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Public Regulation of Land Use in South Carolina

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PUBLIC REGULATION OF LAND USE IN SOUTH CAROLINA

Scarcely more than thirty years ago, the United States Supreme Court, speaking through Justice Sutherland in *Village of Euclid v. Ambler Realty Company*,[1] upheld for the first time the right of a municipality to promulgate and enforce a comprehensive plan for the exclusion of buildings devoted to business from a residential area. In doing so, the court affirmed the stated belief of many state courts of last resort that such exclusion bore a rational relation to the health and safety of the community and was therefore within the police power of the town.[2]

Such a decision was clearly inevitable. Since the dawn of civilization man has sought through various means to adjust and reconcile his needs with those of his neighbor. In the area of land use in this country, the problem has been a difficult one.[3] Various means have been employed in an effort to solve it satisfactorily. The judicial branch of our government has attempted a solution through the doctrine of nuisance.[4] A further attempt has been made through private agreements or covenants[5] which the courts will uphold so long as they do not transgress established legal rights.

Although both of the foregoing methods for the regulation of land use are still being utilized, it soon became apparent with increased urbanization and the complexities which accompanied it, that a new and better type was needed. Out of this need grew a field of law which is comparatively new in America, and by which the legislature and its subdivisions seek through the police power and eminent domain to create a workable formula for adjusting the varying needs of the diverse land users. The concept that this function is a proper one for the legislature is as old as the Romans themselves,

1. Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926).
2. As to characteristics of the police power generally, see the following: State v. Berlin, 21 S. C. 292 (1883); Goodale v. Sowell, 62 S. C. 516, 40 S. E. 970 (1902); Huffman v. Columbia, 146 S. C. 436, 144 S. E. 157 (1928); Rock Hill v. Cothran, 209 S. C. 357, 40 S. E. 2d 239 (1947); Sammons v. Beaufort, 225 S. C. 490, 83 S. E. 2d 153 (1954).
3. See the interesting discussion of Justice Sutherland in Village of Euclid v. Ambler Realty Co., note 1, *supra*, at page 388.
4. 39 AM. JUR., *Nuisances* §1 (1942).
5. 14 AM. JUR., *Covenants, Conditions and Restrictions* §§ 1, 4 (1938).

and yet it had a late start in this country because of the reluctance of the courts to accept it.[6]

Just as one would be correct in his statement that this area of the law is a relatively new one in this country, he would be justified in saying that it still is in the fetus stage in South Carolina. Until recent years we have been a primarily rural state, and problems seldom arose that could not be settled through the doctrine of nuisance and the use of covenants between the land owners themselves. But such is no longer the case, and as we have been swept along in the tide of urbanization, our legislature has found it necessary to play an increasingly important role in this drama.

It is with these thoughts in mind that the writer has embarked upon the task of assembling those principles which have been made applicable by statute or decision. The purpose of this article is twofold; first, to discuss the pertinent cases with a view toward delineating the basic principles followed in this state where such principles have been laid down, and second, to call to the reader's attention decisions from other jurisdictions on matters which possibly will arise in the near future in this state. In doing so, our discussion will necessarily be limited to those cases involving direct action by the state or its subdivision in a legislative capacity, with only incidental reference, where necessary, to the other modes of land control.

ZONING

Zoning consists of a general plan to control and direct the use and development of property in a municipality or a large part of it by dividing it into districts according to the present and potential use of the properties.[7] The power to zone has as its basis the police power which has been conferred upon all city and town councils in this state by statute,[8] and it is legislative rather than judicial in character.[9]

In our approach to the principles governing zoning, a likely starting point would be a discussion of the various land uses which our court has deemed to be apt subjects of legislation

6. 1 YOKLEY, ZONING LAW AND PRACTICE 3 (2d ed. 1953).
7. Devaney v. New Haven Board of Zoning Appeals, 132 Conn. 537, 45 A. 2d 828 (1946).
8. CODE OF LAWS OF SOUTH CAROLINA, 1952 §47-61.
9. Dunbar v. Spartanburg, 226 S. C. 360, 85 S. E. 2d 281 (1954).

designed to regulate such use. In the important case of *Douglass v. Greenville,*[10] our Supreme Court upheld the right of the Greenville City Council to prohibit the erection of a stable within its city limits. Plaintiff had purchased a lot within the city limits with the intention of erecting a stable thereon. An ordinance was subsequently passed prohibiting such establishments, and plaintiff sought a writ of mandamus to compel the issuance of a permit which had been refused to him because the construction was opposed to the new ordinance. In denying the writ, the court held that the livery stable was a proper subject of such prohibition, because the health of the people was directly affected.

Likewise, a town council need not distinguish between a billiard hall which is operated in a boisterous manner so as to amount to a nuisance, and those which for all intents and purposes are operated in a peaceable manner.[11] The council has the power to forbid the operation of all such establishments within its boundaries if it deems such action necessary.[12] The rationale of such holdings is that poolrooms are fraught with some danger to the morals of those who play, even when the playing is done under the most favorable conditions.[13]

One of the earliest land uses which our court decided was a proper subject of regulatory legislation was the keeping of livestock within the town limits. In *Town of Brunson v. Youmanns,*[14] the absolute prohibition of all hogs from the territorial limits of the town was declared valid, and in the subsequent case of *Ward v. Darlington,*[15] an ordinance which regulated the keeping of cattle in the town proper to such an extent as to make the cost prohibitive was similarly upheld. The court declared that the power of the legislature was broader where the health of the community is concerned than it is in most areas. After the holding in the *Youmanns* case, *supra,* that the town could *prohibit* livestock, the result

10. 92 S. C. 374, 75 S. E. 687 (1912).

11. Fowler v. City of Anderson, 131 S. C. 473, 128 S. E. 410 (1925).

12. However, a municipality may not declare a particular church to be a nuisance by a mere *resolution,* though it has the power to do so by an ordinance, duly enacted. Morison v. Rawlinson, 193 S. C. 25, 7 S. E. 2d 635 (1940).

13. Thomas v. Foster, 108 S. C. 98, 93 S. E. 397 (1917).

14. 76 S. C. 128, 56 S. E. 651 (1907).

15. 183 S. C. 263, 190 S. E. 826 (1937).

reached in the *Ward* case, *supra,* was a natural consequence since the greater power includes the lesser.

The court also has been prone to approve of ordinances which seek to further the welfare of the community through restrictions which do not bear directly on the health of the citizenry. A use may be excluded from a residential area even when the only objection to it is a legislative finding that such businesses have a tendency to have a demoralizing effect on the surrounding landowners. For example, a funeral home may be found to have such effect. A zoning ordinance of the City of Charleston was drawn in question when an adjoining property owner sought to enjoin the operation of such an establishment.[16] The permitted uses were, in addition to those allowed in the more restrictive "A" district, two-family dwellings; multiple dwellings; fraternity, sorority or club houses; and hotels or their incidents. The court said that aside from any question of nuisance,[17] the violation of a valid zoning ordinance gave rise to a cause of action in favor of a property owner who has been or will be specially damaged if continuance of the non-conforming use is allowed. The argument that an ordinance dividing the city into use districts according to a general scheme was invalid was curtly dismissed as having long since been settled in this country. The majority of the court felt that the depression caused by being constantly reminded of death justified such an ordinance, and that any land owner who was or would be thusly affected had suffered sufficient special damage as would allow maintenance of an action to enjoin its further continuance.

In *Schloss Poster Advertising Company v. Rock Hill,*[18] where an ordinance required a permit for the erection of a billboard in town,[19] the court intimated that such ordinance would be enforced as a zoning ordinance if proper standards had been included for the guidance of the responsible city

16. Momier v. John McAlister, Inc., 203 S. C. 353, 27 S. E. 2d 504 (1943).

17. A municipality may also declare a funeral home a nuisance due to its depressing effect alone, and abate that nuisance. Fraser v. Fred Parker Funeral Home, 201 S. C. 88, 21 S. E. 2d 577 (1941).

18. 190 S. C. 92, 2 S. E. 2d 392 (1939).

19. "Hereafter it shall be unlawful to erect or maintain any billboard facing on any public street or other public place within the incorporate limits of the City of Rock Hill without having first obtained from the city council a permit to do so." Schloss Poster Advertising Co. v. Rock Hill, note 18 *supra,* at 93.

authority in its administration. The plaintiff had applied for a permit pursuant to the ordinance, and it was denied. The Supreme Court granted a writ of mandamus compelling the issuance of the permit upon the grounds that the ordinance did not prescribe what factors should be taken into consideration in granting or denying the requests of the applicants, but rather, in the words of the court, " . . . leaves the right of property subject to the despotic will of city authorities who may exercise it so as to give exclusive profits or privileges to particular persons."[20] In addition, the court had this to say: "We are of the opinion that the ordinance in its *present form* is objectionable and invalid for the reasons indicated, and cannot be enforced. *If another ordinance should be enacted we must presume that the municipal authorities will in their wisdom enact a proper and reasonable ordinance, in conformity with the views herein expressed.*" [Italics added.]

This language, when coupled with testimony by the defendant city to the effect that one of the primary objectives in the enactment of this ordinance was to prevent unsightliness, seems strongly to indicate that aesthetic considerations may properly form *one* of the bases for a valid zoning ordinance. However, this case should not be construed as a holding on this point. Certainly there is not yet a holding in this state as to whether or not aesthetic considerations may form the *sole* basis for a zoning ordinance.

The general rule appears to be that aesthetic considerations are proper auxiliary considerations in enacting an ordinance prohibiting billboards, but that a city may not prohibit a billboard merely because it is unsightly,[21] though there may be a tendency to allow such prohibitions in the future.[22] It might be well to add that the courts have taken the same view in regard to the general exercise of the police power for aesthetic reasons.[23]

In a recent case,[24] a permit for the erection of a motel was denied on the grounds that such use was not allowed in the

20. *Accord*, State v. Leonhard, 99 Ohio St. 163, 124 N. E. 187 (1919).

21. General Outdoor Advertising Co. v. Indianapolis, 202 Ind. 85, 172 N. E. 309 (1930); State v. Whitlock, 149 N. C. 542, 63 S. E. 123, 128 Am. St. Rep. 670, 16 Ann. Cas. 765 (1908).

22. See Annot., 72 A. L. R. 465; also 156 A. L. R. 581.

23. See Annot., 8 A. L. R. 2d 963.

24. Purdy v. Moise, 223 S. C. 298, 75 S. E. 2d 605 (1953).

district involved under the city's zoning ordinance.[25] The ordinance allowed hotels, and our court held on appeal that the term "hotels" should be construed as including motels. Terms limiting the use of property must be liberally construed for the benefit of the property owner. The court also laid stress on the fact that the city's board of adjustment had previously allowed the construction of a motel in a similarly restricted area on the opposite end of the town.

In addition to the foregoing land uses, our court has upheld the right of the legislature and the various municipalities to enact statutes and ordinances controlling activities in connection with the occupancy of land which may be called land uses only in the broadest sense of the term. Since the scope of this article is limited, it would best serve our purposes to make only casual mention of these. Included under this classification are cases involving the right of a municipality to require the owners of low-lying lands to fill or drain them,[26] to allow city firemen to destroy buildings in the path of a fire,[27] to prescribe building materials for the prevention of fire,[28] to limit the maximum quantity of land which may be cultivated within the city limits,[29] and to regulate the sale of intoxicating liquors.[30] On the other hand, the court has held invalid an ordinance requiring all residents to purchase water from the municipality, where the municipality is shown to be unable to furnish certain residents such water.[31]

REQUIREMENT OF REASONABLENESS

The courts in this state previously adhered to the view that once conceding the power of the legislature to enact an ordinance, the courts could not inquire into its reasonableness.[32] This view was modified in subsequent decisions which held

25. "II (A) Use Regulations: In the residence district no buildings or land shall be used, and no building shall be hereafter erected or structurally altered, unless otherwise provided in this ordinance, except in the following uses: . . . (2) Boarding houses, lodging houses, hotels not involving the conduct of any business other than for the sole convenience of the guests thereof . . ." Purdy v. Moise, note 24 *supra*, at 299, 300.

26. Charleston v. Werner, 38 S. C. 488, 17 S. E. 33 (1893).

27. White v. City Council, 2 Hill 571 (S. C. 1835).

28. Seneca v. Cochran, 84 S. C. 279, 66 S. E. 288 (1909).

29. Town Council v. Pressley, 33 S. C. 56, 11 S. E. 545, 26 Am. St. Rep. 659, 8 L. R. A. 854 (1890).

30. City Council v. Ahrens, 4 Strob. 241 (S. C. 1850).

31. DeTreville v. Grover, 219 S. C. 313, 65 S. E. 2d 232 (1951).

32. *See, e. g.*, Town Council v. Pressley, note 29, *supra*.

that though an ordinance could not be attacked solely on the ground of unreasonableness, it was a factor to be considered in determining its constitutionality.[33] This modification inevitably led to the conclusion reached in *Columbia v. Alexander*[34] that an ordinance may be declared void solely on the ground that it is unreasonable. Clearly the court today has the power to invalidate any ordinance which upon judicial determination is found to be unreasonable.[35] But it is said that the party assailing the validity of the ordinance must sustain the burden of proving its unreasonableness.[36] This proof must be beyond a reasonable doubt,[37] and the court has said: "It should be added that the power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the courts to pass upon the wisdom or expediency of municipal ordinances or regulations."[38]

This power of the court is twofold. That is to say, an ordinance is subject to the scrutiny of the court as to the reasonableness of the ordinance in relation to the subject matter which it attempts to regulate, and in addition, as to the manner in which it purports to enforce that regulation. Falling under the former heading are the cases generally referred to as "spot zoning." In approaching this area of the law it would be beneficial to note the statement of a leading authority on the law of zoning, E. C. Yokley, in regard to which cases should properly be grouped under this heading:[39]

> Cases become "spot zoning" cases where obviously a particularly small lot or parcel of ground is singled out and placed in an area, the use of which is inconsistent with the small lot or area so placed and whose classification is changed in the ordinance, and in these cases where special benefits are sought to be conferred on a particular property owner, or special burdens sought to be imposed

33. State ex. rel. Southern Ry. v. Earle, 66 S. C. 194, 44 S. E. 781 (1903); Town of Brunson v. Youmanns, 76 S. C. 128, 56 S. E. 651 (1907); Kirk v. Board of Health, 83 S. C. 372, 65 S. E. 387, 23 L. R. A. (N. S.) 1188 (1909).
34. 125 S. C. 530, 119 S. E. 241 (1923).
35. Henderson v. Greenwood, 172 S. C. 16, 172 S. E. 689 (1934).
36. See note 13, *supra*.
37. See note 39, *infra*.
38. See note 31, *supra*.
39. 1 YOKLEY, ZONING LAW AND PRACTICE 209 (2d ed. 1953).

> upon particular property owners, these and these alone, in our way of thinking, become the real "spot zone" amendments, and they alone constitute the cases that sabotage the laudable efforts of progressive municipal authorities to comprehensively zone the municipalities and drag into the dust such praiseworthy undertakings.

There is no dispute as to the fact that a "spot zone" regulation is an improper exercise of the police power. Once a regulation has been classified by the courts as such an attempt, it will be struck down. There is but one case directly in point in this state. That this is the case is indeed a credit to the integrity of the various state and municipal authorities; for many jurisdictions are virtually swamped with such cases,[40] notwithstanding the fact that they represent a distinct abuse of the legislative power and are designed to further some selfish motive of a minority. A landmark case in the law of this state is that of *James v. Greenville*,[41] in which an ordinance of the City of Greenville received the rather dubious distinction of being the first to bear the onerous label of a "spot zone" amendment. There have been other cases in South Carolina which might have been decided as "spot zone" cases, but in each instance our court has rested the decision on other equally plausible grounds.[42]

In the *James* case, *supra*, plaintiff began operation of a trailer camp outside of the city limits of Greenville. The city annexed the area in which plaintiff's land was located in 1947. In 1950 the ordinance was enacted designating plaintiff's land as "A" district, the most restrictive classification provided for under the general scheme of zoning in Greenville. This "A" district was composed of plaintiff's land, and a small adjoining lot. The area adjacent was zoned as "E" district, which was considerably less restrictive. Plaintiff was informed that all non-conforming use would have to be ceased within a year of the date of passage of the ordinance. It was from this notification and order, and the subsequent affirmance of these by the Master for Greenville County, that plaintiff appealed to the Supreme Court. The order was reversed, the court holding that the ordinance was an unconstitutional

40. *Id.* at 210.
41. 227 S. C. 565, 88 S. E. 2d 661 (1955).
42. Fincher v. Union, 186 S. C. 232, 196 S. E. 1 (1938); Painter v. Forest Acres, 231 S. C. 56, 97 S. E. 2d 71 (1957).

exercise of the police power as applied to this particular locus, in that it bore no relation to the promotion of public health, safety, morals or welfare. Chief Justice Baker, in his concurring opinion, was most vigorous in condemning this act. In commenting on the proximity of the "A" district to the "E" district, the Chief Justice said: "It is hard to tell the distance a frog will jump from where it sits." This quotation points up the arbitrary manner in which the ordinance was enacted, without regard for the well-recognized principles applicable to such legislation. It is to be hoped that the court shall never again be faced with another such ordinance.[43]

Though not specifically denominating it as a "spot zone" ordinance, the court declared an ordinance of the City of Union to be unreasonable in its application to the particular land in question. In *Fincher v. Union*,[44] plaintiff operated a barbecue stand in what was to all appearances a business area. The city enacted an ordinance making it unlawful for a barbecue stand in a residential area to stay open between the hours of 11 P.M. and 6 A.M., except on Saturdays when they were allowed to remain open until 12 A.M. The ordinance defined a "residential area" as "... any section of the City of Union where two or more houses, used for residential purposes, are located on abutting property." The court, again speaking through Chief Justice Baker, declared the ordinance unreasonable in its application to plaintiff as depriving him of the use of his property without due process of law. The definition of a "residential area" was declared unconstitutional due to its obvious unreasonableness. The court pointed out that had the plaintiff's business been located a few doors away it would not have fallen into the restricted class. This

43. In the most recent case in which the "spot zone" argument was raised, our court found no basis for holding the amendment involved to be such an abuse of the legislative power. An injunction had previously been issued to prevent the operation of a funeral home in an area zoned as a "B" residence district in which businesses were forbidden (see note 16, *supra*). The Charleston City Council subsequently passed an amendment allowing the use of a funeral home on a certain lot in the aforementioned area, and the lot had been cleared and readied for construction. It was held that since the nature of the area had so radically changed that it was no longer suited as a strictly residential zone, the amendment was reasonable and therefore did not constitute "spot zoning." The fact that the whole area was not re-zoned, but rather that only one lot within the area was so treated, was held to be of no consequence, since under the facts of the case it did not appear that such action was taken in an arbitrary manner. Momier v. John McAlister, Inc., 231 S. C. 526, 99 S. E. 2d 177 (1957).

44. See note 42, *supra*.

seems strongly to indicate that the case has all of the requisites of a "spot zone" case and could have been placed on those grounds.

A recent case on this matter arose in Forest Acres,[45] and the facts there closely parallel those of the *Fincher* case, *supra.* Plaintiff operated a drive-in restaurant located within one of four districts which were zoned to allow businesses. The town council enacted an amendatory ordinance, declaring it unlawful for any business to be operated after 12 A.M. Plaintiff sought and was granted an injunction, and on appeal this was affirmed. The ordinance was adjudged to be an invalid exercise of the police power. The decision was based on the arbitrary effect to all business, and also on the premise that the ordinance was obviously aimed at the plaintiff.[46] The court pointed out that a municipality cannot make a business a nuisance by a mere declaration that it is such.

Falling into the second class of cases which the court will declare invalid on the basis of unreasonableness are those which involve ordinances requiring permits in order to put land to a given use and the ordinance does not provide sufficient criteria for the determination by the administrative body of whether or not to issue the permit. The use sought to be regulated may or may not be reasonable, but the ordinance is struck down because there is too much discretion left with the city official, and therefore the ordinance may be used as a means of discrimination.

In *Henderson v. Greenwood,*[47] petitioner had received a permit for the erection of a building on her lot, which lot was within two hundred feet of a railroad track. Acting pursuant to complaints from adjoining property owners, the council revoked the permit and enacted an ordinance which flatly forbade the erection of *any* building within two hundred feet of a railroad track without first obtaining permission through a resolution of the council. In seeking a writ of mandamus, Mrs. Henderson assailed the ordinance on the grounds that it was so unreasonable and discriminatory as to amount to a taking of private property without due process of law in contravention to those rights guaranteed by the constitution of

45. See note 42, *supra.*
46. *Cf.*, DeTreville v. Groover, note 31, *supra.*
47. 172 S. C. 16, 172 S. E. 689 (1934).

this state.[48] In upholding this contention, the court stated it felt the purpose of the ordinance was to deprive Mrs. Henderson of all profitable use of the land. The ordinance was said to be unreasonable in that it provided no standards for the granting or withholding of permits. An actual taking of the land was not necessary as a prerequisite for granting relief under a prior South Carolina decision.[49] It is enough that the act interferes with the legal use and enjoyment of the property.

In the *Schloss* case,[50] such an ordinance was drawn in issue. It provided that anyone desiring to erect a billboard on a public street must first acquire a permit, but failed to state on what grounds such a permit should or should not be granted. In striking the ordinance down, the court in effect stated that such an act left property rights subject to the arbitrary will of a public official. One should remember that the manner in which the ordinance is actually enforced is not the material issue in such a case; the real issue is whether or not, in the eyes of the law, the ordinance sufficiently prescribes criteria for the guidance of the officials who act pursuant to it.

Revocation of a Validly Issued Permit

There is no longer any dispute as to the right of a municipality to require a construction or use permit. It is also recognized that the applicant may be required to show compliance with existing restrictions as a prerequisite to the issuance of such a permit, and also that a permit may be withheld for cause.[51] But a permit may not be wrongfully withheld.[52] Once a valid permit has been issued, the municipality may revoke it upon a showing of cause.[53] However, if the permittee has acted in good faith in incurring expenses of contractual obligations in reliance on the permit, there will arise in him a property right which will insure him against revocation of the permit.[54] At least two South Carolina cases have recog-

48. S. C. Const. Art. I, §5.
49. Gasque v. Conway, 194 S. C. 15, 8 S. E. 2d 871 (1940).
50. See note 14, *supra.*
51. Pendarvis v. Orangeburg, 157 S. C. 496, 154 S. E. 756 (1930).
52. State v. Kreuzweiser, 120 Ohio St. 352, 166 N. E. 228 (1929).
53. Howe Realty Co. v. Nashville, 176 Tenn. 405, 141 S. W. 2d 904 (1940).
54. 43 C. J., *Municipal Corporations* §380 (1927).

nized the principle that such a right, commonly called a "vested right," will arise under the proper circumstances.[55] However, the permittee must have acted in good faith,[56] and the official issuing the permit may not do so in contravention to the ordinance he is acting under, for he does not have the power to sanction what the legislature has declared to be illegal.[57]

VARIANCE

It has long been settled in other jurisdictions that a provision of a zoning ordinance to the effect that the specified board may, upon a hearing, grant relief from the restriction imposed upon the petitioner's land, when a proper showing of need is made, is valid.[58] Such a provision has never been directly challenged in this state, but undoubtedly it would be upheld if challenged.

The important consideration in studying variances can best be stated in the form of a question, to wit: When has the petitioner made a sufficient showing of hardship so as to justify granting him relief? There have only been four cases bearing on this matter in our state. However, all have arisen since 1952, so it appears quite likely that a great many more will follow, and therefore the topic merits our consideration.

In the first of these cases,[59] the issues usually presented in a variance case were not squarely decided on by the court, and were only incidentally present. Plaintiff owned a lot in Myrtle Beach on which he operated a motor court. Such use was permitted in the "R-4" district in which the lot was situate. The dispute arose over a contiguous lot also owned by plaintiff and which was located across the street from the first mentioned lot, but in an "R-1" district, in which a restaurant was not permitted. A petition was filed with the adjustment board for a variance to allow the plaintiff to operate a restaurant on the second lot. The plaintiff argued on the theory that the ordinance was invalid as applied to the lot in question, in

55. Willis v. Town of Woodruff, 200 S. C. 266, 20 S. E. 2d 699 (1924); Pendleton v. Columbia, 209 S. C. 394, 40 S. E. 2d 499 (1946).

56. Aberman v. New Kensington, 377 Pa. 520, 105 A. 2d 586 (1954).

57. Cochran v. Roemer, 287 Mass. 500, 192 N. E. 58 (1934); Ventresca v. Exley, 358 Pa. 98, 56 A. 2d 210 (1948).

58. See Annot., 168 A. L. R. 13.

59. Talbot v. Myrtle Beach Bd. of Adjustment, 222 S. C. 165, 72 S. E. 2d 66 (1952).

that it became so unreasonable as to amount to a deprivation of property without due process of law and therefore unconstitutional. The court had little trouble in disposing of this argument and dismissed the petition. This contention was mainly along the lines of those made in the cases involving "spot zoning," and does not rightly apply to a case such as this. This will be more clearly shown as we examine the later cases in this state.

In the next case confronting the court, the issues of variance were more squarely presented.[60] Here the plaintiffs were radiologists, and sought relief from a building restriction which prevented the construction of any building within six feet of the side yard. The plaintiffs used a great deal of equipment in their work, and this required certain installation in order to be effective. The plaintiffs contended that such installation called for so much room that they would be forced to use more than the allotted space and that the building would extend more than six feet into the side yard. To deny them the privilege of so constructing their building would amount to an "unnecessary hardship" in their opinion. In denying the variance our Supreme Court said: "It is generally held that before a variance can be allowed on the ground of 'unnecessary hardship' there must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation."

On the basis of the evidence presented, the court felt that all that had been shown here was inconvenience. This was based on a lack of a strong enough showing of essentials. In the words of the court, "There is no showing that the side yard requirement, when applied to respondents' property, becomes arbitrary, confiscatory, or unduly oppressive because of conditions of the property distinguishing it from other properties similarly restricted."

Thus the court laid down the principle that so long as the ordinance is valid and applies equally to all within a given class, a mere showing of hardship will not warrant relief; *there must be a hardship suffered which is peculiar to this land.* It was not stated just what would constitute such a showing. The evidence presented by the petitioner tended to prove that the zoning restriction would prevent petitioners

60. Hodge v. Polluck, 223 S. C. 342, 75 S. E. 2d 752 (1953).

from installing their X-ray equipment in the *best* feasible manner. However, it did not show that they would be prevented from making an installation in the *only* feasible way. Perhaps if such a showing had been made, the court would have been less reluctant to grant the petitioners' demands. A close examination of the opinion would seem to justify such a conclusion.

The subsequent case of *Simmons v. Board of Adjustment of Charleston*[61] throws considerable light on the problem. Several issues were raised here which were lacking in the two previous decisions. The petitioners were the lessor and lessee of a parcel of land situate along the river front in Charleston. They sought relief from a zoning regulation which had placed their land in a "B" district, in which restaurants were not allowed. The validity of the ordinance was not questioned. After a variance had been granted, several adjoining landowners appealed to the Supreme Court on the grounds that the grant of such a variance would considerably decrease the value of their land, which had been purchased in reliance on the then existing regulations. Charleston Lobster House, Inc. had leased the land in question from the State Ports Authority with a view in mind of constructing an expensive restaurant. A clause in the deed provided that there would be a mutual release of all contractual obligations in the event the lessees were unable to promulgate their plans due to any restrictions imposed on the land by the city. A majority of the court felt that the variance should not have been granted. It was felt that since the lessees had agreed to lease the land with full knowledge of the use limitations then in effect against it, and since they had shown nothing but financial hardship, the burden of proving "unnecessary hardship" had not been sustained. The court flatly stated that in its opinion, the lessees would suffer no actual present loss because of the aforementioned clause in the lease. But the court went on to say that granting they did suffer such a loss, still they had not made a sufficient showing of hardship. One reason advanced for this proposition was that they had entered into the lease at their peril, and could not now be heard to complain.

The lessees also tried to prove hardship by the fact that there was no other property as suitable for their purposes

61. 226 S. C. 459, 85 S. E. 2d 708 (1955).

available, and that denial of the variance would result directly in the loss of income and profit. This the court refused to consider on the grounds that it was at best speculative.[62] Several principles may be derived from this case, some of which were not heretofore present in the law of this state: (1) In seeking a variance, the burden of proving that the ordinance is unreasonable as applied to the petitioner's land is on the petitioner, the presumption being that the ordinance is reasonable in its application to *all* land; (2) to sustain this burden, there must be a showing of "unnecessary hardship," and a mere showing of financial loss will not be deemed adequate; however, in a proper case, evidence of financial loss is relevant as bearing on the issue of "unnecessary hardship;" (3) the land must suffer a hardship as a result of the application to it of the ordinance, and this hardship must not only be different in *quantity* from that suffered by other land similarly situate, but must also differ in *quality*;[63] (4) the possible loss of future income or profit is merely speculative and may not be used as evidence of hardship; (5) a variance will not be granted if it is not in harmony with the spirit and general scheme of the ordinance.

The most recent decision relevant to this topic also arose in Charleston.[64] The facts briefly are these: The First Baptist Church, hereafter referred to as the church, owned land located in an "A" district on which they had maintained a house of worship for many years before the advent of zoning regulations in Charleston. When the land was zoned, churches were a permitted use. The church also maintained a Sunday School building on the premises, and when they contemplated an addition to this, they ran afoul of a regulation limiting the percentage of any lot in the "A" district on which a "principal building" could be erected. The church sought and obtained a variance, but the board attached a proviso to the effect that the school should not house more than 270 students at any time. This was deemed necessary for two reasons. First, the church planned to use the building for a day school, which meant that it would be in use every day. Second, a traffic congestion was encountered when the church transported the

62. *Contra, id.* at 467 (dissenting opinion).
63. It is interesting to note that this test has proved unsatisfactory in the area of nuisance. PROSSER, TORTS, p. 404 (2d ed. 1955).
64. Stevenson v. Bd. of Adjustment of Charleston, 230 S. C. 440, 96 S. E. 2d 456 (1957).

pupils from the school to the city playground which was used for recreation in lieu of their own facilities, this playground being some three blocks from the school. Adjoining property owners appealed the variance, and the church appealed the proviso. The lower court upheld the variance, but at the same time struck the proviso as unreasonable. Both parties again appealed this decision. The issues clearly presented on this appeal were: (a) Was there a sufficient showing of "unnecessary hardship" to justify a variance? (b) If so, was the proviso appended to the order granting the variance a proper limitation?

Although other issues were involved, we are not concerned with them here. The first of the major issues was that of the variance, the opinion of the court being that this had been properly granted. The church had suffered a singular disadvantage through the operation of this regulation. This finding was based upon a belief that the evidence brought forth by the church as to increased enrollment and lack of other available space had sustained the burden of showing "unnecessary hardship" according to the principles already outlined.

The right of the board of adjustment to attach a proviso to an order granting a variance had not heretofore been challenged in this state, and was attacked only on the grounds of reasonableness in this case. The court met this argument by reference to the code section[65] and the ordinance section[66] authorizing "reasonable and additional stipulations" by the board in granting the variance, and concluded that the proviso here was reasonable and therefore valid. Conceivably the code section and the ordinance section might both have been attacked on the grounds that they constituted an unconstitutional delegation of legislative powers. However, in other jurisdictions such provisions have generally been upheld.[67]

OTHER RELATED AREAS

Aside from zoning, which constitutes the main body of law in this area, the imposition of use regulations may take other forms. For example, other jurisdictions have recognized the

65. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 47-1007.
66. ZONING ORDINANCE OF THE CITY OF CHARLESTON, art. XI § 51 (e).
67. 1 YOKLEY, ZONING LAW AND PRACTICE 354 (2d ed. 1953).

validity of enabling statutes which grant to the municipalities the authority to set up minimum standards for housing under the police power.[68] The requirements made must be reasonable and designed to promote the public health, safety and welfare.[69] South Carolina enacted such a statute in 1939,[70] but it was not until 1955 that the first and only case drawing in issue the validity of a municipal ordinance passed pursuant to the statute came before our Supreme Court. In *Richards v. Columbia,*[71] several owners of rental property in the City of Columbia sought to enjoin enforcement of an ordinance prescribing minimum standards which must be met.[72] The ordinance was assailed as unconstitutional on the grounds that it was confiscatory, impaired the obligation of contract, constituted an unlawful delegation of legislative power, violated constitutional provisions against unlawful searches and seizures, and deprived plaintiff of due process of law. In rejecting these contentions the court, speaking through Justice Stukes, said: "We conclude that the ordinance, as herein restricted, is not an arbitrary or unreasonable exercise of the police power; and that it is not subject to the constitutional objections which have been earnestly and ably argued in behalf of appellants . . . ."

However, of significance is the fact that this was a three-two decision. The dissent was based on the unreasonableness of subdivisions (a) through (g) of Section Nine[73] of the ordinance. This section prescribed the various conditions essential to a finding that a dwelling is fit for habitation. The entire court agreed that the preamble to Section Nine of the ordinance[74] was an invalid delegation of the legislative power and was therefore void. However, two justices felt that even after

68. 9 AM. JUR., *Buildings* § 3 (1937).
69. 12 AM. JUR., *Constitutional Law* § 686 (1938).
70. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 36-501 through 36-511.
71. 227 S. C. 538, 88 S. E. 2d 683 (1955).
72. *Id.* at 543.
73. *Id.* at 545.
74. *"Sec. 9. Standards of Dwellings or Dwelling Units Fit for Human Habitation.* The commission *and/or* the Rehabilitation Director may determine that a dwelling or dwelling unit is unfit for human habitation if conditions existing in such a dwelling or dwelling unit are dangerous or injurious to the health, safety or morals of the occupants of such dwelling or dwelling unit, the occupants of neighboring dwellings or other residents of the city. *Without limiting the generality of the foregoing,* the following conditions are hereby declared to be essential to make a dwelling fit for human habitation." For list of essentials, see 227 S. C. at 545.

striking that provision, the requirements of the ordinance were so stringent that they were unreasonable. Thus the inference might well be drawn that if the same question were to again come before the court, they might modify or even reverse themselves.

The final area within the scope of this article is that of slum clearance, or, as it is more technically called, urban redevelopment. Since this topic is but incidentally related to our main field, only the highlights and more important aspects will be mentioned. This is a new area of case law in South Carolina, there being very few cases thus far. However, the obvious communal benefits strongly suggest that in the immediate future many more municipalities will follow those who have already enacted ordinances, and with these enactments litigation also will increase.

There are two statutes under which ordinances are generally enacted in this state. The first, known as the State Housing Law,[75] was enacted in 1933. In all cases challenging ordinances enacted under the authority of this statute, our court has held that slum clearance and subsequent low-cost housing for families within a denoted income was a proper exercise of the police power and that of eminent domain.[76] It is also said that such plans are for a "public use" within the meaning of Article I, Section 17, of the Constitution of 1895.[77] These holdings are in accord with the weight of authority in this country, and are in keeping with the principles long embedded in our society.[78]

Some courts have even gone so far as to call the use "public" when there is an incidental private benefit derived.[79] Such a case arose recently in this state, but the Supreme Court displayed a reluctance to go this far.[80] The Housing Authority of the City of Columbia, acting under the Redevelopment Law passed in 1939,[81] made a legislative determination that an

75. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 36-1 through 36-61.

76. McNulty v. Owens, 188 S. C. 377, 199 S. E. 425 (1938); Benjamin v. Housing Authority, 198 S. C. 79, 15 S. E. 2d 737 (1941).

77. "Private Property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being made therefor."

78. See Annot., 172 A. L. R. 967.

79. 2 YOKLEY, ZONING LAW AND PRACTICE 26 (2d ed. 1953).

80. Edens v. Columbia, 228 S. C. 563, 91 S. E. 2d 280 (1956).

81. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 36-401 through 36-414.

area of the city, comprising some fourteen blocks, was "blighted," and that there was a need to remedy it. However, in contrast with those cases previously discussed, there was no intention to construct low cost housing on the land after it was condemned through eminent domain. Quite to the contrary, the Housing Authority proposed to sell two blocks of the land to the University of South Carolina, and dispose of the remainder to private companies for their use as sites for light industry. Petitioner was an owner of property in the area in question, and sought a declaratory judgment on the constitutionality of the Redevelopment Law. For the first time in this state, the question squarely before the court was whether such condemnation of private property for later sale to private concerns was a valid exercise of the power of eminent domain, and more specifically whether there was a "public use" within the meaning of Article I, Section 17 of the Constitution of 1895, *supra*. The area to be sold to the University was not in dispute, as it was conceded that this was a "public use."

The lower court found the act to be constitutional, but the Supreme Court reversed on appeal. While cognizant of the fact that other jurisdictions had upheld such laws, the court felt that these decisions were not justified. The court also pointed out that the wording of the comparable clauses of the various constitutions differed with the states. Some were worded "public benefit,"[82] and others "public purpose."[83] Much weight was placed on a recent Florida decision in which a law similar to ours was declared void.[84] However, the better decisions are thought to be those which uphold such laws regardless of the wording of the particular constitutional provision involved. Our court felt that they were bound by a recent decision construing "public use" in a very restrictive sense,[85] and intimated that the only solution would be a constitutional amendment. Since the end result of such projects as that attempted in the *Edens* case, *supra*, is desirable to most municipalities, it would appear that the legislature would do well to consider such an amendment.

82. State v. Rich, 159 Ohio St. 13, 110 N. E. 2d 778 (1953).
83. White v. Chicago Land Clearance Commission, 411 Ill. 310, 104 N. E. 2d 236 (1952).
84. Adams v. Housing Authority, 60 So. 2d 663 (Fla. 1952).
85. Bookhart v. Central Electric Power Coop., Inc., 219 S. C. 414, 65 S. E. 2d 781 (1951).

CONCLUSION

From the foregoing discussion it is apparent that even though the law in this state is limited, a firm foundation has been laid which should serve to assure us of sound decisions on these matters as they arise in the future. Our court has shown an extreme insight into the problems involved in this complicated body of law, and has attempted consistently to further the progress of the communities where it could be done without denying to any one citizen his basic constitutional rights. Several statutes have been enacted which bestow upon municipalities the power to regulate land use in ways differing from those previously discussed.[86] As yet, these have not been tested in our courts, but it is anticipated that they will be in the near future.[87] The attitudes displayed by the legislature and the court insures us that the welfare of the people is the primary consideration of both, and that as each new principle materializes, our state will become that much better to live in.

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86. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 47-1021 through 47-1055; 47-1061 through 47-1094; 47-1101 through 47-1113, providing for planning commissions for cities and towns in various population classes, and in some instances including certain powers to regulate land uses outside of the municipal boundaries.

87. For cases from other jurisdictions, see 1 YOKLEY, ZONING LAW AND PRACTICE 264 (2d ed. 1953).