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Property

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PROPERTY

I. EMINENT DOMAIN

In *Karesh v. City Council of City of Charleston*[1] the South Carolina Supreme Court held on constitutional grounds that the City of Charleston was prevented from entering into a contract with a private developer to construct a convention center and hotel complex. *Karesh* is the court's first major discussion of a city's power to use eminent domain for urban renewal since the 1956 opinion in *Edens v. City of Columbia*[2] and is the court's first interpretation of the new article X of the South Carolina Constitution.

Historically, commercial establishments in Charleston have been located along the King Street corridor that stretches the length of the peninsular city. As in many metropolitan areas, however, some businesses from the central city have branched out to the suburban areas and others have abandoned the city completely.[3] Although residential property in the lower peninsula has increased dramatically in value during the last thirty years, commercial property values have decreased in terms of the dollar's purchasing power.[4] In order to revitalize part of the area, a joint undertaking was arranged between the city and a private developer to construct a one-block convention center and hotel.

Under the arrangement, the developer was to acquire the vacant southern section of the block and construct a hotel complex.[5] The city proposed to acquire most of the remainder of the block by purchase or condemnation and to allow the developer to construct a convention center and parking garage on the property.[6] The structures were to be financed by revenue bonds issued

1. 271 S.C. 339, 247 S.E.2d 342 (1978).

2. 228 S.C. 563, 91 S.E.2d 280 (1956).

3. Brief of Appellants at 2; Brief of Respondent at 5, 6.

4. Brief of Respondent at 5.

5. 271 S.C. at 341, 247 S.E.2d at 343. The block is bounded by Hasell, Meeting, Market and King Streets and the vacant section consists of property formerly occupied in part by a Belk Department Store. The proposed hotel complex would have commercial space fronting on Market and King Streets. The area fronting on King additionally would have contained a department store, restaurant and bar.

6. *Id.* The city was to utilize a $4.1 million Urban Development Action Grant and additional funds from general obligation bonds to acquire the property consisting of both commercial and residential structures, most of which were occupied. The parking garage and convention center were to include commercial space for lease. Additionally, the city

by the city and leased by the city to the developer at a rate calculated to pay off the bonds at the end of the forty-year lease.[7]

The undertaking raised questions touching both the power of the city to condemn the land and the power to issue revenue bonds under the proposed financing structure. In *Karesh,* the court only considered the former question.[8] In some jurisdictions use of eminent domain for these and similar purposes would be within a municipality's authority.[9] Traditional urban renewal, including resale of condemned land to private developers, has been generally upheld in other jurisdictions by applying a liberal standard to determine whether the land is for "public use."[10] The South Carolina courts, however, have maintained a strongly protective attitude toward property rights and adhered to a strict interpretation of the public use requirement.[11] The leading South

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planned to preserve as many valuable architectural facades on Market Street as possible. *Id.* 247 S.E.2d at 343-44.

7. *Id.* All expenses relating to operation, maintenance and insurance of the parking garage and convention center as well as all payments on the revenue bonds by way of principal or interest were to have been payable by the developer as rent. Construction bids on the entire project and the bond offering were to have been privately handled by the developer.

The lease was to have contained a warranty that the parking garage and the convention center would be made available on reasonable demand to all members of the general public and to have provided that no more than ten percent of the space in the parking garage could at any one time be reserved for the exclusive use of the employees and patrons of the convention center. *Id.* at 344, 247 S.E.2d at 345. The lease was also to provide that no use of the convention center or proceeds of the revenue bonds would be made that would cause the bonds to bear interest that would be taxable to the recipient or would cause the convention center and parking garage site to become subject to *ad valorem* and property taxes within the state of South Carolina. Record at 531.

8. 271 S.C. at 341, 247 S.E.2d at 344. The financial structure arranged between the city and the developer was alleged not to comply with the Revenue Bond Act for Utilities, S.C. CODE ANN. §§ 6-21-10 to -570. The city in its brief relied upon Doyle v. Rosen, 229 S.C. 67, 91 S.E.2d 887 (1956), for the proposition that the statutory scheme did not have to be followed literally. Brief of Respondent at 42.

9. *E.g.,* City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 408 P.2d 818 (1965). One treatise states that "[a]n auditorium and convention center constitutes a public use for which a municipality can exercise the power of eminent domain." 2A J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.5181 (Rev. 3d ed. 1976) (citation omitted). *Cf.* Opinion of the Justices, 356 Mass. 775, 250 N.E.2d 547 (1969) ("large multipurpose stadium" may justify use of power); Opinion of the Justices, 231 A.2d 431 (Me. 1967) (municipal parking garage is a "public use").

10. 271 S.C. at 342, 247 S.E.2d at 344.

11. *Id.* The requirement that the taking of private property be for a "public use" is contained in S.C. CONST. art. I, § 13: "Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefore." For a thorough discussion of the development and current status of the power of eminent domain, see

Carolina case is *Riley v. Charleston Union Station Co.*[12] which established that a showing of benefit to the public by a project was not sufficient to satisfy the public use requirement; rather, actual use of the development by the public must be shown.

In determining whether the proposed use of the land to be condemned met the public use test, the court considered three factors: the relationship of the private developer with the city's project, the proposed commercial leases in the development to persons other than the existing land owners, and the adequacy of the guarantees that the public would enjoy the use of the facility. The court did not identify any one factor as controlling, preferring to retain a flexible approach toward determination of public use.[13] Consideration of these factors did lead the court to conclude that the proposed undertaking failed constitutionally because it envisioned a use of the power of eminent domain that would be in direct conflict with the individual's right to own and use property as he pleases.[14]

The court in *Karesh* specifically addressed the trial judge's reliance on paragraph 10, section 14 of the new article X of the South Carolina Constitution.[15] The trial court concluded that since paragraph 10 recognizes "redevelopment" as a proper corporate purpose, the redevelopment at issue constituted a public

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Note, *Components of Eminent Domain: An Ancient Tool for Contemporary Use*, 15 S.C.L. REV. 943 (1963).

12. 71 S.C. 457, 51 S.E. 485 (1905). The court in *Riley* cited with approval a then-contemporary commentator who noted that " '[t]he public use implies possession, occupation, and the enjoyment of the land by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it.' " *Id.* at 485-86, 51 S.E. at 496.

13. 271 S.C. at 343-44, 247 S.E.2d at 345.

14. *Id.* at 344, 247 S.E.2d at 345.

15. S.C. CONST. art. X, § 14, para. 10 (as amended 1976, 1977) provides:

> Indebtedness payable solely from a revenue-producing project or from a special source, which source does not involve revenues from any tax or license, may be issued upon such terms and conditions as the General Assembly may prescribe by general law; *provided*, that the General Assembly may authorize by general law that indebtedness for the purpose of redevelopment within incorporated municipalities may be incurred, and that the debt service of such indebtedness be provided from the added increments of tax revenues to result from any such project. Any and all indebtedness incurred pursuant to the provisions of this subsection shall contain a statement on the face thereof specifying the sources from which payment is to be made and shall state that the full faith, credit and taxing powers are not pledged therefor.

use of property.[16] The supreme court found, contrary to the trial judge, that article X did not support the city's position. The supreme court noted the absence of any mention in the new article X of condemnation, eminent domain, or the taking of property. Article X, in the court's opinion, "[w]hile . . . authori[zing] municipalities to incur indebtedness for the purpose of redevelopment . . . does not repeal the . . . constitutional provision on eminent domain contained in Article I, Section 13 of the Constitution."[17] In addition, the supreme court considered the "redevelopment" provision of article X in light of section 5-7-50 of the South Carolina Code which limits the power of eminent domain in redevelopment work to areas that are "predominantly slum or blighted." In view of the lower court's determination that the city block in question was not a slum or blighted area,[18] the supreme court found further justification for limiting the power of eminent domain in *Karesh.*

II. LIMITATION ON ACTIONS FOR TAX DEEDS

In *Scott v. Boyle,*[19] an action to set aside a tax deed, the court held that the two-year limitation on the recovery of land sold at tax sales[20] was not a bar because the evidence was insufficient to support a finding that the purchasers were in possession of the property in excess of two years. The Scotts' property had been sold for delinquent taxes on January 4, 1971; the chief of police subsequently deeded the property to the purchaser, Red Oak Lands, Inc., on January 14, 1972. The procedure followed by the chief of police was defective in that the chief had not levied on, seized, or gone into possession of the property as required by statute.[21] In 1974 Red Oak placed a "For Sale" sign on the prem-

16. Record at 530, 537-38.

17. 271 S.C. at 345, 247 S.E.2d at 345.

18. Record at 537.

19. 271 S.C. 252, 246 S.E.2d 887 (1978).

20. S.C. CODE ANN. § 12-49-570 (1976). The section provides:

> In all cases of sale the sheriff's deed of conveyance, whether executed to a private person, a corporation or a forfeited land commission, shall be held and taken as prima facie evidence of a good title in the holder and that all proceedings have been regular and all requirements of the law duly complied with. No action for the recovery of land sold by the sheriff under the provisions of this chapter or for the recovery of the possession thereof shall be maintained unless brought within two years from the date of such sale.

Id.

21. *See* S.C. CODE ANN. § 12-49-460(1) (1976), which provides:

ises and subsequently transferred the property to respondent Boyle who thereafter was totally inactive with respect to the property.[22] The only physical contact that Red Oak had with the property was the placing of the "For Sale" sign on the property in 1974.[23] On January 24, 1977, the action was commenced by Scott to set aside the tax deed.[24]

Since the rights of a claimant under a tax deed arise solely by the statute, the former owner may void the deed by proving a failure to comply with the act. To avoid the resulting uncertainty, most states have limited the right of the former owner of the land to a short period within which to test the validity of the tax title.[25] Under these statutes of limitation the majority of jurisdictions requires possession by the purchaser of the tax deed similar in nature to the possession required under statutes of limitation covering land held in adverse possession.[26]

South Carolina courts have consistently held that the two-year statute of limitations does not commence until the purchaser is placed in possession of the property,[27] although the statute itself contains no such requirement. The rationale of this construction was explained in *Gardner v. Reedy*:[28]

> The statute did not intend to bar the taxpayer's cause of action until he had two years within which he could bring his action.

Under and by virtue of such warrant or execution the sheriff shall:

(1) Seize and take exclusive possession of so much of the defaulting taxpayer's estate real, personal or both, as may be necessary to raise the sums of money named therein and such charges thereon;

Additionally, S.C. CODE ANN. § 12-49-550 (1976) provides:

Upon failure of a defaulting taxpayer or other person interested to redeem land sold for taxes under the provisions of § 12-49-460 within twelve months, the sheriff shall make title to the purchase and put the purchaser in possession of the property sold and conveyed.

22. 271 S.C. at 253, 246 S.E.2d at 888.

23. *Id.* at 255, 246 S.E.2d at 889.

24. Record at (a). The burden of proof in *Scott* ostensibly was placed upon the party claiming under the tax sale. Arguably, the burden should rest upon the party seeking to upset the tax sale.

25. H. BLACK, A TREATISE ON THE LAW OF TAX TITLES § 492 (2d ed. 1893).

26. *See* cases cited in 72 AM. JUR. 2d *State and Local Taxation*, § 1057 and 85 C.J.S. *Taxation* § 984(d)(1).

27. *E.g.*, Leysath v. Leysath, 209 S.C. 342, 40 S.E.2d 233 (1946); Glymph v. Smith, 180 S.C. 382, 185 S.E. 911 (1936); Gardner v. Reedy, 62 S.C. 503, 40 S.E. 947 (1902). *See generally* Note, *Effect of Disability of Landowner with Respect to the Acquisition of Adverse Rights by Another by Statutes of Limitations, Presumption of a Grant, and Prescriptive Right in South Carolina*, 10 S.C.L.Q. 292, 302 (1958).

28. 62 S.C. 503, 40 S.E. 947 (1902).

> He could not bring his action until there was a person on the land withholding possession from him. As was said by the court in Suber v. Chandler, 18 S.C. 532, in order 'to give currency to the statute, there must be a plaintiff who can sue and a defendant who can be sued.'[29]

The supreme court in *Scott* reviewed the minimal evidence of possession in light of the standard of possession contemplated by South Carolina case law concerning tax sales;[30] the evidence was found insufficient to meet the standard. The court approached the question of possession only after first deciding that "short statutes of limitation barring actions to recover land sold for taxes are not construed with that liberality exhibited toward the general statutes of limitation."[31]

The facts of *Scott* reveal that both Red Oak and Boyle were record owners for more than two years.[32] Indeed, in concluding that the property had not been possessed for the requisite two years, the court considered not only the activity of Red Oak, the immediate grantee, but also that of respondent Boyle, the subsequent grantee.[33]

The supreme court's refusal to find evidence of possession is understandable. In Red Oak's case, generally, the placement of a "For Sale" sign on one's premises should be a sufficient indicator of *possession* in the context of the two-year statute of limitations. Indeed, the placement of a "For Sale" sign quite arguably would provide sufficient evidence to conclude that one is in adverse possession.[34] In light, however, of the lack of evidence presented to establish the length of time the "For Sale" sign remained erected on the premises, the court was justified to conclude that evidence of possession was not sufficient.

It can be reasonably inferred from the court's treatment of the facts in *Scott* that the two-year requirement could have been satisfied by either Red Oak or Boyle; that is, the statute of limita-

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29. *Id.* at 505, 40 S.E. at 947.

30. Glymph v. Smith, 180 S.C. 382, 185 S.E. 911 (1936); Gardner v. Reedy, 62 S.C. 503, 40 S.E. 947 (1902).

31. 271 S.C. at 256, 246 S.E.2d at 889 (citing 72 AM. JUR. 2d *State and Local Taxation* § 1051, p. 318).

32. 271 S.C. at 253, 246 S.E.2d at 888.

33. *Id.* at 255-56, 246 S.E.2d at 889.

34. A "For Sale" sign that is sufficiently conspicuous would seem to meet the requirements for adverse possession set out in Mullis v. Winchester, 237 S.C. 487, 491, 118 S.E.2d 61, 63 (1961) ("actual, open, notorious, hostile, continuous and exclusive") so long as the sign is displayed "for the whole statutory period." *Id.*

tions could have commenced running with the taking of actual possession of the property by either of the two record owners. While admittedly not necessary to the disposition of the case before it, the court in *Scott* did not address the question whether "tacking," by adding the time that the immediate grantee and the subsequent owner are in actual possession, would satisfy the two-year statute. The unanswered question is an important one. Often, it may not be possible to determine that previous grantors have been in actual possession for more than two years. Nothing in the *Scott* opinion would seem to bar the court from allowing "tacking" in a future case similar to *Scott.* In light of the limited opinion in *Scott,* however, the record searcher should be on notice upon discovery of a recorded tax sale that some situations will cause difficulties in determining whether the two-year possession requirement is satisfied.

Once it is discovered that property in a chain of title has been subjected to a tax sale, the record searcher will need to determine whether the property has been in actual possession for two years. This determination will obviously involve more than checking record ownership; the cautious record searcher will find it necessary to secure an affidavit verifying that the possession requirement has been satisfied. The very purpose of the two-year statute of limitation is to facilitate the clearing of title,[35] and the burden on all subsequent purchasers to prove two years of possession appears somewhat anomolous in light of that purpose.

III. ZONING

In *Estate of Maguire v. City of Charleston*[36] the supreme court was presented with an unusual set of facts and rendered a decision of considerable importance for South Carolina land use law. The court apparently held that a purchaser of property zoned for residential use cannot maintain the right to a nonconforming use by asserting the prior owner's incapacity to form an intent to discontinue that nonconforming use.

In 1963 J.T. Hiott, Jr., a person *non compos mentis,*[37] inher-

35. See text accompanying note 25 *supra.*

36. 271 S.C. 451, 247 S.E.2d 817 (1978).

37. In 1940 Dr. Hiott petitioned the Charleston County Probate Court to act as his son's guardian and described his son then as follows: " 'Josiah T. Hiott, Jr., age twenty-two years since he is a person *non compos mentis* and has the mentality of a child about seven years, and is unable to conduct his own business and support and care for himself . . . .' " Master's Report, Record at 176.

ited a life estate in the building that his father, a doctor, had used as an office. After Dr. Hiott's death, three other physicians rented the property until 1965. At that time the son moved into the building, although it was designed exclusively for use as a doctor's office.[38] He resided there until the sale of the property in 1974 to Dr. Maguire. During the period between the death of his father and the sale of the property, young Hiott was without benefit of a guardian or committee.

The property was zoned for use as either a residence or doctor's office until 1966 when the ordinance was changed to allow only residential use. The ordinance, however, provided the right to continue a nonconforming use until the use was discontinued or a conforming use was substituted.[39]

Dr. Maguire applied to the City of Charleston Board of Adjustment for permission to modify the building and grounds in order to improve its usefulness as an office based upon the right to continue the nonconforming use of the property. The request was denied and Dr. Maguire petitioned the circuit court for certiorari.[40] The petition was referred to a master who recommended

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38. The building consisted of a reception room, two examining rooms and a consulting room but had no bath or shower. Young Hiott and his mother, who was also a person *non compos mentis* and lived with him during part of the period, "apparently washed out of the sink and did their cooking in a haphazard fashion." Master's Report, Record at 177.

39. Section 54-10 of the Charleston Code provides in pertinent part:

> (1.) The lawful use of land existing at the time of the adoption of this chapter, or of an amendment thereto, although such use does not conform to the provisions thereof, may be continued; but if such nonconforming use is discontinued, as evidenced by lack of use for a period of at least one year or by substitution of a conforming use, any future use of said land shall be in conformity with the provisions of this chapter.
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> . . . .
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> (4.) Whenever a nonconforming use of a building has been changed to a conforming use, such use shall not thereafter be changed back to a nonconforming use.
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> (5.) Whenever a nonconforming use of a building, or a portion thereof, has been discontinued, as evidenced by the lack of use, or vacancy for a period of at least one year, or by substituting a conforming use, such nonconforming use shall not thereafter be re-established and the future use shall be in conformity with the provisions of this chapter.

CHARLESTON, S.C., CODE § 54-10 (1975). Similar ordinances to the one interpreted in this case are CAYCE, S.C., ZONING ORDINANCE § 5-2 (1975); FOREST ACRES, S.C., CODE Appendix A § 6-1 (1976); GEORGETOWN, S.C., CODE Appendix A, art. 8, § 800 (1964); LANCASTER, S.C., CODE § 36-22 (1974); ORANGEBURG, S.C., CODE § 29-21 (1969).

40. Dr. Maguire died in 1974 and his estate was substituted as petitioner. Master's Report, Record at 175.

that the city be ordered to issue the requested permit. The circuit court later set aside the master's report affirming the decision of the Board of Adjustment and the case was appealed to the supreme court.

The general rule acknowledged by the South Carolina Supreme Court in *Conway v. City of Greenville*[41] is that proof of intent to abandon the right to a nonconforming use is essential to an "abandonment" of that right.[42] To avoid the difficulty of proving this intent to abandon, some zoning ordinances provide for termination of nonconforming uses after they have been "discontinued"; such ordinances, however, are seldom more effective because "discontinuance" has generally been construed as being synonymous with "abandonment."[43] Therefore, some cities have resorted to "discontinuance-time limitation" acts. These acts provide for the termination of a nonconforming use after a specified period of time during which the nonconforming use has not been exercised.[44] In a North Dakota decision, *City of Minot v. Fisher,*[45] three different interpretations of the discontinuance-time limitation type of ordinance were identified: (1) that intent is still required after the expiration of the time limit; (2) that intent is not relevant under the ordinance; or (3) that the ordinance raises a presumption of intent upon the expiration of the period.[46]

In finding in favor of Dr. Maguire's estate, the master apparently determined that the ordinance as applied to the facts of the case was not of the discontinuance-time limitation type[47] and

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41. 254 S.C. 96, 173 S.E.2d 648 (1970).

42. *Id.* at 105, 173 S.E.2d at 652-53. A more general statement of the rule is:

> A temporary cessation, even for a lengthy period, caused by circumstances over which the property owner had no control, is generally held not to constitute proof of a discontinuance in the sense of abandonment within the meaning of zoning ordinance provisions since the circumstances themselves negate an inference of the necessary intention to abandon the use.

3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING ch. 61, § 5 (4th ed. Cum. Supp. 1979).

43. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 6.61 (2d ed. 1968 & Cum. Supp. 1975). The treatise notes that "[t]he courts have merged the terms 'abandon' and 'discontinue' and require proof of intent to abandon although the ordinance speaks in terms of a use discontinued for a period of time." *Id.* at 442 (citation omitted). *See also* Board of Zoning Adjustment v. Boykin, 265 Ala. 504, 92 So. 2d 906 (1957), which Professor Anderson refers to as expressive of the "prevailing view," 1 R. ANDERSON, *supra,* at 442.

44. 3 A. RATHKOPF, *supra* note 42, ch. 61, § 1.

45. 212 N.W.2d 837 (N.D. 1973).

46. *Id.* at 839-41.

47. Master's Report, Record at 190. Interestingly, Justice Rhodes, joined by Chief Justice Lewis, dissenting, maintained that the master had adopted the first interpretation

noted that the ordinance's one-year requirement applied "*only* when the non-conforming use is 'discontinued' by 'lack of use' *or* 'vacancy for a period of at least one year' . . . ."[48] The facts in *Maguire* persuaded the master that the proscription against nonconforming use should be immediate because the situation fell under the ordinance provisions, which did not specify a time limitation.[49] Accordingly, the master reasoned that because the "intent is *not* 'supplied' by the time period of discontinuance under the Ordinance, . . . the holding of *Conway* . . . [was] mandated."[50]

Applying the intent requirement of *Conway,* the master found two grounds for determining that the necessary intent was not present.

> [I]n the first instance, J.T. Hiott, Jr., had no mental capacity to form any intent to discontinue or abandon the use . . . . Secondly, even if the younger Hiott had been *compos,* he was placed, by economic necessity, with the problem of being unable to find a doctor tenant. Thus, his inability to earn a living coupled with the uncertainty created by the Will contest created an emergency situation where cessation of the property usage as a doctor's office was certainly far from voluntary. Young Hiott's situation (whether viewed from the standpoint of he [*sic*] being *non compos* or *compos*) fits well within the numerous cases, such as *Conway*, *supra*, which allow for involuntary, unintentional interruptions in property usage.[51]

In setting aside the master's report, the circuit court concluded that the ordinance was of the discontinuance-time limitation type. Adopting by implication the second interpretation in *Minot,* the court distinguished *Conway* on the ground that the ordinance in that case contained no stated time limitation after the discontinuance of nonconforming uses. The circuit court maintained that the City of Charleston chose "to eliminate the necessity of any inquiry into intent of an owner of property by

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recognized in *Minot* of the discontinuance-time limitation type. 271 S.C. at 456, 247 S.E.2d at 819 (Rhodes, J. joined by Lewis, C.J., dissenting).

48. Master's Report, Record at 190.

49. "When one 'changes' to, or 'substitutes' a conforming use, §§ 51-10(4) and (5), the Ordinance's proscription is *immediate* . . . . [W]e only deal here with a changed or substituted use situation . . . ." Master's Report, Record at 190 (emphasis in original).

50. Master's Report, Record at 190.

51. *Id.* at 194-95 (footnotes omitted).

inserting a time limit upon the discontinuance of nonconforming uses."[52]

The South Carolina Supreme Court affirmed the circuit court order, but did not rely on the circuit court's rationale. The supreme court briefly noted several reasons for ruling in favor of the city. Noting that Dr. Maguire purchased the property with constructive notice of the amended zoning regulation and notice of the use of the property, the court saw "no reason to allow the appellant Estate to take advantage of Hiott's disability."[53]

Justice Rhodes in dissent, joined by Chief Justice Lewis, urged the adoption of the third construction discussed in *Minot*—that is, the creation of a presumption of intent upon the expiration of the time limitation.[54] This approach was preferred by the dissenters because it avoids the due process problem of a presumption of abandonment even when the cessation of the nonconforming use is due to circumstances beyond the control of the property owner. Thus, the dissenters reasoned that the mental incompetency of Hiott rebutted any presumption of intent since there was no parent or guardian to exercise control over the property.[55]

As noted, *Maguire* apparently holds that a purchaser of property zoned for residential use cannot maintain a claim of right to a nonconforming use by asserting the prior owner's incapacity to form an intent to discontinue that nonconforming earlier use. This holding contradicts the generally accepted principle that the right to a nonconforming use runs with the land.[56] The effect of a nonconforming use that does not run with the land would be particularly significant if the owner of a fee seeks to transfer property from one tenant who has maintained a nonconforming use to another tenant. If the right is personal, the transfer would destroy the right to the nonconforming use. If *Maguire* alternatively stands for the more general proposition stated in the circuit court's order that the supreme court affirmed, that is, that the ordinance avoids the necessity of proving intent, then *Maguire*

52. Record at 204 (Order of Honorable Clarence E. Singletary of July 14, 1977).

53. 271 S.C. at 454, 247 S.E.2d at 819 (Rhodes, J., joined by Lewis, C.J., dissenting).

54. *Id.* at 456, 247 S.E.2d at 819-20 (Rhodes, J., joined by Lewis, C.J., dissenting).

55. *Id.*, 247 S.E.2d at 820 (Rhodes, J., joined by Lewis, C.J., dissenting).

56. *E.g.*, Eitnier v. Kreitz Corp., 404 Pa. 406, 412, 172 A.2d 320, 323 (1961); Gibbons & Reed Co. v. North Salt Lake City, 19 Utah 2d 329, 336, 431 P.2d 559, 564 (1967). *See generally* 1 R. ANDERSON, *supra* note 43, § 6.37; 6 P. ROHAN, ZONING AND LAND USE CONTROLS § 41.03[6] n.105 (1978).

provides South Carolina municipalities with a means to avoid the difficult proof requirements mandated by *Conway*.

Whichever proposition is ultimately determined to be the true holding of the case, the court left open the option of negating *Maguire*'s effect in the future by holding an ordinance similar to that involved in *Maguire* violative of constitutional due process. The due process arguments were addressed by both the master and the circuit court and argued in briefs submitted to the supreme court. Little doubt exists that zoning regulations may be so restrictive that they unconstitutionally deprive an owner of important property rights. The supreme court, however, has left resolution of this important issue for another day.

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