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Property

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PROPERTY

I. ZONING—ADOPTION OF THE PENDING ORDINANCE DOCTRINE

In *Sherman v. Reavis*,[1] the South Carolina Supreme Court held that a "municipality may properly refuse a building permit for a land use in a newly annexed area when such use is repugnant to a pending and later enacted zoning ordinance."[2] *Sherman* is the first decision by the court in which it expressly recognized that denial of a permit may be based on a later enacted ordinance.

In August 1977, the City of Charleston annexed a portion of Charleston County known as "the Neck." This newly annexed area was briefly without a valid zoning ordinance and several landowners, seeking to take advantage of this fact, applied for permits for uses previously prohibited under county ordinances. The City of Charleston, however, denied plaintiffs' applications for permits to construct billboards on private property[3] and, less than three weeks later, passed its own ordinance forbidding the use requested.[4] Plaintiffs asserted a vested right to a permit on the sole basis that at the time of the application the intended use was permitted by law.[5]

Sherman made explicit what prior cases have implied—that the making of an application will not in itself give rise to a vested right that can withstand later zoning changes. In *Whitfield v. Seabrook*,[6] a permit was granted after passage of a new

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1. 273 S.C. 542, 257 S.E.2d 735 (1979).

2. *Id.* at 545, 257 S.E.2d at 737.

3. The City of Charleston defended its denial of the permits on the following two grounds: (1) that a city has a right to maintain the status quo of a newly annexed area for a reasonable time while a new zoning ordinance is enacted; and (2) that the new ordinance was pending at the time of the application. Brief of Appellant at 11, 18. Charleston County Court Judge Theodore D. Stoney rejected the first argument at a hearing on plaintiffs' request for a writ of mandamus and expressed "serious reservations" about allowing a denial on the basis of a pending ordinance. He granted the writ ordering issuance of a permit on the ground that even if the pending ordinance doctrine did apply in South Carolina, there had not been sufficient notice to plaintiffs in this instance. Record at viii-xii.

4. See notes 11 & 18 *infra*.

5. 273 S.C. at 545, 257 S.E.2d at 737.

6. 259 S.C. 66, 190 S.E.2d 743 (1972).

ordinance but with notice that the ordinance, which barred the type of construction planned, would take effect in ten days. Plaintiff failed to begin construction before that date, and the permit was revoked. The South Carolina Supreme Court held that the mere acquisition of the permit carried no right to begin nonconforming construction after the new ordinance took effect and the court affirmed the city's right to revoke.[7] *Whitfield* thus implied that the mere *application* for a permit does not create a vested right to *issuance* of a permit after a new ordinance is passed.

On the other hand, *Pure Oil Division v. City of Columbia*[8] established that good-faith reliance upon zoning ordinances existing at the time of the application creates a vested right to a permit that withstands ordinance changes subsequent to the application.[9] In *Pure Oil,* the court's considerable emphasis on good-faith reliance suggested that without reliance the court would have found that the applicant had no right to a permit. A number of states have adopted the view that an applicant has no vested right to a building permit if the law is changed prior to issuance.[10] Underlying this general rule is the policy concern that an applicant should not be able to disrupt a proposed zoning plan by asserting a right just prior to final enactment.[11]

South Carolina, however, by requiring that the ordinance be pending at the time of the application in order to have any effect on the application, is one of about a half-dozen states that limits the retrospective application of zoning ordinances.[12] Under *Sherman,* unless an applicant can show either good-faith

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7. *Id.* at 72, 190 S.E.2d at 746.

8. 254 S.C. 28, 173 S.E.2d 140 (1970).

9. *Id.* at 35, 173 S.E.2d at 143.

10. 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 57-2 to 3 (4th ed. 1979). *See, e.g.,* Malmar Assocs. v. Board of County Comm'r, 260 Md. 292, 272 A.2d 6 (1971); Arcelo Reprod. Co. v. Modugno, 31 A.D.2d 642, 296 N.Y.S.2d 257 (1968); Gulf Ref. Co. v. McKernan, 179 N.C. 314, 102 S.E. 505 (1920); McEachern v. Town of Highland Park, 124 Tex. 36, 73 S.W.2d 487 (1934).

11. *See* Miller v. Board of Pub. Works, 195 Cal. 477, 496, 234 P. 381, 388 (1925).

12. Other states include Pennsylvania, California, Illinois, and by implication Idaho. *See, e.g.,* City of Los Angeles v. Superior Court, 34 Cal. Rptr. 161 (Dist. Ct. App. 1963); Lomond, Inc. v. City of Idaho Falls, 92 Idaho 595, 448 P.2d 209 (1968); Westerheide v. Obernueferman, 3 Ill. App. 3d 996, 279 N.E.2d 402 (1972); Boron Oil Co. v. Kimple, 445 Pa. 327, 284 A.2d 744 (1971). *See generally* Annot., 50 A.L.R.3d 596, 620-32 (1973). Several states do not allow zoning statutes to have any retroactive effects. *See* 3 A. RATHKOPF, *supra* note 10, at 57-4 to -6.

reliance expenditures or the existence of a law upon which he reasonably might have relied, an applicant has no right to a permit superior to a subsequent ordinance change, if at the time of application the new ordinance is pending.[13] By implication, however, any right to a permit would not be defeated by subsequent zoning changes if the application were made prior to pendency of the ordinance.

The limitation on the general rule that subsequent enactment of a zoning statute may affect prior applications furthers the policy underlying *Pure Oil* and *Whitfield* that a citizen should be able to depend upon the laws of his municipality. A city will not be allowed to delay issuance of a permit if, at the time of the application, no proposed ordinance is pending. The existence of a right to a permit, therefore, at least if there is no reliance on existing law, depends on whether the proposed ordinance is "pending" at the time of application.

"An ordinance is legally pending when a governing body has resolved to consider a particular scheme of rezoning and has advertised to the public its intention to hold public hearings on the rezoning."[14] Thus, for an ordinance to be considered pending, public notice is the first requirement. Notice of a public hearing is adequate advertisement, even if the hearing has not actually been held at the time of the application.[15] Furthermore, the court indicated in dictum that notice may be derived from a number of sources and need not be actual notice. "Clearly, the matter of rezoning . . . was a matter of public notoriety at and before the time of the filing . . . . [The Shermans] knew, or could have known, through the newspaper advertisement, or the maps which were on file, that the proposed ordinance would . . . prohibit such a use."[16]

The second requirement is that some official action be un-

13. 273 S.C. at 545, 257 S.E.2d at 737.

14. *Id.* This same requirement is set forth by the Pennsylvania Supreme Court in Casey v. Zoning Hearing Bd., 459 Pa. 219, 328 A.2d 464 (1974).

15. 273 S.C. at 546, 257 S.E.2d at 737. In *Sherman,* the local newspaper on August 12 published notice of an August 17 meeting of the zoning commission scheduled for discussion of the proposed ordinance. That advertisement also gave notice of a public hearing on the matter to be held before city council on September 13. The Shermans requested and were denied a permit on September 8. The hearing was held by the city council as scheduled on September 13. Record at I-III.

16. 273 S.C. at 546, 257 S.E.2d at 737.

dertaken amounting to a resolution to consider a particular scheme.[17] An ordinance can be pending without any action by city council.[18] Beyond this, however, the court is vague in defining the earliest stage of the enactment process at which an ordinance can be declared pending. In *Sherman,* there had been *final* action by the zoning commission, but the court indicated that less than finality of action would be sufficient. The guideline that a governing body must have "resolved to consider a particular scheme"[19] gives the court considerable room within which to apply the pending ordinance doctrine and may lead to a fairly broad application in subsequent cases.

In interesting contrast to *Sherman,* the South Carolina Supreme Court did not apply the doctrine to the analogous circumstances of *Scott v. Carter,*[20] decided only five days earlier. *Scott* arose from action by the Greenville County Council to delay issuance of a building permit until a decision to rezone was made. The council had received a petition to rezone an area from multifamily to single family, a change that would preclude apartment construction. The next day, plaintiff, with knowledge that the council had referred the matter to committee, applied for a permit to build apartments in the same area. After the county administrator ordered the delay in processing the application, a majority of the supreme court upheld a writ of mandamus ordering the county to issue the permit.[21] The right of the plaintiff to a permit arose from his prior reliance on the existing statute.[22] No mention was made by the majority of a pending ordinance.

Justice Ness, however, dissenting, concluded *inter alia*[23] that an ordinance was pending and, therefore, that the action to

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17. *Id.*

18. *Id.* at 547, 257 S.E.2d at 738. The city planning and zoning commission recommended the ordinance on August 17 but the formal recommendation was not presented to the city council until September 13, five days after the permit was denied. The city council gave first reading on September 13 and final approval on September 27. *Id.* at ——, 257 S.E.2d 736.

19. *Id.* at 546, 257 S.E.2d at 737.

20. 273 S.C. 509, 257 S.E.2d 719 (1979).

21. *Id.* at 517, 257 S.E.2d at 722.

22. *See id.* at 513, 257 S.E.2d at 721.

23. Justice Ness also concluded that the applicant had failed to supply all the materials necessary for the application to be complete. He contended, therefore, that the county had not been the cause of any delay in the issuance of the permit. 273 S.C. 509, 517-19, 257 S.E.2d 719, 723-24 (Ness, J., dissenting).

delay approval was allowable so long as plaintiff could not show a superior vested right to a permit.[24] Addressing the argument that a right arose from reliance, Justice Ness indicated that plaintiff's rights could not vest prior to the time of application for the building permit. He concluded that since plaintiff had notice of the proposed ordinance at the time he applied, he could not claim good-faith reliance under the existing ordinance.[25] Significantly, this analysis by Justice Ness implies he would not have reached a different conclusion in *Sherman,* even if reliance had been present in that case.

The justice's dissent went even further, however. Analyzing the claim of reliance, Justice Ness contended that under *Douglass v. City Council of Greenville*[26] expenditures made in preparation for the project did not create a right "superior to the interest of the public in the valid exercise of the police power"[27] by the county. There are factual differences, however, between *Scott* and *Douglass* that make reliance on the latter difficult. In *Scott,* unlike *Douglass,* there was no showing of public necessity. In *Douglass,* the South Carolina court upheld the power of a city to legislate against uses endangering the public health and welfare.[28] The intended meaning of the statement by Justice Ness is, therefore, unclear. Absent a showing of necessity, however, his view would seem to conflict with the language of *Pure Oil Division v. City of Columbia:*

> 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. There are no intervening considerations of public ne-

24. *Id.* at 521, 257 S.E.2d at 725 (Ness, J., dissenting).

25. *Id.* at 520, 257 S.E.2d at 724 (Ness, J., dissenting).

26. 92 S.C. 374, 75 S.E. 687 (1912).

27. 273 S.C. at 519, 257 S.E.2d at 724 (Ness, J., dissenting).

28. Plaintiff was given a permit to use his property for a stable, a use not prohibited by any ordinance in force at that time. Plaintiff spent several hundred dollars preparing the property before an ordinance was passed forbidding stables within the city. The court upheld the power of the city to revoke the permit upon a determination that the use would be a menace to public health. 92 S.C. at 383, 75 S.E. at 689.

cessity involved under the facts of this case.[29]

Despite the lengthy dissent, the failure of the *Scott* majority to apply the pending ordinance doctrine to the facts of that case is understandable. In addition to evidence of reliance on the existing statute by the applicant, there was no indication that any further action to rezone the subject property had occurred by the time of the lower court mandamus hearing three weeks later. This factor, combined with the council's minimal action on the matter when it was first presented, might lead to the conclusion that there had been no "resolution to consider a particular scheme of rezoning." Unfortunately, since the court in *Scott* chose not to consider the fact that the council had taken *some* action toward rezoning and also chose not to distinguish the case later in *Sherman,* the significance of *Scott* to the pending ordinance doctrine is open to some question.

What is clear is that one justice, Justice Ness, found the county council's referral of a petition to committee to be sufficient action to create a "pending ordinance."[30] The other justices did not discuss whether they would have found the action sufficient to invoke the doctrine in other circumstances. Justice Ness would apparently have no difficulty extending the pending ordinance doctrine beyond the facts of *Sherman* to ordinances that amend existing ordinances. Indeed, other states have done the same.[31] The precedential significance of two earlier South Carolina cases, *Niggel v. City of Columbia*[32] and *Stevenson v. Board of Adjustment,*[33] however, would be uncertain in light of such an application of the doctrine. *Niggel,* citing *Stevenson,* held that a citizen cannot be denied the use of property for a purpose *expressly* permitted by law.[34] Furthermore, unlike *Sherman, Scott* raised the question of reliance and its role in the pending ordinance doctrine.

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29. 254 S.C. at 34, 173 S.E.2d at 143. Justice Ness, however, did not suggest in *Scott* that *Pure Oil* is in conflict with his position. *See generally* Note, *The Building Permit and Reliance Thereon in South Carolina,* 21 S.C.L. REV. 70, 78-80 (1968).

30. 273 S.C. at 521, 257 S.E.2d at 725 (Ness, J., dissenting).

31. *See, e.g.,* City of Los Angeles v. Superior Court, 34 Cal. Rptr. 161 (Dist. Ct. App. 1963); Westerheide v. Obernueferman, 3 Ill. App. 3d 996, 279 N.E.2d 402 (1972); Boron Oil Co. v. Kimple, 445 Pa. 327, 284 A.2d 744 (1971).

32. 254 S.C. 19, 173 S.E.2d 136 (1970).

33. 230 S.C. 440, 96 S.E.2d 456 (1957).

34. 254 S.C. at 23, 173 S.E.2d at 137.

These questions are left for a later day, but if the other justices share the relatively broad position embraced by Justice Ness, it can be expected that, if proper notice of a proposed change is issued, nearly any official action toward a consideration of rezoning will be deemed sufficient to invoke an application of the pending ordinance doctrine.

II. Recording of Instruments—Determination of Priority

In *Atlas Supply Co. v. Davis*,[35] the South Carolina Supreme Court was asked to determine the priority between two liens recorded the same day. Plaintiffs had obtained a judgment lien against defendant Davis based on an open account that had existed in 1971 and 1972. The judgment was given on June 21, 1973, and filed for record in Orangeburg at 9:58 a.m. on June 25. Defendant First Federal Savings and Loan Association held a mortgage executed by Davis on the morning of June 25 and recorded the same day at 11:59 a.m. The court favored the mortgage, the second lien recorded,[36] relying heavily upon *Prudential Insurance Co. of America v. Wadford*.[37]

The South Carolina recording statute[38] protects the rights of subsequent creditors only.[39] The typical sequence envisioned by the statute is one in which *A* receives a mortgage from *X*, but does not record the mortgage until after *B* has extended credit to *X* without knowledge of the mortgage. The statute provides that the claims of *B*, as a subsequent creditor without notice, will be protected against *A*'s lien, although *A* was the first to execute.[40]

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35. 273 S.C. 392, 256 S.E.2d 859 (1979).

36. *Id.* at 395, 256 S.E.2d at 860.

37. 232 S.C. 476, 102 S.E.2d 889 (1958).

38. S.C. Code Ann. § 30-7-10 (1976).

39. 232 S.C. at 480, 102 S.E.2d at 891-92.

40. S.C. Code Ann. § 30-7-10 (1976) lists the documents within its scope and then provides in relevant part as follows:

> [The instruments] shall be valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice only from the day and hour when they are recorded . . . . But in the case of a subsequent purchaser of real estate, or in the case of subsequent lien creditor on real estate or personal property or both, for valuable consideration without notice, the instrument evidencing such subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor . . . and the prior-

The situation is more complicated if *B* records a judgment lien between the time *A* executes and records. In that case, application of the statute depends upon whether the debt on which the judgment is obtained was incurred prior to or subsequent to the mortgage execution. This issue was raised in *Wadford,* which held that the recording statute does not protect the judgment creditor who records the judgment between the execution and recording of a mortgage if the judgment is obtained on a debt incurred prior to the mortgage execution.[41] Professor Means, summarizing the post-*Wadford* position of the law, asserted that "an unrecorded mortgage has priority over a judgment against the mortgagor based upon a debt contracted prior to the execution of the mortgage but entered subsequent thereto . . . ."[42]

Plaintiff in *Atlas Supply* argued at length that an amendment to the recording statute after *Wadford* placed *Atlas Supply* within the scope of the statute and made the time of recording the determinative factor of priority.[43] The South Carolina Supreme Court, however, indicated that the amendment was intended merely to limit statutory protection to subsequent creditors who recorded first, and did not change the requirement that a judgment lien be upon a subsequent debt.[44]

Therefore, with the *Wadford* decision in mind, the court in *Atlas Supply* looked first to the judgment lien and determined that since it was for an antecedent debt, the recording statute

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ity shall be determined by the time of filing for record.

Id.

41. 232 S.C. at 480, 102 S.E.2d at 892. *See* Carraway v. Carraway, 27 S.C. 576, 581, 5 S.E. 157, 159 (1886).

42. Means, *The Recording of Land Titles in South Carolina (Herein of Bona Fide Purchase of Land): A Title Examiner's Guide,* 10 S.C.L.Q. 346, 377 (1958).

43. Brief of Appellant at 16-19. The amendment to the present § 30-7-10 referred to by plaintiff added the sentence beginning with "[b]ut in the case of a subsequent purchaser . . ." and ending with "priority shall be determined by the time of filing for record." See note 40 *supra.*

44. 273 S.C. at 395, 256 S.E.2d at 860. The court held that the amendment was designed to correct the result of South Carolina Nat'l Bank v. Guest, 232 S.C. 367, 102 S.E.2d 215 (1958), rather than *Wadford.* In *Guest,* two chattel mortgages were executed on the same day and recorded in the same sequence the next day. The court favored the later mortgage because at the time it was executed, the first mortgage, although executed, was not recorded. The second mortgage was held to have priority, thus protecting the subsequent creditor from a lien of which there was no notice. *Id.* at 373, 102 S.E.2d at 218. Further, the court would not protect one who failed to protect himself by prompt recording. *Id.* at 372, 102 S.E.2d at 217-18.

was inapplicable.[45] The court then applied *Wadford* as controlling law and held that the First Federal mortgage, which was recorded after the judgment lien, had priority.[46] In reaching its conclusions, however, the court failed to mention the sequence of the recording of the judgment and the execution of the mortgage. The judgment lienholder's brief filed in *Atlas Supply* stated that the judgment was recorded prior to execution of the mortgage,[47] and there was testimony that the recording preceded the mortgage closing.[48] This sequence, if proven, would distinguish *Atlas Supply* from *Wadford.*

Wadford made no reference to the situation in which *B* recorded his judgment prior to even *A*'s execution of the mortgage. To extend *Wadford* to these facts would go well beyond the law as previously interpreted by Professor Means.[49] The effect would be that a mortgage, executed at any time, could be used to defeat a prior-recorded judgment lien on the same property. Under this interpretation it would be pointless to record judgment liens at all if the judgment is on an antecedent debt.

Therefore, if the judgment lien in *Atlas Supply* were, in fact, recorded prior to execution of the mortgage, reason suggests the better course would have been for the court to follow the common-law principle that "first in time is first in right"[50] and to give priority to the judgment lien. In this situation, no statute has directly preempted the common law and there is no overriding reason or precedent for rejecting the common-law principle at this late date.[51] If, on the other hand, the court assumed that the judgment was recorded after execution of the mortgage and intended no extension of *Wadford,* it is hoped that the confusion caused in this area of the law will be eliminated in future opinions.

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45. 273 S.C. at 394, 256 S.E.2d at 860.

46. *Id.*

47. Brief of Appellant at 5, 18.

48. Record at 36-37.

49. See note 42 and accompanying text *supra.*

50. *See* Powers v. Fidelity & Deposit Co., 180 S.C. 501, 510-11, 186 S.E. 523, 527-28 (1936).

51. O'Hagan v. Fraternal Aid Union, 144 S.C. 84, 88, 141 S.E. 893, 894 (1927); S.C. CODE ANN. § 14-1-50 (1976). In addition, when the legislature does not intend for this rule to apply, it has expressly so stated. *E.g.,* S.C. CODE ANN. §§ 14-1-60, 15-1-10 (1976).

III. WILLS—VESTING OF PART OF GIFT IN PARAMOUR DEFEATS INTEREST OF SUBSTITUTIONAL LEGATEE

In *Ray v. Tate*,[52] the South Carolina Supreme Court held that the interest of a substitutional legatee in a will was destroyed by the vesting of a gift in the primary taker, even though the primary beneficiary was not allowed by law to receive the full gift intended.[53]

South Carolina law limits the amount that a paramour can receive from a testator with whom she lived in adultery.[54] In *Ray*, the testator devised his entire estate to his paramour with the provision that if she did not survive him, the property should pass to her niece. The paramour survived and collected without contest her one-fourth share of the estate as allowed by the statute. The niece, however, claimed a remainder interest in the remaining three-fourths of the estate, which she contended should accelerate and pass to her upon failure of the prior estate.

The court had held in *White v. White*[55] that if a paramour of the testator is left his entire estate, she is entitled to a one-fourth share, with the remaining share passing by intestacy.[56] *White*, however, did not involve a condition of survivorship, and *Ray* marks the first occasion in which the court has determined the interest of a contingent legatee in the distribution of the larger share.

Since a remainder cannot follow a fee simple,[57] the South Carolina Supreme Court rejected the niece's claim to a remain-

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52. 272 S.C. 472, 252 S.E.2d 568 (1979).

53. *Id.* at 476, 252 S.E.2d at 570.

54. S.C. CODE ANN. § 21-7-480 (1976) reads as follows:

> If any person who is an inhabitant of this State or who has any estate therein shall beget any bastard child or shall live in adultery with a woman, such person having a wife or lawful children of his own living, and shall give, by legacy or devise, for the use and benefit of the woman with whom he lives in adultery or of his bastard child or children, any larger or greater proportion of the real clear value of his estate, real or personal, after paying of his debts than one-fourth part thereof, such legacy or devise shall be null and void for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate.

Id.

55. 212 S.C. 440, 48 S.E.2d 189 (1948).

56. *Id.* at 445, 48 S.E.2d at 191.

57. L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 19 (2d ed. 1966).

der and instead, characterized her interest as substitutional.[58] Under the terms of the will, the niece could take her interest only if the paramour failed to survive the testator; because the paramour survived to claim her share, the exact contingency of the will had not occurred and the substitutional gift could not vest.[59] Therefore, the substitutional beneficiary had no interest in the estate of the testator and the amount of the gift to the paramour greater than that permitted by law must pass under the laws of intestate succession.

IV. EMINENT DOMAIN—DETERMINATION OF A PUBLIC USE

After plans for a joint undertaking between the City of Charleston and a private developer for the construction and operation of a parking garage and convention center were declared unconstitutional in 1978,[60] the city revised its plan. In *Goldberg v. City of Charleston*,[61] the South Carolina Supreme Court held that the constitutional impediments to the original plan had been removed in the revision.[62]

In *Karesh v. City of Charleston*,[63] the court had invalidated the exercise of the city's condemnation powers for acquisition of the site, because the proposed use would not have served the public. Under the original plan, the city would have condemned property for the site of a facility to be leased and controlled by a private developer. The only restriction on the developer's use was the requirement that the parking garage be made available "on reasonable demand to all members of the general public"[64] with a maximum of ten percent of the space reserved for patrons of the developer. The court, in considering the degree of control to be exercised by the developer and the inadequacy of guarantees that the public could beneficially use the facility, found that use by permission of the developer failed to assure that the project would be for the "public use" and that, therefore, the planned exercise of the city's condemnation powers would be an

58. 272 S.C. at 475, 252 S.E.2d at 570.

59. *Id.* *See also In re* Waring's Will, 293 N.Y. 186, 56 N.E.2d 543 (1944).

60. See *Property, Annual Survey of South Carolina Law*, 31 S.C.L. REV. 119, 119-22 (1979).

61. 273 S.C. 140, 254 S.E.2d 803 (1979).

62. *Id.* at 141, 254 S.E.2d at 804.

63. 271 S.C. 339, 247 S.E.2d 342 (1978).

64. *Id.* at 344, 247 S.E.2d at 345 (quoting Record at 21).

unconstitutional interference with the owner's right to use private property.[65]

The revised plan upheld in *Goldberg* provided that responsibility for operation of the garage will remain with the city and the public will be given "the enforceable right to use the parking facility."[66] The court found these provisions sufficient to insure that condemnation will be for the "public use." That some of the public using the facility may also be patrons of the developer does not defeat the "public use" requirement, so long as the public has an enforceable right of use and the project is not primarily for the benefit of the private developer.[67]

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65. *Id.* at 344, 247 S.E.2d at 345.
66. 273 S.C. at 142, 254 S.E.2d at 804.
67. *Id.*