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Zoning--Power of Zoning Board of Adjustment and the Vested Rights Rule in South Carolina

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ZONING—POWER OF ZONING BOARD OF ADJUSTMENT AND THE VESTED RIGHTS RULE IN SOUTH CAROLINA*

I. Introduction

Two threshold questions which necessarily confront the property owner who is planning to convert his property to a particular use are:

1. What right has he to the issuance of a building permit for a use expressly permitted under an existing zoning ordinance?

2. After incurring substantial expenses in reliance on the existing ordinance, what protection has he from a subsequently enacted amendment prohibiting the contemplated use?

Prior to the recent case of *Pure Oil Division v. City of Columbia*,[1] there was considerable uncertainty as to the proper answers to these questions under South Carolina law[2]; there was, moreover, a wide divergence of opinion in other jurisdictions as to the proper resolution of these issues. The *Pure Oil* court, however, has clarified the state of the law in South Carolina as to this area of property law and has indicated the trend which the court will follow in dealing with similar issues in the future. This comment will discuss the conflicting interests which should be considered in answering these questions, positions taken by other jurisdictions, and the law in South Carolina both prior and subsequent to the *Pure Oil* case.

II. The Pure Oil Decision

The *Pure Oil* case presented a factual situation which encompassed both of the above issues. The respondent, the South Carolina National Bank as trustee, had in its charge a parcel of land situated on the northwestern corner of the intersection of Trenholm Road and Belt Line Boulevard in the City of Columbia. The zoning classification of this property was *C-4, General Commercial*, which expressly included gasoline filling stations as a permitted use.[3] This was the only property zoned

* Pure Oil Div. v. City of Columbia, 254 S.C. 28, 173 S.E.2d 140 (1970).

1. 254 S.C. 28, 173 S.E.2d 140 (1970).
2. *See* Note, *The Building Permit and Reliance Thereon In South Carolina*, 21 S.C.L. Rev. 70 (1968).
3. Columbia, S.C., Zoning Ordinance at 87 (1963).

nonresidential within a radius of one mile. In 1968, the respondnet bank began to implement a plan for the reorganization of the property in order to utilize the corner lot for a filling station. At the bank's expense, some of the existing buildings were demolished and removed from the property, and other businesses were relocated on the property. A lease was entered into with the respondent, Pure Oil, which likewise incurred expense in preparing plans and specifications for the proposed filling station.

After incurring these expenses and obligations, the respondents applied for a building permit to the Zoning Administrator, who concluded that the application was proper and approved it. Prior to issuance of the permit, however, the appellants, who resided in the adjoining residential areas, appealed to the Zoning Board of Adjustment which reversed the Zoning Administrator and denied the permit. Thereafter, the respondents appealed to the trial court which reversed the Board of Adjustment and enjoined the appellant, the City of Columbia, from enacting a zoning ordinance amendment inconsistent with the respondents' planned use. On certiorari, the South Carolina Supreme Court decided:

1. The Board of Adjustment had no authority to deny the respondents a building permit for the use expressly permitted by the existing zoning ordinance; and

2. The respondents, by substantially altering their positions and incurring expenses and obligations in reliance upon the existing zoning ordinance, though no permit had been issued, acquired vested rights entitling them to issuance of the permit as against the right of the municipality to amend the ordinance so as to prohibit the contemplated use.[4]

III. Power of the Board of Adjustment to Deny Expressly Permitted Uses

Nearly all zoning ordinances and enabling acts provide for the creation and operation of a Zoning Board of Adjustment, sometimes called the Board of Appeals.[5] Since each zoning

4. The question of whether the trial court was correct in prohibiting the City of Columbia from taking any action toward rezoning the property was also at issue. Since the court found that the respondents had vested rights to use the property for a filling station, the fact that the trial court may have illegally enjoined the City from amending its zoning ordinance could not have prejudicially affected the rights of any of the parties. The court, therefore, only briefly and inconclusively considered this issue.

5. W. Goodman and E. Freund, Principles of Urban Planning, 438 (4th ed. 1968).

ordinance may, however, determine differently the proper allocation of powers to the Board of Adjustment, each case must be treated individually.[6]

In *Pure Oil* the court was called upon to decide whether the Board of Adjustment had the authority to deny a landowner the right to use his property for a purpose expressly permitted by the zoning ordinance then in existence. One of the general powers of the Board of Adjustment enumerated in section 47-1009 of the South Carolina Code is as follows: "To hear and decide appeals when it is alleged that there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this article or of any ordinance adopted pursuant hereto".[7] The appellants argued that under this provision the Board of Adjustment in the exercise of its quasi-judicial power could review a decision of the Zoning Administrator to issue a building permit and reverse such decision if necessary for the furtherance of overall zoning objectives, notwithstanding the fact that the use desired by the applicants was expressly permitted under the zoning ordinance.

The appellants also pointed out that, under the Prohibited Uses and Structures category of the zoning ordinance, the Board of Adjustment is given the power to prohibit

> [a]ny use which [it] upon appeal and after investigation of similar uses elsewhere, shall find to be potentially noxious, dangerous or offensive to persons in the *district* or to those who pass on public ways by reason of odor, smoke, noise, glare, fumes, gas, vibration, threat of fire or explosion, emission of particulate matter, radiation, interference with radio or television reception or *likely for other reasons to be incompatible with the character of the district.*[8]

Since the filling station was definitely incompatible with the surrounding *neighborhood*[9] for many of the reasons quoted

6. Ordinarily the Zoning Board of Adjustment is described as a quasi-judicial body with its duties generally falling into these categories: (1) interpretation of the zoning ordinances; (2) the granting of "special use permits" or "special exceptions"; and (3) the granting of "variances". *Id.*

7. S.C. CODE ANN. § 47-1009 (1962).

8. Brief of Appellants at 10, Pure Oil Div. v. City of Columbia, 254 S.C. 28, 173 S.E.2d 140 (1970).

9. Emphasis is added to the word, "neighborhood," because of its significance in the court's interpretation of the word, "district." The court found the words, "neighborhood" and "district," to have very distinct meanings. See text at note 19 *infra.*

above, the appellants contended that the Board of Adjustment was expressly empowered to prohibit the use.

The court, rejecting these arguments, based its finding entirely upon its holding in *Niggel v. City of Columbia*,[10] a case decided on the same day as *Pure Oil*. With one exception, to be pointed out later, the facts of *Niggel* were almost identical to those of *Pure Oil*. Necessarily, the *Pure Oil* court's finding was based upon answers to two questions:[11]

1. Does the Zoning Board of Adjustment under its general powers have the authority to deny a use expressly permitted by the existing zoning ordinance?

2. Does the Zoning Board of Adjustment have authority to deny an expressly permitted use under its specific power to deny a use which is "incompatible with the character of the district?"

Identical questions were answered in *Niggel* and the court in *Pure Oil*, considering the facts of the two cases to be identical, merely adopted, without elaboration, the reasoning and answers expressed in the *Niggel* opinion.[12]

The first question was not squarely and directly answered in *Niggel*. The court decided that the Zoning Board of Adjustment has no general power to deny an expressly permitted use.[13] This answer is generally in accord with prior South Carolina law on the point. The court, in *Kerr v. City of Columbia*[14] and *Stevenson v. Board of Adjustment*,[15] in less direct terms, answered a similar question in essentially the same manner. In *Stevenson* the court stated:

> Since the Zoning Ordinance itself permits the operation of a day school within the zoned district . . . the Board [of Adjustment] could not deny the right which the Zoning Ordinance permitted.[16]

The second question was one of more novel impression, and the *Niggel* court managed to decide the case while reserving an answer until later. The court in *Niggel* interpreted the term,

10. 254 S.C. 19, 173 S.E.2d 136 (1970).
11. Answers to these questions were necessary because of the arguments offered by appellants. *See* Brief of Appellants, Pure Oil Div. v. City of Columbia, 254 S.C. 28, 173 S.E.2d 140 (1970).
12. 254 S.C. at 33, 173 S.E.2d at 142.
13. 254 S.C. at 23, 173 S.E.2d at 138.
14. 232 S.C. 405, 102 S.E.2d 364 (1958).
15. 230 S.C. 440, 96 S.E.2d 456 (1957).
16. *Id.* at 453-54, 96 S.E.2d at 463.

"*district*," in the Prohibited Uses and Structures category of the zoning ordinance[17] to mean the immediate zoning "*district*" in which the proposed use was to be located, rather than the "*general neighborhood*" or "*surrounding districts*" interpretation urged by the appellants.[18] The court in *Niggel* explained its interpretation as follows:

> The Zoning Ordinance provides for the division of the City of Columbia into districts with definite geographical limits, which are shown on an official zoning map. The term, "district", as used in the Ordinance, means the respective geographical areas into which the City has been divided for zoning purposes. The property of respondent lies in a clearly defined area which has been classified or zoned as a commercial district. The *incompatibility* of the proposed use of respondent's property must be determined, under the clear terms of the Ordinance, from the character of the *district* in which it is situated and *not* by the character of the surrounding districts. Any other construction would render the zoning districts meaningless because it would, in effect, confer upon the Board of Adjustment the power to rezone any district in the City by determining incompatability with reference to the character of the surrounding districts and not the district in which the property involved is located. Clearly, the Board of Adjustment has no authority to rezone.[19]

Under this narrow construction it was only logical to conclude, as the court did in *Niggel*, that the proposed filling station was compatible with the immediate "district," since another filling station already existed within the district. Clearly, the Board of Adjustment had no power to deny, as incompatible with the district, a use which already existed within the district. Under the court's construction of the term, "*district*," the second question, based on the facts of *Niggel*, became moot; and it was, therefore, unnecessary for the court to decide whether the Board of Adjustment has power to deny an expressly permitted use which is in fact incompatible with the zoning district. The *Pure Oil* court, by equating the facts of the two cases, was able to adopt the *Niggel* reasoning and likewise expressed no direct answer to the second question.

17. *See* Columbia, S.C., Zoning Ordinance at 89 (1963).
18. See text at note 9 *supra*.
19. 254 S.C. at 23, 173 S.E.2d at 138.

It is important here to note a distinction between the facts in *Pure Oil* and those in *Niggel*. The zoning district in *Pure Oil* consisted of only apartments, a beauty shop, and a dry cleaning pick up station, while the district in *Niggel* contained, along with other commercial uses, an existing filling station immediately across the street from the proposed site of the new filling station. With this distinction in mind, it was conceivable in *Pure Oil* that, even under the *Niggel* court's narrow construction of the term, "district", the proposed filling station was incompatible with the immediate "district", which contained only apartments, a beauty shop, and a dry cleaning pick-up station. The *Pure Oil* decision, by equating the facts of the two cases, passed over this possibility without mention. One can only speculate as to the court's reasons for so doing. Assuming that it was not an inadvertent error by the court, it would seem that the intent was to allow the respondents to prevail in *Pure Oil*, where incompatability with the zoning district would have been difficult to justify, without handcuffing the Board of Adjustment in the future by expressly holding that the Board of Adjustment has no power to deny an expressly permitted use even though it is clearly incompatible with the zoning district. Possibly, the court conceived of factual situations in which the Board's express power to deny an incompatible use would be justified and necessary and was, therefore, reluctant to destroy this power expressly.

In holding that the Board of Adjustment has no general powers to deny an expressly permitted use, the South Carolina court seems to be in accord with the majority of other jurisdictions.[20] It is admitted that a contrary holding would have the effect of conferring upon the Board of Adjustment the power to amend zoning laws, which is a function of the proper legislative body. But, on the other hand, denying the Board of Adjustment the specific power to refuse to permit a use clearly incompatible with the immediate "district" could have a detrimental effect upon the overall objectives of zoning. This part of the question apparently remains unanswered in South Carolina.

IV. Vested Rights Rule in South Carolina

A nonconforming use has been defined as a use which lawfully existed at the enactment of a zoning ordinance or amendment and which is maintained after the effective date of the

20. *See* 1 Yokley, Zoning Law and Practice § 9-3 (3d ed. 1965) [hereinafter cited as Yokley].

ordinance or amendment although it does not comply with the new use restrictions applicable to the area in which it is situated.[21] In order to make zoning ordinances and amendments politically, economically, and constitutionally feasible, it has been necessary to allow nonconforming uses to continue in existence subject to long range plans designed to effect their elimination.[22] This allowance of nonconforming uses applies to uses which are in various stages of development when a new ordinance or amendment is enacted. When the development has reached a certain stage, the property owner is said to have acquired a "vested right" to continue the development and subsequently to put the use to its intended function.[23] The point in the development of the use at which time the property owner is said to have acquired a "protected use" or "vested right" is not easily defined and can present a very perplexing problem for the lawyer.[24] The *Pure Oil* decision is particularly significant as it relates to the question of when a right to continue a nonconforming use vests.

The courts have generally held that, where a building permit has once been granted by an officer authorized to issue it and the permittee has acted in reliance thereon and incurred expenses, the right to continue construction under such a permit becomes a "vested right" which the municipality has no right to violate by revocation of the permit or subsequent amendment to the zoning ordinance.[25] Under this general rule the property owner must not only have a valid building permit but must also have incurred substantial expenses in actual construction.[26] What constitutes "substantial expenses" is debatable, but the rule that the issuance of a building permit alone confers no "vested right" is well settled.[27]

Notwithstanding the general rule that the issuance of a building permit is necessary to acquire "vested rights," there is a current trend in decisions which indicates that "vested rights" may be acquired where, in reliance on the existing ordinance, expenses are incurred in preparing for and seeking the issuance of a permit.[28] This emerging trend has the effect of conferring

21. 1 ANDERSON, AMERICAN LAW OF ZONING § 6.01 (1968).
22. GOODMAN, *supra* note 5, at 435.
23. *See generally* 1 YOKLEY, *supra* note 20, § 9-5 *et seq.*
24. *See* INTRODUCTION, *supra.*
25. 1 YOKLEY, *supra* note 20, § 9-5.
26. 1 YOKLEY, *supra* note 20, at 407.
27. Note, *The Building Permit and Reliance Thereon In South Carolina, supra* note 2, at 76.
28. 1 YOKLEY, *supra* note 20, at 409.

a vested right at a very early stage in the development of a use. In *Pure Oil*, the court became one of the forerunners in the adoption of this emerging rule by stating:

> We see no sound reason to protect vested rights acquired after a permit is issued, and to deny such protection to similar rights acquired under an ordinance as it existed at the time a proper application for a permit is made. In both instances, the right protected is the same, that is, the good faith reliance by the owner on the right to use his property as permitted under the Zoning Ordinance in force at the time of the application for a permit . . . .
>
> In accordance with the then existing zoning ordinance, respondents were entitled to a permit to construct and operate a filling station on the lot in question; and its issuance could not be legally denied, even under a subsequently enacted ordinance prohibiting such use, so as to deprive the owner of the vested rights acquired.[29]

Prior to *Pure Oil*, there seems to have been no clearly delineated "vested right" rule in South Carolina,[30] in spite of several decisions which were based on a "vested right" concept.[31] The South Carolina courts apparently looked to the public interest protected by the new ordinance or subsequent amendment rather than to a definite "vested right" concept.[32] For example, in *Douglas v. City Council of Greenville*[33] the court held that a proper ordinance restricting the location of livery stables was not invalid as to one who had bought a lot and commenced building operations at considerable expense before the ordinance was adopted. Compare *Kerr v. City of Columbia*,[34] where the court held that a substantial change of position in reliance on the existing ordinance may confer a right to establish a use inconsistent with a subsequently adopted zoning ordinance. The two cases can only be reconciled by considering public health and safety interests.

29. 254 S.C. at 34, 173 S.E.2d at 143.
30. Note, *The Building Permit and Reliance Thereon In South Carolina*, *supra* note 2, at 78.
31. *E.g.*, Pendleton v. City of Columbia, 209 S.C. 394, 40 S.E.2d 499 (1946) and Willis v. Town of Woodruff, 200 S.C. 266, 20 S.E.2d 699 (1942).
32. Note, *The Building Permit and Reliance Thereon In South Carolina*, *supra* note 2, at 78.
33. 92 S.C. 374, 75 S.E. 687 (1912).
34. 232 S.C. 405, 102 S.E.2d 364 (1958).

In retrospect, the *Kerr* case seems to have been handwriting on the wall.[35] However, the complexity of the facts in *Kerr* and the severity of the damages which would have befallen the property owner if the court had decided otherwise threw a cloud of uncertainty over the decision.[36] The decision apparently was based upon equity principles rather than upon the law of zoning. The court subsequently relied heavily upon *Kerr* in its *Pure Oil* decision;[37] the court thus indicated that the intent in *Kerr* was to establish a "vested right" rule similar to the one clearly adopted in *Pure Oil.*

Exception to the "vested right" rule of *Pure Oil* apparently still exists in the interest of public necessity.[38] In *Pure Oil*, the appellants pointed out that there was considerable traffic congestion, evidenced by a high accident rate and the recent widening of the street, existing at the intersection where the filling station was to be located and that increased congestion and accidents, caused by vehicles turning into the station, would cause danger to persons traveling by the intersection and to small children going to and from a park located nearby. There also existed the possibility of contamination to a stream running behind the proposed site of the filling station. Furthermore, the residential area surrounding the proposed site had a history of very stable property values. The appellants argued that the location of a filling station in this area would cause the area to lose its residential character and that property values would likely decline.[39] These arguments failed to arouse any feeling of public necessity among the justices. The court succinctly stated: "There are no intervening considerations of public necessity involved under the facts of this case."[40] The degree of public necessity required to circumvent the "vested right" rule laid down in *Pure Oil* remains undetermined, but it is apparent from this case that the necessity must be extensive.

35. *See* W. LEDBETTER, JR., ZONING LAW OF SOUTH CAROLINA 43 (1970).
36. This is apparent from the fact that the appellants in *Pure Oil* were willing to pursue their case to the South Carolina Supreme Court.
37. 254 S.C. at 34, 173 S.E.2d at 143.
38. The court has always qualified its "vested rights" holdings by stating that such rights cannot be deprived without cause or in the absence of public necessity. *See, e.g.,* Pure Oil Div. v. City of Columbia, 254 S.C. 28, 34, 173 S.E.2d 140, 143 (1970).
39. *See generally* Record, Pure Oil Div. v. City of Columbia, 254 S.C. 28, 173 S.E.2d 140 (1970).
40. 254 S.C. at 34, 173 S.E.2d at 143.

V. CONCLUSION

Zoning controversies between individual property owners and municipalities or surrounding property owners often boil down to the protection of individual property rights on one side and the protection, promotion, and maintenance of public welfare on the other. The legislature and the courts must establish and maintain a delicate balance between the two. Such was the situation confronting the court in the *Pure Oil* case. The respondents, the South Carolina National Bank and Pure Oil, in the exercise of their right to control the property, incurred expenses in preparing the property for an expressly permitted use under the existing Zoning Ordinance; apparently, their actions were in good faith. Thereafter, the appellants, the City of Columbia and the surrounding property owners, realized that the use contemplated by the respondents was very likely to be detrimental to the general welfare of the surrounding neighborhood. The zoning plan for the area had originated in an earlier time, when the scarceness of speedy transportation was such that neighborhood commercial districts were essential. Apparently, the possible effects of the zoning plan on a modern residential area had not been thoroughly considered prior to *Pure Oil*, since no action had been taken to alleviate the problem through amendment to the zoning ordinance.

In summary, it is now settled law in South Carolina that (1) the Zoning Board of Adjustment has no authority to deny a use expressly permitted under an existing zoning ordinance and (2) where property owners substantially alter their position and incur expenses and obligations in reliance upon the existing zoning ordinance, they acquire "vested rights" as against a subsequent zoning amendment even if no building permit has been issued. These rules of law establish rights of property owners at an early stage of property development and thereby greatly increase the lawyer's ability to advise a client of his rights.

Recognizing "vested rights" at an early stage admittedly results in less risk to landowners, but it tends to perpetuate the problems that zoning is intended to eliminate.[41] "Vested rights" will often be conferred before zoning officials and surrounding property owners are aware that an undesirable use is being

41. *See* W. LEDBETTER, JR., *supra* note 35, Chapter V, for an excellent discussion of zoning objectives.

planned.[42] A subsequently enacted amendment can only have the effect of "closing the gate after the horse has escaped."

One writer has praised the *Pure Oil* case as follows:

> While these cases [*Pure Oil* and *Kerr*] seem to be against the weight of authority in this country, they are more equitable to the individual property owner and generate more confidence in government than do the decisions which decline to find a vested right except where a valid building permit has been issued and there has been substantial reliance thereon. As someone has said: "Men naturally trust in their government, and ought to do so, and ought not to suffer for it."[43]

It is, however, submitted that individual property owners should not have an exclusive right to "trust in their government." Should such "trust" not be equally applicable to surrounding property owners who see their welfare endangered and their property values depreciated because of an obsolete zoning ordinance enacted and administered by a government with whom they have entrusted their welfare? Perhaps it would be better to adhere to the majority rule, requiring a building permit and substantial reliance thereon, for acquiring "vested rights," thereby delaying a decision on allowing the use until the appropriate officials have investigated the planned use. Is this not more equitable to all concerned?

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42. This seems to be precisely the situation in the *Pure Oil* case.
43. W. LEDBETTER, JR., *supra* note 35, at 43.