South Carolina Law Review

Volume 40
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 3

Fall 1988

Administrative Law

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SOUTH CAROLINA
LAW REVIEW

VOLUME 40 AUTUMN 1988 NUMBER 1

ADMINISTRATIVE LAW

I. ZONING DECISIONS HELD TO "FAIRLY DEBATABLE" STANDARD OF REVIEW

The *Fasano* doctrine's[1] brief but convoluted course through South Carolina law came to a halt in *Hampton v. Richland County*,[2] in which the supreme court dismissed, as improvidently granted, a writ of certiorari to review an opinion by the court of appeals.[3] The supreme court characterized all discussion of *Fasano* in the court of appeals' opinion as merely dicta.[4] By dismissing certiorari, however, the court effectively may have rejected the doctrine.

The *Fasano* doctrine arose after years of increasing skepticism among judges and legal scholars that local zoning bodies make land use decisions fairly, impartially, and with a proper concern for effects on the totality of any general zoning plan. In particular, critics objected to rezoning ordinances in which a local zoning board would settle a dispute between quarreling factions over a single parcel of land. Such rezonings traditionally have been considered legislative acts, therefore presumptively

1. *See* Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973), *overruled in part*, Neuberger v. City of Portland, 288 Or. 155, 603 P.2d 771 (1979), *reh'g denied*, 288 Or. 585, 607 P.2d 722 (1980).

2. ___ S.C. ___, 370 S.E.2d 714 (1988).

3. Hampton v. Richland County, 292 S.C. 500, 357 S.E.2d 463 (Ct. App. 1987).

4. ___ S.C. at ___, 370 S.E.2d at 714.

valid. Under the *Fasano* doctrine such ordinances are characterized as "judicial" or "quasi-judicial" acts, subject, therefore, to a stricter standard of judicial review.[5]

The disputed property in *Hampton* was an undeveloped hill outside the Columbia city limits. Its owner, Hampton, contracted to sell the land to the Krystal Company, which wished to build a fast food restaurant on the site. A neighborhood group opposed these plans. The Richland County Council (Council) settled the dispute by rezoning the property from D-1 (development district) to C-1 (office and institutional), a classification under which restaurants are not allowed. The circuit court upheld Council's decision.[6]

In 1986 the court of appeals reversed. The court followed the *Fasano* approach in holding Council's action to be quasi-judicial in nature. Thus stripped of any presumption of legislative validity, Council's decision was considered not fairly debatable but clearly arbitrary, unreasonable, and capricious.[7]

On rehearing the next year, however, the court reversed itself. Two principal concerns now caused the court to flatly reject *Fasano*:

> 1) a quasi-judicial approach would over-burden courts with "countless challenges"; and
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> 2) the authority of a zoning board's action would be debased so that every affected property owner could challenge it on entirely selfish motives; the result would be the destruction of "both the necessity and desirability of representative legislative action as well as [the reduction of] land use determination to a type of 'what's-in-it-for-me' or spot zoning scheme."[8]

Judge Gardner, who had authored the original opinion, dissented, basing his position on the following dictum quoted in *Rushing v. City of Greenville*:[9] "[I]n the final analysis the ques-

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5. *See* Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Legal Legitimacy*, 71 CALIF. L. REV. 839 (1983).

6. 292 S.C. at 503, 357 S.E.2d at 464.

7. Hampton v. Richland County, No. 0785, slip op. 33 (S.C. Aug. 25, 1986). This opinion is appendixed to the published opinion listed on rehearing. 292 S.C. at 509, 357 S.E.2d at 468.

8. 292 S.C. at 507, 357 S.E.2d at 467 (quoting Ed Zaagman, Inc. v. City of Kentwood, 406 Mich. 137, 163, 277 N.W.2d 475, 481-82 (1979)).

9. 265 S.C. 285, 217 S.E.2d 797 (1975).

tion of due process is a judicial, not legislative, one."[10] Judge Gardner viewed this language as an expansion of the "fairly debatable" standard of review to permit stricter scrutiny of the rezoning of single tracts of land.[11]

The conflict within the court of appeals, therefore, was not merely one over acceptance or rejection of *Fasano*; the more basic issue was the proper application of the "fairly debatable" standard of review in regard to rezonings of single tracts of land. Based on its construction of the *Rushing* dictum, the dissent reviewed Council's action pursuant to a complex set of eight factors.[12] The majority rejected such a strict analysis, however, reasoning that the fairly debatable standard, itself, is premised on a presumption of validity as to municipal rezoning.[13]

By dismissing certiorari the supreme court effectively upheld the court of appeals' majority view of the fairly debatable standard. Such a view is incompatible with the *Fasano* doctrine. Despite its characterizing all discussion of *Fasano* by the court of appeals as dicta, the supreme court appears to have laid to rest the doctrine in South Carolina.

Daniel J. Westbrook

II. ZONING BOARD MAY RECONSIDER PREVIOUSLY RENDERED DECISIONS

In *Bennett v. City of Clemson*[14] the Supreme Court of South Carolina held that the Board of Adjustment of the city of Clemson invalidly approved Wyant Associates' (Wyant) request for a variance to construct a multifamily development in Clemson. Despite determining that the board acted lawfully in reconsidering Wyant's request, the court found that the approval

10. *Id.* at 289, 217 S.E.2d at 799 (quoting James v. City of Greenville, 227 S.C. 565, 585, 88 S.E.2d 661, 671 (1955)).

11. 292 S.C. at 514, 357 S.E.2d at 471. A decision is not fairly debatable when it is "so unreasonable as to impair or destroy constitutional rights." Rushing v. City of Greenville, 265 S.C. at 288, 217 S.E.2d at 799 (quoting Rush v. City of Greenville, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965)).

12. 292 S.C. at 514 n.1, 357 S.E.2d at 471 n.1.

13. *Id.* at 503, 357 S.E.2d at 465 ("[T]he action of a municipality regarding the rezoning of property will not be overturned by a court if the municipality's decision is 'fairly debatable.' This is because the municipality's action is presumed to have been validly exercised . . . .").

14. 293 S.C. 64, 358 S.E.2d 707 (1987).

lacked the requisite four votes in favor of the variance. *Bennett* offers guidance for practitioners in the law of land use development by discussing two previously unaddressed issues.

On October 8, 1984, Wyant proposed a 324-unit housing development to the Clemson Planning Commission. The Commission denied the request, however, because the number of units contained in Wyant's proposal exceeded the maximum density limit in the area when combined with the units already in existence.[15] On November 5, 1984, the Clemson City Council lowered the maximum density figure.[16] Subsequently, Wyant submitted a new proposal that satisfied the 1971 density requirement but failed the stricter standard imposed by the 1984 ordinance. The Planning Commission, using the 1971 ordinance, approved Wyant's plan and recommended it to the Board of Adjustment.[17] On June 13, 1985, the Board of Adjustment denied Wyant's request for zoning approval, but after reconsideration and with the addition of two new members,[18] the Board subsequently approved the development.[19]

The supreme court first determined that the Board of Adjustment acted lawfully in reconsidering its June 13, 1985, decision. The courts of South Carolina had not previously discussed a zoning board's power to reconsider a matter once it rendered a decision.[20] By granting zoning boards such authority, however, the *Bennett* court adopts the approach employed in what appears to be a slight majority of jurisdictions.[21]

In reaching this decision, the supreme court first considered

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15. *Id.* at 65, 358 S.E.2d at 708.

16. Record at 33.

17. 293 S.C. at 65, 358 S.E.2d at 708.

18. On May 13, 1985, the Clemson City Council amended the zoning ordinance to increase the membership of the Board of Adjustment from five to seven members. The new members were added on June 24, 1985. Record at 34.

19. 293 S.C. at 66, 358 S.E.2d at 708.

20. *Id.* The issue has been addressed in a number of other jurisdictions. Many states allow reconsideration if new facts are alleged or circumstances substantially change. *See, e.g.*, Adler v. Lynch, 415 F. Supp. 705 (D. Neb. 1976); Wright v. Zoning Bd. of Appeals, 174 Conn. 488, 391 A.2d 146 (1978); Braughton v. Metropolitan Bd. of Zoning Appeals, 146 Ind. App. 652, 257 N.E.2d 839 (1970); Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975). Other states, however, prohibit reconsideration when not expressly authorized by statute. *See, e.g.*, Kethman v. Oceola Township, 88 Mich. App. 94, 276 N.W.2d 529 (1979). *Cf.* Franklin v. Iowa Dep't of Job Servs., 277 N.W.2d 877 (Iowa 1979) (agency's unemployment compensation decision not reviewable).

21. *See* cases cited *supra* note 20.

the legislation discussing the powers of the Board of Adjustment. Neither the state enabling statutes[22] nor the city zoning ordinances[23] address the Board of Adjustment's power to reconsider a matter previously decided. The court determined that the absence of a legislative prohibition against reconsideration indicated the Board had not exceeded its lawful authority by reconsidering Wyant's proposal.[24]

The court recognized the potential uncertainty created by allowing the board to reconsider prior decisions.[25] The court recommended reconsideration only in the event of "justification and good cause."[26] Further, the court found two justifications for the reconsideration: (1) both Wyant, the architect, and the attorney most familiar with the project were absent from the hearing, and (2) there was a need for additional information.[27] Therefore, it held that under the circumstances the Board of Adjustment did not abuse its discretion in reconsidering its earlier decision.

Next the court examined the validity of the Board's approval of Wyant's proposal. The court decided that the recently enacted 1984 ordinance, rather than the 1971 ordinance, applied

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22. *See* S.C. CODE ANN. §§ 6-7-710 to -830 (Law. Co-op. 1976 & Supp. 1987).

23. *See* CLEMSON, S.C., ZONING ORDINANCES art. XVI, §§ 1603 to -05 (1971); art. IX § 914 (1984).

24. The appellants, landowners in the neighborhood where Wyant proposed to develop, argued the lack of direct regulatory authorization prevented the Board from reconsidering the matter. In support of the proposition, appellants cited Bostic v. City of West Columbia, 268 S.C. 386, 324 S.E.2d 224 (1977), and Piedmont & N. Ry. v. Scott, 202 S.C. 207, 24 S.E.2d 353 (1943). The respondent, however, distinguished those cases pointing out that they involved regulatory decisions explicitly contradicting state legislation. Brief of Respondent at 5-6.

25. 293 S.C. 64, 66, 358 S.E.2d 707, 708. In support of arguments to this effect, the court cited Crawford v. Town of Winnsboro, 205 S.C. 72, 30 S.E.2d 841 (1944), and Miles v. McKinney, 174 Md. 551, 199 A. 540 (1938). Decisions from other jurisdictions also support this proposition. *See, e.g.*, Andreatta v. Kuhlman, 43 Colo. App. 200, 600 P.2d 119 (1979); Fisher v. City of Dover, 120 N.H. 187, 412 A.2d 1024 (1980). Respondent, arguing that *Crawford* was distinguishable from the case at bar, claimed that the subject matter in *Crawford*, workers' compensation decisions, is a much more precise field than the amorphous law of land use development. Brief of Respondent at 7-9.

26. 293 S.C. at 66-67, 358 S.E. 2d at 709. The court also indicated that "newly discovered evidence, fraud, surprise, mistake, inadvertence, or change in conditions would satisfy this requirement." *Id.* at 67, 358 S.E.2d at 709.

27. Respondent explained that the additional information included a buffer area to protect adjacent landowners, university student occupancy, a $1,000 developer's impact fee, construction code compliance, and regulation of design and occupancy. Record at 20, 22, 25, and 28.

in the board's reconsideration.[28] In so doing, it relied on the well-settled principle that statutory enactments are applied retroactively only if remedial or procedural in nature.[29] The court classified the 1984 voting regulations as procedural and consequently applied the 1984 ordinance retroactively.

Finally, the court found the Board's approval invalid under the 1984 ordinance. The approval was supported by four votes, one cast *in absentia.* The court noted the lack of authorization for absentee voting from both the Clemson ordinances and state enabling statutes.[30] It also explained that the Clemson zoning ordinance implicitly required the presence of all four supporters of a zoning request.[31] Finally, the court found persuasive an Alabama decision construing a similar statute requiring all concurring votes be cast while board members are present.[32] Accordingly, the court held that Wyant's request was not approved by the requisite four votes and reversed the trial court's affirmation of the Board of Adjustment's decision.

In the narrowest sense, the supreme court in *Bennett* held

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28. 293 S.C. at 67, 358 S.E.2d at 709. Both parties argued on the applicability of the 1984 ordinance, but the importance of this issue should not be overlooked. As the appellant pointed out, if the two newly-appointed members can participate but no absentee voting is permitted, Wyant's request would be denied under the 1984 ordinance but pass under the 1971 ordinance. Brief of Appellant at 10-11.

29. In South Carolina, statutory application is presumed to be prospective absent clear legislative intent to the contrary. *See* Rockton & Rion Ry. v. Davis, 159 F.2d 291 (4th Cir. 1946); Oehler v. Clinton, 282 S.C. 25, 317 S.E.2d 445 (1984); Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978); Pulliam v. Doe, 246 S.C. 106, 142 S.E.2d 861 (1965); Carolina Chemicals, Inc. v. South Carolina Dept. of Health & Environmental Control, 290 S.C. 498, 351 S.E.2d 575 (Ct. App. 1986). The principal exception to the general rule is that remedial or procedural statutes are to operate retroactively. Segars v. Gomez, 360 F. Supp. 50 (D.S.C. 1972); Merchants Mut. Ins. v. South Carolina Second Injury Fund, 277 S.C. 604, 291 S.E.2d 667 (1982).

30. Respondent argued the absence of direct legislation effects the opposite result. Respondent asserted that the proper question in such a situation was whether an absentee vote by one of the members who had voted in the initial hearing, who therefore was familiar with the case, was a reasonable exercise of the broad procedural powers granted to local boards of adjustment by S.C. CODE ANN. § 6-7-740 (Law. Co-op. 1976 & Supp. 1987). Brief of Respondent at 24-27.

31. The applicable ordinance provides: "The Board shall keep minutes of its proceedings, showing the vote of each member upon each question, *or if absent* or failing to vote, indicating such fact." CLEMSON, S.C., ZONING ORDINANCES, art. IX, § 911 (1984)(emphasis added). The court explained that by linking "if absent or failing to vote" so closely together, the ordinance contemplated the requisite four votes to be cast by members who were present.

32. Moore v. Pettus, 260 Ala. 616, 71 So. 2d 814 (1954).

that the Clemson zoning ordinance precludes absentee voting by members of the Board of Adjustment. Practitioners should realize, however, that the real significance of the decision may lie in the court's authorization of zoning boards to reconsider matters previously decided.

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