South Carolina Law Review

Volume 21 | Issue 1 Article 7

1969

The Building Permit and Reliance Thereon in South Carolina

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THE BUILDING PERMIT AND RELIANCE THEREON IN SOUTH CAROLINA

The right to free, unhampered use of real property in South Carolina has been severely restricted by recent developments which have drastically changed the nature of what was once primarily a rural, agricultural state. The growth of urban complexes and the instrusion of new industrial developments have combined to limit this once sacred privilege of the property owner. The municipality's power to zone has passed the constitutional obstacle, and it may be surmised that zoning ordinances will soon be established in every urban center of any size in this state.

Consider the following situation, which is not an unusual one. An attorney is consulted regarding the use of certain land. His client either (1) owns the land and desires to put it to a certain use, (2) is interested in buying the land for that purpose, or (3) is desirous of leasing it to someone who will put it to the particular use. The desired use is in conformity with the current zoning ordinance. The client wants an assurance of his right to begin transformation of the property into the permitted use. The attorney in South Carolina who finds himself in this situation will be confronted with a series of unanswered questions and contradicting opinions. This discussion will attempt to aid him in determining what rights, if any, his client has.

I. The Right to Require a Building Permit

The right of a municipality to require a building permit before any construction is undertaken is no longer an open question in any jurisdiction in this country. Ordinances requiring that such a permit be obtained from the municipality have been consistently upheld as a valid exercise of the police power vested in municipalities.[1]

II. The Effect of Applicable Ordinances on the Issuance of Building Permits

A. Administration

When a valid zoning ordinance covers the area for which the building permit is desired, and the desired use of the land is per-

1. 1 E. Yokley, Zoning Law and Practice § 9-2, at 395 (3d ed. 1965) [hereinafter cited as Yokley].

mitted by the ordinance, the issuing official (generally the building inspector) has no right arbitrarily to refuse to issue the permit.[2] The building plans must meet the specifications of local building ordinances. If this is so, and the proposed use is a proper one, the building inspector must issue the permit. The official's discretion extends only to a determination of conformity with permited uses and building ordinance requirements. It does not allow him to refuse issuance of a permit if all statutory requirements are met.[3]

Mandamus is the proper remedy to compel issuance of an improperly refused building permit.[4] This rule has been in effect in South Carolina for many years.[5] To obtain a writ of mandamus, the applicant must show: (1) that the duty to be performed is ministerial in character; (2) that the applicant has a legal right to the discharge of that duty; (3) that there is no other adequate remedy available to the applicant.[6] In the area of building permits, if the applicant can show compliance with the applicable ordinances, a court should require the building official to issue the permit.[7]

B. Constitutionality

Ordinances which limit property rights must be uniform in nature, and must be uniformly administered. An ordinance may be uniform on its face and have been passed for a valid public purpose. Yet if it is discriminatorily enforced, a court will not hesitate to invalidate it as an unconstitutional deprivation of property.[8] Our supreme court has never held that the police power is a carte blanche to pass unreasonable ordinances. However, the court's definition of a reasonable ordinance has wavered over the years. Zoning discretion of municipalities has generally been upheld where the division of a city into residential, business, and industrial segments is involved.[9] More difficulty has arisen over the problem of the prohibition of particular uses

2. 101 C.J.S. *Zoning* § 346, at 1174 (1958).
3. 1 YOKLEY § 9-3, at 396.
4. 101 C.J.S. *Zoning* § 346, at 1174 (1958).
5. *See* Henderson v. City of Greenwood, 172 S.C. 16, 21, 172 S.E. 689, 691 (1934).
6. Lake v. Mercer, 214 S.C. 189, 194, 51 S.E.2d 742, 744 (1949).
7. *See, e.g.,* Henderson v. City of Greenwood, 172 S.C. 16, 22, 172 S.E. 689, 691 (1934).
8. Willis v. Town of Woodruff, 200 S.C. 266, 273, 20 S.E.2d 699, 702 (1942).
9. *E.g.,* Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, 169, 72 S.E.2d 66, 68 (1952).

over a wide area. The court has voided an ordinance which required special permission of the city council to erect any structure within two hundred feet of any railroad crossing within the city limits, characterizing it as a "drastic and unreasonable law."[10] An ordinance prohibiting erection of any billboard facing a public street or public place without a special permit from the city council was stricken because "it commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them, the right and power to absolutely prohibit the use of property for the erection of billboards."[11] Obviously, then, unlimited discretion in municipal officials will serve to void such a prohibitive ordinance. A standard by which the impartial enforcement of the ordinance can be secured is necessary.[12]

The court has upheld the prohibition of stables within a municipality's limits, although the ordinance was in the same form as in *Schloss* (requiring special permission from the city council).[13] However, this ordinance listed five factors which the city council would use in determining whether or not to grant the permit.[14] Therefore, the court saw no danger of arbitrary enforcement. In the *Henderson* opinion, the court distinguished *Douglass* because only one type of building was prohibited there; therefore curtailment of free land use was less severe.[15] A more basic distinction would seem to be the limiting standards in *Douglass*, compared with the unbridled discretion of the city council in *Henderson.*

A more definite ground of unconstitutionality was handed down in *Willis v. City of Woodruff.*[16] Here the plaintiff desired to build a service station next to his residence, in a residential section. The city council passed a motion that his request for a building permit be granted if, among other requirements, it was agreeable with the surrounding property owners. The building inspector apparently issued the permit without consulting with the plaintiff's neighbors, who immediately protested. The city council then passed a resolution invalidating the permit unless

10. Henderson v. City of Greenwood, 172 S.C. 16, 24, 172 S.E. 689, 692 (1934).
11. Schloss Poster Advertising Co. v. City of Rock Hill, 190 S.C. 92, 96, 2 S.E.2d 392, 394 (1939).
12. *Id.*
13. Douglass v. City Council of Greenville, 92 S.C. 374, 75 S.E. 687 (1912).
14. *Id.* at 378, 75 S.E. at 688. For example, the possible danger to pedestrians.
15. Henderson v. City of Greenwood, 172 S.C. 16, 25, 172 S.E. 689, 692 (1934).
16. 200 S.C. 266, 20 S.E.2d 699 (1942).

the plaintiff obtained the requisite permission from the surrounding landowners. On review, this procedure was invalidated by the court, holding that a municipality cannot make a lawful use of property[17] conditional upon the assent of the owners of neighboring property.[18]

C. Compliance with Administrative Procedure

Although it is hardly to be doubted that a landowner desiring to make a particular use of his land must comply fully with the procedure set out by the applicable zoning and building ordinances, this requirement applies equally to the municipality desiring to deny the particular use to the landowner. The typical zoning ordinance places the original determination of whether or not to issue the building permit in a building inspector, with provision for appeal of his decision to a zoning board of adjustment. Such was the situation in *Lominick v. City of Aiken.*[19] Here, after the plaintiff had obtained a building permit from the building inspector, the city council, following a complaint from neighboring landowners, revoked it. The plaintiff appealed to the zoning board of adjustment. The city council advised the board to revoke the permit. The plaintiff then sought a judicial determination of the validity of the permit. The state supreme court held that the city council had no authority to revoke the permit.[20] Nor would the court allow the city council to attack the original decision of the building inspector since the council had failed to appeal that decision to the board of adjustment, in accordance with the provisions of the ordinance.[21]

III. VESTED RIGHTS

A. Variances

Zoning ordinances usually contain a provision by which a variance from the terms of a zoning ordinance may be authorized in instances where literal enforcement of the ordinance would result in "unnecessary hardships."[22] The Columbia zoning ordi-

17. The court found the use lawful since the city council had otherwise agreed to it. *Id.* at 272, 20 S.E.2d at 701.
18. *Id.; see* Annot., 21 A.L.R.2d 551 (1952).
19. 244 S.C. 32, 135 S.E.2d 305 (1964).
20. *Id.* at 43, 135 S.E.2d at 310.
21. *Id.* at 44, 135 S.E.2d at 310.
22. 2 YOKLEY § 15-4, at 139. A *variance,* which allows the landowner to use his land in a manner forbidden by the ordinance, should be distinguished from an *exception,* which adds additional conditions to a use already permitted by the ordinance.

nance contains such a provision, which seems to be representative of the variance provisions in zoning ordinances in other municipalities in South Carolina.[23]

Although a variance has not been involved in most of the building permit cases in this state, a South Carolina landowner may feel more secure in his right to make a particular use of his land if he has obtained one. While a building permit is a personal right and, as will be pointed out later in this discussion, is inalienable, a variance is a vested right which attaches to the *land*, and runs with it if the land is subsequently transferred, a distinction which was determinative in *Nuckles v. Allen*,[24] in which the court emphasized that a variance "inures to the benefit of the land,"[25] and is available to a subsequent purchaser. Therefore, although the plaintiff's transferor had failed to avail himself of his right to put the land to the particular use (the erection of a motel), the variance, running with the land, was still available to the plaintiff.[26]

In *Nuckles*, the zoning board of adjustment attempted to rescind the variance. The court refused to allow this, pointing out that the conditions affecting the use of the property were unchanged since the variance was originally granted, and that the zoning board of adjustment had offered no other justification for its action.[27] The possibility of sufficient justification to override a vested right is discussed later in this article.

B. Building Permits

While a variance inures to the benefit of the land, a building permit is generally regarded as only a personal privilege granted to the applicant which, of itself, confers no vested right upon him.[28] In addition, the privilege conferred is often of limited duration, and may expire if not acted upon within a certain period.[29]

Disputes frequently arise when, after a building permit has been validly issued in conformity with the applicable ordinances, a subsequent effort is made to revoke the permit or declare it

23. Columbia, S.C., Zoning Ordinance § 320.03, Feb. 6, 1963.
24. 250 S.C. 123, 156 S.E.2d 633 (1967).
25. *Id.* at 131, 156 S.E.2d at 637.
26. *Id.*
27. *Id.*
28. Palmetto Petroleum, Inc. v. City of Mullins, 251 S.C. 24, 27, 159 S.E.2d 854, 856 (1968).
29. Columbia, S.C., Zoning Ordinance § 300.06, Feb. 6, 1963.

inoperative. Such problems have caused the development of a principle generally known as the "vested rights rule," which may be stated in its simplest form thusly: if a building permit (or zoning permit) has been granted by an officer authorized to issue it, in comformity with the applicable ordinances, and the permittee has acted in reliance thereon, incurring expenses, the right to continue construction under the permit becomes a vested right which the municipality, in the absence of public necessity, has no right to violate.[30]

An illustration of this doctrine's application in South Carolina is *Pendleton v. City of Columbia*.[31] Here the plaintiff was granted a permit to build an addition to her residence. This was to be used as an apartment and would have increased the number of family units in the entire building to two, the maximum number permissible under the city zoning ordinance. The plaintiff contracted with a builder and work was begun by which the plaintiff incurred expenses of approximately one thousand dollars. Following protests by the plaintiff's neighbors, the city council revoked the permit, claiming the ordinance was being violated.[32] The city engineer had determined that the building was proceeding in accordance with the approved plans. The court found that the plaintiff had acted upon the permit in good faith and that her property might be imperiled by her being deprived of the privilege to complete the construction.[33] Therefore, the court held that the plaintiff had acquired a vested property right, entitled to the court's protection, and, "in the absence of any public necessity for doing so,"[34] the city council had no authority to revoke the permit.[35]

This problem, in its purest form, has only come before the South Carolina Supreme Court in *Pendleton*. Consequently, there have been no pronouncements concerning the extent to which a landowner must rely, by changing his position, upon the permit.[36] A survey of other jurisdictions is not particularly enlightening. There is general agreement that a substantial

30. Pendleton v. City of Columbia, 209 S.C. 394, 399, 40 S.E.2d 499, 501 (1946); 13 AM. JUR. 2D *Buildings* § 10, at 274 (1964); 1 YOKLEY § 9-5, at 403.
31. 209 S.C. 394, 40 S.E.2d 499 (1946).
32. Originally the plaintiff had submitted plans for a two-unit addition, which would have violated the ordinance, but had modified them to the city engineer's satisfaction. *Id.* at 396, 40 S.E.2d at 500.
33. *Id.* at 398, 40 S.E.2d at 501.
34. *Id.*
35. *Id.*
36. The question has arisen in related cases. *E.g.*, Lominick v. City of Aiken, 244 S.C. 32, 135 S.E.2d 305 (1964).

expense must be incurred, but no court has attempted to draw any finer line.[37]

In one rather unique decision in this state, a landowner obtained the benefit of the vested rights rule without ever actually receiving a building permit.[38] After being assured by Eau Claire town officials that his land was in a district zoned for business use, the plaintiff executed a long-term lease to an oil company (for the operation of a gasoline station), borrowed $21,000.00, contracted with a builder to erect the station, and bought a new home. (Formerly, the plaintiff had maintained a residence on the lot in question.) The town council then refused to issue the required building permit. Two months later, Eau Claire merged with Columbia. The plaintiff's application was then denied because the city considered all newly annexed territory residential in nature, until a zoning ordinance covering the area could be enacted. The master in equity for Richland County required the city to issue the permit, concluding that the Eau Claire town council had no right to refuse its issuance, and invoking the maxim "equity will regard as done that which ought to have been done."[39] The South Carolina Supreme Court affirmed, agreeing that "equity and good conscience demand that Columbia stand in Eau Claire's shoes."[40] The court determined that the plaintiff's right had become vested before the consolidation of the cities, and, therefore, that any subsequent Columbia ordinance was irrelevant.[41]

It must be remembered that a building permit alone does not confer or alter vested rights. A change of position, incurrence of expenses, and the like is necessary. The permit alone is only a personal right of the permittee. This point was crucial in *Palmetto Petroleum, Inc. v. City of Mullins*,[42] a recent South Carolina case in which a novel question was raised before the court. The property owner obtained a permit from the city of Mullins to construct a service station but, seven months later, sold the land without having incurred any construction expenses. The plaintiff, transferree of the original permittee, contracted for the construction of the station. The city then enacted an ordinance zoning that area for residential use only. The court held that

37. 1 YOKLEY § 9-5, at 407.
38. Kerr v. City of Columbia, 232 S.C. 405, 102 S.E.2d 364 (1958).
39. *Id.* at 411, 102 S.E.2d at 366.
40. *Id.* at 412, 102 S.E.2d at 367.
41. *Id.* at 413, 102 S.E.2d at 367.
42. 251 S.C. 24, 159 S.E.2d 854 (1968).

a building permit does not inure to the benefit of a subsequent purchaser of the property, as it is only a non-assignable personal privilege of the permittee, and does not run with land, as a variance does.[43] Therefore, as the permit was never more than a personal privilege of the plaintiff's transferor, the plaintiff had no right to rely upon it. When the land was sold, the permit became a nullity.[44]

IV. EXCEPTIONS TO THE VESTED RIGHTS RULE

A. Improperly Issued Permits

Generally, a building permit issued in violation of law, or under some mistake of fact, confers no right or privilege on the permittee.[45] Although this problem has not arisen in South Carolina, the law is well-settled elsewhere that such an improperly issued permit confers no vested right on the permittee and may be summarily revoked notwithstanding reliance, expenditures, or changes of position by the landowner.[46]

B. Subsequent Action by the Municipality

Quite often, after issuing a building permit, a municipality may desire to revoke the permit by subsequent enactments. If the permittee's right has not become "vested," most jurisdictions allow the revocation of the permit by a subsequent ordinance which prohibits the use for which the permit was issued.[47] This is apparently true even though no pressing and immediate public need is served by the ordinance. The South Carolina Supreme Court has never decided this precise question, *i.e.*, just what effect a valid subsequent zoning ordinance has on a building permit which has not yet become vested. The question was before the court in *Palmetto Petroleum*, but, having determined that the permit in that case became a nullity when the permittee sold the property without acting on the permit, the court declined to make a decision on the effect of the subsequent ordinance.[48]

43. Id. at 27, 159 S.E.2d at 856. This reasoning seems questionable. Why should a right to put land to a permitted use be given less weight than a right to except land from the permitted uses to which the zoning ordinance restricts it?

44. *Id.*

45. 1 YOKLEY § 9-6, at 412.

46. *See, e.g.*, Vogt v. Borough of Port Vue, 170 Pa. Super. 526, 85 A.2d 688 (1952).

47. 13 AM. JUR. 2D *Buildings* § 10, at 275 (1964); 1 YOKLEY § 9-6, at 413. *But see* Gibson v. City of Oberlin, 171 Ohio St. 1, 167 N.E.2d 651 (1960).

48. Palmetto Petroleum, Inc. v. City of Mullins, 251 S.C. 24, 27, 159 S.E.2d 854, 856 (1968). However, at least one authority feels the South Carolina court has already expressed its view on this issue in Douglass v. City Council of Greenville. 13 AM. JUR. 2D *Buildings* § 10, at 275 n.7 (1964).

As demonstrated earlier, a mere resolution of the city council is not considered a zoning ordinance and is not sufficient to revoke any building permit, vested or not.[49] Likewise, a subsequent ordinance which is found to be invalid or unconstitutional will not revoke the permit. Therefore, the attempt to confer power on neighboring landowners in *Willis* and the ordinance conferring unlimited discretion upon the city council in *Henderson* had no effect on the building permits in those cases.

More difficult questions arise when the permittee *has* incurred expenses in reliance on the validity of his permit, and the municipality subsequently passes an ordinance which prohibits the originally permitted use.

Most jurisdictions have approached this problem by attempting to determine whether or not the permittee's right has become vested. If it has, a subsequent municipal ordinance cannot revoke the permit.[50] Apparently, the theory is that a nonconforming use has been established, the removal of which is not within the scope of this discussion.[51] Obviously, a court using this approach must indulge in linedrawing to determine when sufficient "substantial" expenditures have been made, in reliance on the validity of the permit.

The South Carolina court has avoided this predicament in a direct, if puzzling, way. The court has looked to the purpose of, and public interest protected by, the subsequent ordinance, rather than to the extent to which the permittee has relied upon the validity of his permit. For example, in *Douglass v. City Council of Greenville*,[52] the landowner obtained a building permit to construct a stable within the city limits of Greenville. This permit was issued by the city engineer. The city council then enacted an ordinance prohibiting the *opening* of a stable at any place within the city where a stable had not been operated before the ordinance, without special permission from the city council. The ordinance listed five factors which the council would rely upon in deciding whether to grant such permission.[53] The plaintiff was denied the requisite permission, although he had contracted with a builder, and construction was in progress.

49. Lominick v. City of Aiken, 244 S.C. 32, 43, 135 S.E.2d 305, 310 (1964).
50. 1 YOKLEY § 9-5, at 406.
51. *See generally* 2 YOKLEY § 16.1 *et seq.*
52. 92 S.C. 374, 75 S.E. 687 (1912).
53. *Id.* at 377, 75 S.E. at 688.

The state supreme court upheld the ordinance as a valid and reasonable exercise of the police power, against which the plaintiff's extensive (and expensive) reliance on his permit could not prevail.[54] The court went so far as to say that the same result would follow if the construction had been *completed*, as long as the protection of public health and safety is involved.[55]

This reasoning causes one to doubt that the vested rights rule is very deep-rooted in this state, despite the strong statements which the court has made in support of the rule,[56] as apparently a municipality can bypass the rule with a sufficient showing of public interest in passing a subsequent ordinance. In addition, one can only wonder as to the importance of the unanswered question in *Palmetto Petroleum*, the effect of a subsequent ordinance on a naked permit.[57] If a subsequent ordinance can divest a permittee of a vested right, surely it can nullify his mere permit. Further speculation suggests the court is approaching a much more difficult area of line-drawing, in determining whether or not the ordinance in question is one protecting "the public health and safety."[58] For example, an ordinance prohibiting only one particular use over the whole city (as the livery stable in *Douglass*) might qualify more easily than one which only adjusts the limits of certain business, professional, industrial, or residential districts.[59] However, it can well be argued that these general zoning ordinances are just as strongly based on public need.[60] It is difficult to see any definite standards

54. *Id.* at 382, 75 S.E. at 689.
55. *Id.* at 383, 75 S.E. at 690. This seems dubious. Surely the completed construction of a business should give it the status of a non-conforming use, regardless of whether or not it has opened for business.
56. *E.g.*, Pendleton v. City of Columbia, 209 S.C. 394, 399, 40 S.E.2d 499, 501 (1946).
57. *See* note 48 *supra.*
58. Douglass v. City Council of Greenville, 92 S.C. 374, 383, 75 S.E. 687, 689 (1912).
59. Valid public interests (the detrimental effects of a bus station on a near-by library and high school) were in issue in Carolina Scenic Stages v. City of Columbia (trial order, S.C. Cir. Ct., 5th Jud. Cir. 1960), but were raised only in hearings before the public service commission. The zoning ordinance prohibiting bus stations contained no reference to these interests, and specified no factors which the city council would use in determining whether or not to grant the required special permission. Judge Ness, on the authority of *Henderson*, declared the ordinance invalid on its face, and did not have to reach a determination of whether or not the public interests being protected were sufficient to override the vested interest of the permittee bus company.
60. S.C. CODE ANN. § 47-1105 (1962) allows a municipality "in the interest of the public health, safety, order, convenience, comfort, prosperity, or general welfare" to adopt a zoning ordinance for the purpose of regulating "any use of property." Can this be said to endow every zoning ordinance with the requisite public interest?

of public health or safety in these decisions. More definite guidelines are needed for adequate counsel to be given to landowners on the possible effects of subsequent ordinances.

V. PENDING AMENDMENTS

A final municipal action which prevents the exercise of land use in accord with an existing ordinance is the issuance of a "hold order" by a city council, prohibiting the issuance of building permits until a pending amendment to a zoning ordinance is passed upon. Although the point has never been before the South Carolina court, except perhaps indirectly in *Kerr v. City of Columbia*,[61] the majority view today appears to allow the refusal of a building permit if at the time of application there is pending an amendment to a zoning ordinance which, if enacted, would prohibit the use for which the permit is being sought.[62] The policy, as with most of these municipal enactments is to prevent additional nonconforming uses to be established. These would have to be dealt with after the amendment was passed, by amortization[63] or some equally lengthy process, so the courts, in this instance, have allowed the municipality to nip them in the bud.

VI. CONCLUSION

To reiterate briefly, in South Carolina the holder of a valid building permit who actually commences construction and incurs liability for work and materials may acquire a vested property right which he is entitled to have protected. However, the express or implied revocation of a building permit has been sustained where, subsequent to its issuance, the municipality passes a valid ordinance which has the effect of prohibiting the heretofore permitted use. This may be the result even though the permittee has substantially relied on the permit. Lesser actions by municipalities have generally failed to overcome this vested right.

Therefore, the attorney in our hypothetical situation might well advise his client to seek written assurances from city officials as to the lack of any city ordinance prohibiting the desired

61. 232 S.C. 405, 102 S.E.2d 364 (1958).
62. 1 YOKLEY § 9-7.
63. A recent case, Jones v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1956), suggests amortization is improper in this state. *But see* S.C. CODE ANN. § 14-350.17 (Supp. 1968).

use. He should then attempt to obtain the necessary permits as speedily as possible. If they are refused without a valid reason, mandamus is available. Once obtained, the land-owner, or his lessee, should begin the transformation of the property as soon as possible, in the hope that, should his right to so use the land be questioned, the right will have attained vested status.

It is difficult to imagine any situation in which a landowner has a greater right to rely upon his municipality than where he has properly obtained a valid building permit for a use which conforms with all current zoning and building ordinances. Yet this discussion has revealed many attempts by that same municipality to deny this right of reliance, some of which have succeeded. It is submitted to the prudent landowner that reliance upon present conditions may prove fruitless, unless coupled with a sagacious insight into the future.

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