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Property

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PROPERTY

I. ATTEMPTS TO ESTABLISH A PRIVATE RIGHT OF WAY

A. *Statutory Eminent Domain*

In South Carolina a landowner whose land can be drained properly only through adjacent land appears to have statutory authority [1] to enter the adjoining land for the purpose of constructing necessary drainage ditches. The appellant corporation in *Clemson University v. First Provident Corp.*[2] wanted to enlarge its prescriptive easement, originally established to drain farm land,[3] to support drainage for a residential subdivision.[4] The corporation argued the statute did not grant a private right of eminent domain or condemnation.[5] Instead the statute was said to establish "a right and concommitant obligation in every landowner in the state."[6] This novel argument by the appellant was necessary because the court had earlier held[7] the statute violated that provision of the South Carolina Constitution which says "private property shall not be taken for private use without the consent of the owner. . . ."[8] The corporation further argued that, since private eminent domain was not now an issue, any challenge to the statute must be premised on a denial of equal protection or a lack of due process.[9] The equal protection attack would

1. S.C. CODE ANN. § 18-51 (1962) provides:

> **Right to open waterway for drainage.**—Any person owning lands which can only be properly drained through or over lands of other persons through or over which there is no right of way, sufficient waterway or ditch cut may, as hereinafter provided, enter, construct and cut a waterway or ditch through and over such lands to the nearest waterway, ditch stream or outlet then existing.

2. 260 S.C. 640, 197 S.E.2d 914 (1973).

3. *Id.* at 651, 197 S.E.2d at 919.

4. *Id.* at 647, 197 S.E.2d at 917.

5. Brief for Appellant at 9.

6. *Id.*

7. Young v. Wiggins, 240 S.C. 426, 126 S.E.2d 360 (1962). In *Young* two property owners enjoined a watershed conservation district from taking their land to construct a community watershed. The court held the attempted taking was for private use and therefore prohibited by S.C. CONST. art. 1, § 17. *See also* Beaudrot v. Murphy, 53 S.C. 118, 30 S.E. 825 (1897). The court in *Beaudrot* examined a statute granting a land-locked private landowner the legal right to construct an access road to the nearest public highway across neighboring lands. The court held the statute invalid, for it allowed private takings in violation of the constitutional prohibition of art. 1, § 17.

8. S.C. CONST. art. 1, § 17.

9. Brief for Appellant at 9, Clemson Univ. v. First Provident Corp., 269 S.C. 640, 197 S.E.2d 914 (1973).

fail, they alleged, because all property owners are benefited and burdened equally.[10] Moreover, provisions of the statute which provide for proper notice and procedures for implementing the statutory right of way rebut any due process argument.[11] The court, however, unpersuaded by appellants' reasoning, held the attempted expansion of the prescriptive easement was for private use and therefore unconstitutional.[12] To support this proposition the court cited *Young v Wiggins*.[13] In *Young*, the plaintiffs sought to enjoin the directors of a local watershed district from condemning their land in order to establish a resevoir.[14] The plaintiffs alleged that impounding water for the agricultural benefit of the other abutting landowners was not for "public use," as required by the state constitution in eminent domain proceedings.[15] In the sense that the abutting landowners seeking the reservoir were members of the public, there would have been public benefit. The public in general, however, would not have been able to use the proposed resevoir.[16] The court narrowly interpreted "public use" to mean use by the public rather than merely of "public benefit."[17] Thus, the court held the flooding of the plaintiffs' property, under the guise of eminent domain, would have been for private use and, therefore, was unconstitutional.

The court correctly implied by its cite to *Young* that the subdivision owners' position in *Clemson* was analogous to that of the property owners seeking establishment of the reservoir in *Young*. In both cases, private parties attempted to take private land for private use. Had the court in *Clemson* found the drainage easement, sought by the appellant corporation, to represent a public use there would have been a serious undermining of the concept of private property. Such an expansive interpretation of public use would permit a developer to build in any low area with the assurance that the court would enforce a drainage easement across adjoining private property.

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10. *Id.*

11. S.C. CODE ANN. §§ 18-52 to 58 (1962).

12. 260 S.C. at 649, 197 S.E.2d at 918.

13. 240 S.C. 426, 126 S.E.2d 360 (1962).

14. Young v. Wiggins, 240 S.C. 426, 428, 126 S.E.2d 360, 361 (1962).

15. *Id.* at 432, 126 S.E.2d at 363.

16. *Id.* at 433, 126 S.E.2d at 364.

17. *Id.* at 432-33, 126 S.E.2d at 363-64. *See* 29A C.J.S. *Eminent Domain* § 31 (1965) and 26 AM. JUR. 2d *Eminent Domain* §§ 27-38 (1968) for general discussions on what constitutes public use.

B. *Easement by Implication and Right of Way by Necessity*

The appellant corporation in *Clemson* also argued that its prescriptive easement should be enlarged on the theory of easement by implication and easement by necessity.[18] The distinction between an easement by implication and one of necessity was not given by the court but an excellent discussion on implied easements can be found in *Crosland v. Rogers*.[19] In *Crosland*, the court said that to establish an implied easement there must have been unity of title of the dominant and servient estates at some point in time and a division of the single estate. Furthermore, the easement must have been apparent, continuous, and necessary at the time of the division of the estate. "[T]he term necessary meaning there could be no other way to enjoy the dominant tenement without this easement."[20]

Creation of an easement by necessity is fully discussed in *Brasington v. Williams*.[21] The elements stated in *Brasington* are unity of title, severance of title, and necessity.[22] In defining necessity[23] one of the cases cited was *Crosland*. Therefore, necessity would seem to mean the same thing in both an easement byimplication and an easement by necessity. The only distinction between these two types of easements is that the easement by implication must be apparent and continuous at the time of severance of title. Both easements are based on the notion of an implied grant,[24] which will be implied only if the easement is necessary for the enjoyment of the dominant estate. The necessity requirement can only be determined at the time of separation from the servient estate.[25] In *Clemson* testimony showed the estates in question were once part of a single farm,[26] satisfying the requirements of unity and severance of title. The new residential subdivision on the dominant estate represented a change in circumstances that precipitated the current necessity to increase the

18. Clemson Univ. v. First Provident Corp., 260 S.C. 640, 651-52, 197 S.E.2d 914, 919 (1973).

19. 32 S.C. 130, 10 S.E. 874 (1889).

20. *Id.* at 133, 10 S.E. at 875.

21. 143 S.C. 233, 141 S.E. 375 (1927).

22. *Id.* at 245-46, 141 S.E. at 382-83.

23. *Id.* at 247, 141 S.E. at 383.

24. Clemson Univ. v. First Provident Corp., 260 S.C. 640, 652, 197 S.E.2d 914, 919 (1973), *citing* Brasington v. Williams, 143 S.C. 233, 141 S.E. 375 (1927).

25. 260 S.C. at 652, 197 S.E.2d at 920, *quoting* Merrimon v. McCain, 201 S.C. 76, 84, 21 S.E.2d 404, 408 (1942).

26. 260 S.C. at 652, 197 S.E.2d at 920.

prescriptive drainage easement.[27] Since the necessity was subsequent to the division of the dominant and servient estates, the court ruled no claim of an easement by implication or necessity could be maintained.[28]

C. *Owner Abandonment*

After platting a subdivision, including streets, the developer in *City of Myrtle Beach v. Parker*,[29] sold lots to the public. In the early 1940s as a result of an accidental burning of a bridge spanning a swash area, one of these streets, Spivey Beach Road, ceased to be used for vehicular traffic. The general public, however, continued to use the street to walk to and from the beach. Construction to the north of the destroyed bridge blocked the tide thus creating a dead swash and obviating the need for a bridge.[30] The respondent then leased the surrounding property and succeeded in getting the entire area, including the dead swash, rezoned by the city to accommodate an amusement park. After construction of the amusement park in the rezoned area, including that portion of the dead swash where the old bridge had been, the city notified the respondent that he had to vacate the city's right of way.[31]

In the circuit court the respondent successfully argued that the city had abandoned its rights in the road "as a road" in the amusement park area.[32] On appeal the supreme court distin-

27. *Id.*

28. *Id.*

29. 260 S.C. 475, 197 S.E.2d 290 (1973).

30. Epps v. Freeman, 200 S.E.2d 235, 238-39 (S.C. 1973). The facts in *Parker* do not indicate how the disputed area became a dead swash, but in *Epps* the facts concern the same swash area and indicate the construction created the dead swash.

31. City of Myrtle Beach v. Parker, 260 S.C. 475, 481, 197 S.E.2d 290, 293 (1973).

32. *Id.* at 483-84, 197 S.E.2d at 294. The court said:

> Both the master and the circuit judge relied upon the following seven facts as showing an unequivocal intention on the part of the city to abandon that portion of Spivey Beach Road which traverses the swash or park area, to wit: (1) The absence of the bridge over [the swash] for about 25 years . . . . (2) Failure of the city to maintain the bridge and the portion of the road passing through the amusement park area. (3) The appropriation in 1949 of money to remove a portion of the remains of the bridge. (4) The erection by the city of [a sewer] in the right of way . . . . (5) The action of the city in changing the zoning to permit the construction of the park . . . and referring to the [disputed right of way] in the official minutes of the meeting "as seemingly abandoned." (6) The acceptance of a zoning map . . . showing the [disputed road] "stubbed off." (7) The failure of the city to attempt to enforce its rights from the construction of the park in 1966 until August 1970. *Id.*

guished between a public and private easement, apparently because no distinction was made in the lower court.[33] This distinction was necessary because just as public and private easements arise differently, they are extinguished differently.[34] Public rights in the dedicated streets could not have arisen until there had been an expressed or implied acceptance, as evidenced by formal public acceptance or general public use.[35] Thus the public easement would have arisen no later than the time the road was first used for vehicular traffic, around 1937.[36] The court noted the general rule that once a public right of way is established nonuse alone will not constitute legal abandonment.[37]

In addition to the above common law safeguard, the court also discussed statutory provisions which were applicable.[38] The legal power to abandon public streets was vested in the city council and could be exercised only after the council had made an official determination that the street was no longer needed.[39] The statutory procedure also required that public notice be given of the intention to abandon the road[40] and that a court determine whether the action was in the best interest of the municipality.[41] The supreme court held the facts indicated the city had not abandoned the road because it had not complied with the statutory requirements necessary to constitute legal abandonment.[42]

Reluctant to forego the abandonment argument, the respondent asserted that a city may accept only the desired segment of a dedicated easement and that likewise a segment of such an easement may be abandoned without abandoning the easement in its entirety.[43] The respondent argued the city had abandoned the portion of the easement formerly used for vehicular

33. *Id.* at 485, 197 S.E.2d at 295. Although the city might have had property rights in the disputed road by virtue of its purchase of two abutting lots, the court found no need to explore this as a further rationale for its holding.

34. *Id.* at 485-86, 197 S.E.2d at 295.

35. Outlaw v. Moise, 222 S.C. 24, 31, 71 S.E.2d 509, 512 (1952).

36. 260 S.C. at 479, 197 S.E.2d at 292 (1973).

37. *Id.* at 487, 197 S.E.2d at 296, *citing* Chafee v. City of Aiken, 57 S.C. 507, 35 S.E. 800 (1900).

38. 260 S.C. at 487, 197 S.E.2d at 296, *citing* S.C. CODE ANN. § 47-1327 (1962); *see also* S.C. CODE ANN. §§ 33-521-22 (Cum. Supp. 1973).

39. 260 S.C. at 487, 197 S.E.2d at 296, *citing* S.C. CODE ANN. § 47-1327 (1962).

40. 260 S.C. at 487, 197 S.E.2d at 296, *citing* S.C. CODE ANN. § 33-521 (Cum. Supp. 1973).

41. *Id.*

42. 260 S.C. at 487, 197 S.E.2d at 296.

43. *Id.* at 487-88, 197 S.E.2d at 296.

traffic, while retaining the segment used for sewer and storm drains under the road.[44] The court dismissed this argument because neither the respondent nor the court knew of any authority to support it.[45] Actually this argument had been negated by the previous arguments relating to public easements. The fact that only a portion of the easement was abandoned would not narrow the issue to a point where the court could sidestep the overwhelming common law and statutory authority opposed to casual abandonment of a public right of way.

D. Estoppel

The supreme court, in *Parker* also rejected the argument that the city was estopped from asserting its rights in the public easement. Assuming only a private right were involved, the court pointed out that the necessary elements for an affirmative plea of estoppel were not present.[46] Respondent and his attorney admitted in testimony they knew that city sewer pipes were located in the disputed right of way.[47] The court intimated that since the respondents knew the city was using the right of way they could not be misled into thinking the city had abandoned any claim to the property. When one attempts to invoke the doctrine of estoppel against a municipality with respect to streets dedicated to the public, the considerations are different than those applied against private parties.[48] The court said no private rights in a public street can be acquired by adverse possession alone.[49] But where

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44. *Id.* at 488, 197 S.E.2d at 297.

45. *Id.*

46. *Id.* at 488, 197 S.E.2d at 297. The elements, although not given by the court, are listed in 12 S. WILLISTON, CONTRACTS § 1508 n.1 (3d ed. 1970) where the writer quotes Williams v. Jones, 324 P.2d 541, 543 (Okla. 1958), which in turn quotes Fite v. Von Antwerp, 201 Okla. 26, 28, 200 P.2d 439, 441 (1948):

> The essential elements of an 'equitable estoppel' are: First, there must be a false representation or concealment of facts; second, it must have been made with knowledge, actual or constructive, of the real facts; third, the party to whom it was made must have been without knowledge or the means of knowledge, of the real facts; fourth, it must have been made with the intention that it should be acted upon; fifth, the party to whom it was made must have relied on, or acted upon, it to his prejudice.

This description ultimately derives, with some minor alterations from M. BIGELOW, ESTOPPEL 570 (5th ed. 1890).

47. City of Myrtle Beach v. Parker, 260 S.C. 475, 488, 197 S.E.2d 290, 297 (1973).

48. *Id.* at 489, 197 S.E.2d at 297. By an analogy to Crocker v. Collins, 37 S.C. 327, 155 S.E. 951 (1892), the court explained the different considerations. In *Crocker* the plaintiff attempted to obtain part of a municipal alley by adverse possession.

49. *Id.* at 488, 197 S.E.2d at 297, *citing* Crocker v. Collins, 37 S.C. 327, 15 S.E. 951 (1892).

there has been adverse possession for the statutory period plus other circumstances that would make it inequitable not to favor the assertion of private rights over the public rights, then the court may invoke the principle of estoppel to protect the private party.[50] The court in *Parker* was saying the law is the same whether the private party claims a public right of way on the theory of estoppel or adverse possession; both theories must be proved to be successful. In *Parker* the court found neither sufficient injustice to the respondents to support a plea of estoppel nor adverse possession for the prescriptive period.[51]

The court considered still another type of easement in *Epps v. Freeman.*[52] It held the grantees had "special property interests" in an open area abutting their lots because the open area was an integral part of the original subdivision plan. The grantor had sold the lots at Myrtle Beach with reference to a plat which represented them as ocean front, but a vacant area approximately one hundred eighty-five feet in width existed between the eastern end of the lots and the seaward subdivision line.[53] The grantor's heirs brought an action to remove any cloud on their claim of title to the open area. The court inferred from the facts that there was no intention by the grantor to include the disputed area as part of the grantees' lots. Instead, the court reasoned, the grantor meant to enhance the value of the property by leaving the area open, thus creating ocean front lots.[54] The court analogized the open area to a park in a platted subdivision.[55] It noted that when lots in a platted subdivision which includes a park or an open area are sold, an easement is generally implied in favor of the property owners.[56] This easement is not to be confused with an easement by implication which only arises from necessity.[57] The similarity of language is unfortunate; however, in *Carson v. Gibson,*[58] a case cited by the court in *Epps*, the court characterized this property interest as

50. *Id.* at 489, 197 S.E.2d at 297, *quoting* Grady v. City of Greeville, 129 S.C. 89, 100, 123 S.E. 494, 498 (1924), which quotes with approval Crocker v. Collins, 37 S.C. 327, 332-33, 15 S.E. 951, 953 (1892).

51. *Id.* at 489, 197 S.E.2d at 298.

52. 200 S.E.2d 235 (S.C. 1973).

53. *Id.* at 236.

54. *Id.* at 242.

55. *Id.*

56. *Id., quoting* Carson v. Gibson, 217 S.C. 500, 509, 61 S.E.2d 58, 62 (1950).

57. Crosland v. Rogers, 32 S.C. 130, 133, 10 S.E. 874, 875 (1890). *See generally* Brasington v. Williams, 143 S.C. 223, 141 S.E.2d 375 (1927).

58. 217 S.C. 500, 61 S.E.2d 58 (1950).

> [flowing] from the deed and plat of the former owner to [the purchaser] and, as is uniformly held, equity and good conscience requires its vindication and protection. Many courts base the right of the grantee or his assigns . . . upon the theory of implied grant or covenant; more, probably, upon the ground of equitable estoppel and some upon a combination of these concepts.[59]

The court in *Epps* made no attempt to clarify the issue. It held that the lot owners had acquired "a special property interest" in the vacant area and whether it was created "by implied grant, estoppel, or otherwise" the plaintiff was barred "from the relief sought by the complaint."[60]

II. FRAUDULENT CONVEYANCE

In *Coleman v. Daniel*[61] the respondent transferred his farm to his daughter and son-in-law shortly before imminent foreclosure.[62] The alleged consideration for the farm was cancellation of a prior debt, assumption of an existing mortgage on the farm and an agreement to support the grantor, who was to retain possession of the farm.[63] The total consideration valued most favorably to the respondents was approximately one half the fair market value of the farm.[64] The plaintiff brought this action to set aside the deed as being a fraud on him as a creditor.[65]

The South Carolina statute[66] on fraudulent conveyances has been interpreted to require that two types of conveyances be set aside. They are:

> First, where the transfer is made by the grantor with the actual intent of defrauding his creditors [and] the intent is imputed to the grantee, . . . and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without consideration.[67]

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59. *Id.* at 507, 61 S.E.2d at 61.

60. 200 S.E.2d at 242.

61. 199 S.E.2d 74 (S.C. 1973).

62. *Id.* at 76.

63. *Id.*

64. *Id.* at 77. Note that the supreme court made its own finding of facts in a case of equity.

65. *Id.* at 75.

66. S.C. CODE ANN. § 57-301 (1962).

67. Coleman v. Daniel, 199 S.E.2d 74, 79 (S.C. 1973), *quoting* Jeffords v. Berry, 247 S.C. 347, 351, 147 S.E.2d 415, 417-18 (1966), which in turn quotes Gardner v. Kirven, 184 S.C. 37, 40, 191 S.E. 814, 816 (1937). *Gardner* cited Farmers Bank v. Bradham, 129 S.C. 270, 123 S.E. 835 (1924) and McInnis v. McRae, 134 S.C. 162, 132 S.E. 473 (1926).

The court said some circumstances are so frequently present in fraudulent conveyances that they are said to be "badges of fraud."[68] Some of the more frequent badges of fraud are:

> (1) the indebtedness of the grantor; (2) insufficient consideration; (3) special relationship between grantor and grantee; (4) departure from usual method of business; . . . (7) transfer of debtors entire estate; (8) reservation of a benefit in transfer; (9) retention by debtor of possession of the property.[69]

The court found practically all of these indicia of fraud present in the conveyance at issue.[70] Apparently this was conclusive as to the grantor's fraudulent intent because the court then imputed this intent to the grantees,[71] thus voiding the conveyance. The court said that the closeness of the family situation and the presence of the "badges of fraud" demanded an inquiry by the grantees and they failed to adequately explain why a detailed inquiry was not made.[72]

III. REMOVAL OF RESTRICTIVE COVENANTS

In *Abbott v. Arthur*[73] the owner of a restricted lot on the perimeter of a residential subdivision attempted to construct a commercial building thereon.[74] The issue was whether advancing encroachment of commercial structures[75] and minor covenant violations by three property owners[76] had so changed the residential nature of the subdivision that the purposes of the restrictions were defeated.[77] The court concluded that neither the advancing commercial structures[78] nor "the petty business carried on by three residents" of the subdivision had any substantial effect[79] on

68. 199 S.E.2d at 79.

69. *Id. quoting* 37 AM. JUR. 2d *Fraudulent Conveyances* § 10 (1968).

70. 199 S.E.2d 74, 80 (S.C. 1973).

71. *Id.*

72. *Id.*

73. 261 S.C. 31, 198 S.E.2d 261 (1973). The supreme court republished the opinion of the Honorable George T. Gregory, Presiding Judge of the Court of Common Pleas for Spartanburg County.

74. *Id.* at 33, 198 S.E.2d at 262.

75. Brief for Appellant at 3.

76. *Id.* at 8-10. One resident apparently had no occupation other than that of a produce business operated out of his basement. Another resident had thousands of azaleas growing in cans waiting to be sold. A third resident also raised thousands of azaleas.

77. 261 S.C. at 38, 198 S.E.2d at 264.

78. *Id.* at 42, 198 S.E.2d at 266, *citing* Pitts v. Brown, 215 S.C. 112, 54 S.E.2d 538 (1949).

79. 261 S.C. 31, 40, 198 S.E.2d 261, 265 (1973).

the residential character of the neighborhood. Focusing on encroaching commercial development, the court said that in any restricted area there must be a boundary line beyond which there will be unrestricted development.[80] If the restrictions are removed on one lot it will only be a matter of time until the character of the entire development would be changed.[81] No black letter rule can be laid down to determine when changed conditions will be held to have defeated the purpose and intent of a restrictive covenant. However, "it can be safely asserted the changes must be so radical as practically to destroy the essential objects and purposes of the agreement."[82]

IV. ZONING

The question presented in *Staats v. Snowden*[83] is the only instance of a new interpretation of property law for the survey period. In *Staats*, the supreme court interpreted a zoning ordinance of the city of Charleston that provides schools may not be expanded within a residentially zoned area unless an exception to the zoning scheme is approved by the Board of Adjustment.[84] Prior to making an exception the Board must determine that excessive traffic will not be generated on a residential street.[85] If, however, a school wishes to build or expand in an area zoned light industrial there is no municipal requirement other than obtaining a building permit.[86] The issue on appeal was whether a school within the bounds of a residentially zoned "area must apply to the Board of Adjustment to build a gymnasium several" blocks from the school in an area zoned light industrial.[87] The parties stipulated there were no questions of fact, the only issue being the interpretation of the ordinance.[88] The circuit court determined the ordinance was only aimed at controlling the expansion of schools where both the expansion and the school were physically

80. *Id.* at 39, 198 S.E.2d at 264-65, *quoting* Flinkingshelt v. Johnson, 258 S.C. 77, 87, 187 S.E.2d 233, 238 (1972).

81. 261 S.C. 31, 42, 198 S.E.2d 261, 266 (1973), *quoting* Pitts v. Brown, 215 S.C. 122, 132, 54 S.E.2d 538, 543 (1949).

82. Pitts v. Brown, 215 S.C. 122, 133, 54 S.E.2d 538, 543 (1949), *quoting* Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 17-18, 40 S.W.2d 545, 553 (1931).

83. 260 S.C. 387, 196 S.E.2d 125 (1973).

84. *Id.* at 389, 196 S.E.2d at 125.

85. *Id.*

86. Brief for Respondent at 3-4.

87. Record at 2.

88. 260 S.C. at 389, 196 S.E.2d at 126.

within a residentially zoned district.[89] The supreme court reversed, citing appellant's brief which "ably states the case for reversal . . . ,"[90] and said:

1. The school is in a protected residential area.
2. The addition of a gymnasium is an expansion of the school.
3. The ordinance forbids expansion without the required determinations by the Board of Adjustment.
4. These determinations have not been made.[91]

The school is currently leasing gymnasium facilities some distance from the school.[92] If the Board of Adjustment refuses to make an exception to the zoning ordinance, as the court indicated is necessary, they no doubt also have the authority to prevent the school from leasing the present gymnasium facilities. This would be true because the court bottomed its decision on the intent behind the zoning ordinance rather than on a literal interpretation.[93] This intent was to prevent excessive traffic in the residential area. Commuting to leased premises would create just as much traffic as commuting to the proposed expansion.

The court did not say what the outcome would be if the school had attempted to build or lease its gymnasium facilities outside the municipal limits and therefore beyond the jurisdiction of the Board of Adjustment. It would seem, however, the holding here could be applied to such a situation. The new traffic would be within the residential area and thus within the jurisdiction of the Board of Adjustment.

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89. *Id.*
90. *Id.* at 390, 196 S.E.2d at 126.
91. *Id.*
92. Record at 7.
93. 260 S.C. at 390, 196 S.E.2d at 126.