlawfully proceeded over plaintiff's protests. It appears that the city had undertaken condemnation proceedings under the statute appearing in the Code as sections 59-203 and 59-204. However, when the case came on for trial in 1955, it was discovered that these Code sections had been repealed prior to the institution of the condemnation proceedings. The condemnation proceedings were then dismissed, and a second

13. 231 S. C. 327, 98 S. E. 2d 751 (1957).

proceeding instituted under the 1953 Act.[14] To determine if the causes of action were properly joined, the Court undertook to ascertain the nature of the action against the city. The Court said:

> We have no statute authorizing a common law action for tort against a municipality in a case of this kind. However, Article I, Section 17 of the Constitution, which provides that private property shall not be taken "for public use without just compensation being first made therefor", is self-executing, and may, without enabling legislation, be invoked by an individual whose property has been taken for public use.
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> . . . Although the city may have entered as a trespasser, it may not be ejected as an ordinary trespasser. Having the right to take Plaintiff's property under condemnation, it may retain possession upon payment of due compensation to her for the taking . . . .
>
> The second cause of action is entirely different. It is not based on a statute or the Constitution but is solely a common law action in tort for an alleged trespass. The nature and measure of damages recoverable in the two actions are different. While punitive damages may be recovered for wilful trespass of an individual, they are not recoverable against a municipality.

On this basis the Court correctly concluded that the causes of action were misjoined and that the demurrer should be sustained.

Liability of Municipality for Defects in Streets

Floyd v. Town of Lake City[15] is a case in which a pedestrian recovered for injuries sustained when a manhole cover, situated in a grass plot between the paved sidewalk and the roadway, turned as she stepped on it, causing her to fall and sustain personal injuries. There was circumstantial proof indicating that the manhole cover had been recently moved by an employee of the municipality, sufficient in the opinion of the Court to warrant the submission of the question of knowledge to the jury. On this point the case was distinguished from the case of *Driggers v. City of Florence*[16] in which no recovery

14. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 25-161 *et seq.* (Supp. 1957).
15. 231 S. C. 516, 99 S. E. 2d 181 (1957).
16. 193 S. C. 309, 2 S. E. 2d 790 (1939).

was permitted because of the failure of that plaintiff to show that the meter box (there involved) had been opened by any employee of Florence, or that the city had actual or implied knowledge of the existence of the dangerous condition resulting from the open meter box. Of far greater interest in the *Floyd* case is the question which arose by reason of the Lake City ordinance which declared that "[a]ll such places as lie between the street curbing [roadway] and the sidewalks [are] parkways." The ordinance went on to provide that "[i]t shall be unlawful for any person to trespass upon, walk, ride, cross or . . . stand upon or otherwise trespass on . . . such parkways." On the basis of this ordinance, the city sought to escape liability.

The Supreme Court pointed out that the city's liability arose from the South Carolina statute[17] providing that any person who shall sustain personal injury or property damage by reason of "a defect in any street, causeway, bridge or public way . . . " may (if not guilty of contributory negligence) recover from the municipality.

The Court defined the city's duty with respect to the grass plot in this language:

> . . . Because its primary function is not to serve as a place for pedestrian travel, the city is not required to keep it, and those who walk upon it must not expect to find it, as free of obstructions and as smooth of surface as the sidewalk or other portion of the street that is designed for such travel. But it does not follow that the city is immune from liability for injury caused by negligence to one who walks upon or across such an area. The "grassplot", by its very location, invites some pedestrian travel.

It thereupon concluded:

> . . . In furtherance of its utilitarian and ornamental purposes, the city may fence or barricade it, and such obstructions to pedestrian use, if properly constructed and maintained, are not defects within the meaning of the statute, 25 Am. Jur., Highways, Section 407, pp. 702, 703; Annotation 19 A. L. R. (2d) 1053 *et seq.*; but it may not, by the mere passage of an ordinance, as in the case at bar, declaring all such areas to be parkways and pro-

17. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 47-70.

hibiting trespass upon them, attain immunity from liability under the statute for injury or damage caused by its negligence.

The result here seems entirely correct. Since municipal corporations are the creatures of the legislature, their powers and liabilities are subject to definement by the legislature and a liability imposed by the legislature may not be escaped through the means of an ordinance of this sort.

Offstreet Parking Facilities as a Public Purpose of Incorporated Municipalities

In the case of *Boykin v. City of Camden*,[18] Boykin sought to restrain the City of Camden from condemning certain property owned by him for use as a part of a public municipally owned and operated offstreet parking lot.

In disposing of the plaintiff's contention, the Court noted that the Off-Street Parking Facilities Act of 1954[19] authorized all municipalities of the State to acquire and operate such facilities and that the constitutionality of this act had been specifically upheld by the Court in the case of *Sammons v. City of Beaufort*,[20] which holding clearly precluded the attempt made by the plaintiff to enjoin the defendant city. Unless it were to overrule the holding in the *Sammons* case, the purpose which prompted the plaintiff to institute this action is beclouded. The *Sammons* case has been the subject of an earlier review.[21]

Sewers

The case of *City of Greenville v. Greater Greenville Sewer District*[22] is a case of very narrow impression. Its sole purpose was to obtain a statutory construction which would determine which of two municipal agencies was responsible for the cost of installing a particular sewer line in a section of the City of Greenville which was formerly a part of Overbrook Water and Sewer Subdistrict, but which had then recently become annexed to the City of Greenville. To really understand the mechanics of sewage disposal in Greenville County one has to delve through a multitude of special acts creating a multitude of Special Purpose Districts of the sort

18. 231 S. C. 325, 98 S. E. 2d 755 (1957).
19. 48 STAT. 1771 (1954).
20. 225 S. C. 490, 83 S. E. 2d 153 (1954).
21. 8 S. C. L. Q. 108 (1955).
22. 232 S. C. 472, 102 S. E. 2d 524 (1958).

whose constitutionality was unsuccessfully challenged in *Mills Mill v. Hawkins*.[23] Suffice it to say that Greater Greenville Sewer District was created to provide "main trunk lines" for the disposal of sewage. The City of Greenville and the "subdistricts" utilizing the "main trunk lines" were to provide the "laterals." The question litigated was whether the particular sewer line was a "main trunk line" or a "lateral." The Supreme Court agreed with the county judge (who had overruled the master in equity) that the sewer lines in question were "laterals" for whose cost the City of Greenville was responsible. The writer is in complete accord with this holding.

23. 232 S. C. 515, 103 S. E. 2d 14 (1958).