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Zoning Law

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ZONING LAW

I. COURT LIMITS DISCRETIONARY POWERS OF BOARD OF ADJUSTMENT

In *Colbert v. Krawcheck*[1] the South Carolina Supreme Court established the proper standards for a board of adjustment to use when it approves or denies an application for the adjustment of boundary lines. These standards did not exist in the Charleston Zoning Ordinance (Ordinance) prior to this decision.[2] In *Colbert* the court upheld and extended the holding of *Stevenson v. Board of Adjustment of Charleston*,[3] which limited the discretionary power of the board to grant variances and prohibited it to make determinations based on standards that are not prescribed by the local ordinances and zoning standards.[4]

Mrs. Colbert, the Petitioner, filed an application to adjust certain boundary lines with the Charleston Board of Adjustment (Board). Section 54-48(a) of the Ordinance grants jurisdiction to the Board and states that "[a]ny owner, agent or developer who proposes to adjust the boundary lines between any area . . . shall submit detailed plans . . . to the Board of Adjustment created under this chapter and no such adjusted boundary lines shall be platted of record . . . unless the board shall have approved the aforesaid adjustment . . . ."[5] The Ordinance establishes no further standards or criteria to approve lot line adjustments beyond this grant of power.

The Board denied the application and used its discretionary power because no standard existed in the Ordinance. The Board determined that the standards used to grant a variance were applicable, and that the petitioner's application did not meet the requirements. Therefore, the application had to be denied. The trial court affirmed the Board's decision and found that the variance standards were the appropriate measure of review. The court of appeals, however, did not consider the merits of the case and affirmed on the ground that Colbert did not properly appeal the use of variance standards.[6]

The South Carolina Supreme Court granted Mrs. Colbert's petition for certiorari. The supreme court disposed of the procedural bar

1. 299 S.C. 299, 384 S.E.2d 710 (1989).
2. *Id.* at 304, 384 S.E.2d at 713.
3. 230 S.C. 440, 96 S.E.2d 456 (1957).
4. *Id.* at 448, 96 S.E.2d at 460.
5. CHARLESTON, S.C., ZONING ORDINANCE § 54-48(a)(1986).
6. *Colbert*, 299 S.C. at 302, 384 S.E.2d at 712.

and held that the record properly preserved the standards issue.[7] The supreme court also reversed the court of appeals' decision, and held that the Board erred when it applied the variance standards, and that the proper standard to use to adjust a lot line is found in section 54-55 of the Charleston Zoning Ordinance.[8] The language of section 54-2 defines a variance as "[r]elief from the literal enforcement of this Chapter, permitting the use of property in a manner otherwise forbidden . . . ."[9] Thus, a variance is used only when the applicant's request does not comply with a zoning ordinance. The court stressed that in *Colbert* neither the requested adjustment of lines nor the resulting lots would have violated any ordinance, and fully complied with zoning standards.[10] The court, therefore, found that the variance standards were inapplicable, and directed the Board to apply the standards for new lot creation, which set forth all requirements for footage and street access.[11]

The court indirectly relied on *Stevenson v. Board of Adjustment of Charleston*,[12] which ruled on the Board's abuse of discretion in granting a variance, and limited its discretionary power.[13] "In exercising its discretion, the board of adjustment is not left free to make any determination whatever that appeals to it's sense of justice. It must abide by and comply with the standard prescribed by the local ordinance and zoning statutes."[14] In effect, the supreme court in *Colbert* extended this discretionary limitation concept to apply to situations in which specific standards do not exist when it required the Board to utilize the standards that are most closely designed to meet the needs of the request, as opposed to those standards the Board arbitrarily determines to use. The supreme court portrayed the Board as self-serving when Justice Toal admonished it for ruling capriciously and arbitrarily as a direct result of the pressure exerted on it by Colbert's neighbors, who opposed the proposed changes.[15] The Board's improper motivation, however, ultimately did not influence the outcome of the case. Rather, the court applied a common-sense interpretation to an unambiguous ordinance.

The court's decision in *Colbert* has a dual effect on state zoning law. In a narrow sense, the court has created new standards to govern

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7. *Id.* at 303, 384 S.E.2d at 712.
8. *Id.* at 303-04, 384 S.E.2d at 712-13.
9. CHARLESTON, S.C., ZONING ORDINANCE § 54-2 (1986).
10. 299 S.C. at 304, 384 S.E.2d at 713.
11. *Id.*, 384 S.E.2d at 712-13.
12. 230 S.C. 440, 96 S.E.2d 456 (1957).
13. *Id.* at 448, 96 S.E.2d at 460.
14. *Id.*
15. *Colbert*, 299 S.C. at 304, 384 S.E.2d at 713.

an application for the adjustment of boundary lines and these determinations will no longer be governed by the standards used to grant a variance. In a broader sense, however, *Colbert* limits the Board's discretionary application of standards and when no specific standard exists, requires the Board to apply those standards that most closely suit the particular request.

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II. PLANNING COMMISSION AND COUNTY COUNCIL MUST COMPLY WITH ZONING ORDINANCE WHEN MAKING ZONING DECISIONS

In *Turner v. Barber*[16] the South Carolina Supreme Court held that a planning commission may not recommend approval of a Planned Unit Development (PUD)[17] that does not comply with the county zoning ordinance.[18] The Richland County zoning ordinance requires all PUD applications to contain a generalized drawing and a descriptive statement before the planning commission can recommend the rezoning plan for approval to the county council. The court held that the commission's recommendation to the council was "fatally flawed" without the descriptive statement.[19]

Universal Associates (Universal) applied to have a 100 acre tract of land rezoned as a PUD. Under the county zoning ordinance, each PUD application must have a General Development Plan that consists of a drawing and a descriptive statement. When Universal submitted its application to the planning commission, however, the application did not include a descriptive statement. Despite the omission, the commission recommended the plan for approval. Universal subsequently submitted the descriptive statement to the county council, and the county council approved the rezoning plan after the third reading.[20]

Prior to the third reading, a group of homeowners challenged the suffiency of Universal's PUD descriptive statement. The homeowners claimed that the statement did not include the information required by the county ordinance. Following approval by the county council, the

16. 298 S.C. 321, 380 S.E.2d 811 (1989).

17. "The intent of *planned unit development* districts is to derive the benefits of efficiency, economy, and flexibility by encouraging unified development of large sites, while also obtaining . . . optimum service by community facilities . . . ." *Id.* at 322 n.1, 380 S.E.2d at 811 n.1 (citing RICHLAND COUNTY, S.C., CODE OF ORDINANCES, app. A, § 6-10.1 (1983)).

18. *Id.* at 324, 380 S.E.2d at 812-13.

19. *Id.* at 323, 380 S.E.2d at 812.

20. *Id.* at 322-23, 380 S.E.2d at 811-12.

homeowners challenged the decision in the Richland County Circuit Court. The circuit court upheld the council's approval of the plan. The homeowners then appealed to the supreme court the circuit court's order that upheld the rezoning ordinance.[21]

In their appeal, the homeowners argued that the commission and county council should have been required to comply with the county zoning ordinances; a presumption of validity should not attach to unreasonable and unlawful zoning decisions; and rezoning specific parcels of land should be considered a quasi-judicial rather than a legislative act.[22]

Universal argued that its failure to comply with the zoning ordinance was a technical defect similar to the defect at issue in *Smith v. Georgetown County Council*.[23] In *Smith* property owners sought to set aside an amendment to a county zoning ordinance that allowed a developer to zone a 140 acre tract into a PUD. As in *Turner*, the *Smith* PUD's conceptual plan failed to provide certain information required by the ordinance.[24] Despite a lack of the requisite information, the South Carolina Court of Appeals ruled that both the planning commission and the county council had enough conceptual information about the plan for it to comply with the zoning ordinance.[25] In *Turner*, however, Universal did not give the planning commission the essential information that the Richland Council zoning ordinance required. According to the supreme court, the omission in *Turner* presented a more significant defect than the omission in *Smith*.[26]

Under South Carolina law, zoning decisions are legislative acts and, therefore, are presumably valid.[27] Unless an act by a municipal body is arbitrary, unreasonable, or an obvious abuse of discretion, courts generally will not disturb the municipality's act on appeal.[28] Only when an ordinance is so unreasonable that it impairs a citizen's constitutional rights will courts question the validity of the govern-

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21. *Id.*

22. Brief of Appellant at iv.

23. 292 S.C. 235, 355 S.E.2d 864 (Ct. App. 1987).

24. *Id.* at 238, 355 S.E.2d at 866. (plan did not contain information on drainage, contours, location of flood and marsh prone areas, and density).

25. *Id.* at 238-39, 355 S.E.2d at 866.

26. 298 S.C. at 324, 380 S.E.2d at 812.

27. Rushing v. City of Greenville, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); Rush v. City of Greenville, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965); Bob Jones Univ. v. City of Greenville, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963), *appeal dismissed*, 378 U.S. 581 (1964).

28. *Bob Jones Univ.*, 243 S.C. at 359, 133 S.E.2d at 847; Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, 169, 72 S.E.2d 66, 68 (1952). *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

ment regulation.[29] In *Turner* the supreme court ruled that the omission of a descriptive statement of the PUD violated the county zoning ordinance and, therefore, the circuit court abused its discretion when it upheld the county's approval of the plan.[30]

The supreme court reversed the circuit court based on the homeowners' first two arguments. The planning commission and county council failed to comply with the county zoning ordinance and, therefore, the court concluded that their acceptance of the PUD plan was unreasonable and unlawful.[31] The court resolved the issue in *Turner* without addressing the homeowners' third argument which questioned the validity of a legislative approach to rezoning and which suggested the adoption of a quasi-judicial approach.

The South Carolina Court of Appeals, however, has addressed this issue. In *Hampton v. Richland County*[32] the court of appeals refused to classify municipal rezoning decisions as quasi-judicial. The court held that the rezoning "like an ordinance adopting a comprehensive zoning plan, is legislation, pure and simple."[33] The court of appeals expressly rejected the quasi-judicial approach to rezoning, which is known as the *Fasano* doctrine.[34]

In *Fasano v. Board of County Commissioners*[35] the Oregon Supreme Court held that land use planning or rezoning decisions about single tracts of land, rather than a whole city, are more like quasi-judicial decisions than legislative decisions.[36] In characterizing land use decisions as quasi-judicial acts, the Oregon court attempted to counter the pressures of private economic interests and enlarge the scope of review for decisions made by municipal zoning bodies. The Oregon court adopted a quasi-judicial approach to rezoning to achieve a more efficient and fair system of land use decision making.[37] Rezoning decisions by local authorities have a significant impact on land values, and local zoning bodies often rely on unstated land use policies to arrive at their decisions. Furthermore, when a board rezones a single tract of

29. James v. City of Greenville, 227 S.C. 565, 585, 88 S.E.2d 661, 671 (1955).

30. *Turner*, 298 S.C. at 323, 380 S.E.2d at 812 (1989); *see also* Renney v. Dobbs House, 275 S.C. 562, 564, 274 S.E.2d 290, 291 (1981) (abuse of discretion arises in cases in which the judge was controlled by error of law).

31. *Turner*, 298 S.C. at 324, 380 S.E.2d at 812-13.

32. 292 S.C. 500, 357 S.E.2d 463 (Ct. App. 1987), *cert. dismissed*, 296 S.C. 72, 370 S.E.2d 714 (1988).

33. *Id.* at 507, 357 S.E.2d at 467.

34. *Id.* at 506, 357 S.E.2d at 466-67.

35. 264 Or. 574, 507 P.2d 23, (1973) (partial overruling recognized by Norvell v. Portland Metro. Area Local Gov't Boundary Comm'n, 43 Or. App. 849, 604 P.2d 896 (1979)).

36. *Id.* at 587, 507 P.2d at 29.

37. *Id.* at 588, 507 P.2d at 30.

land, it can neglect individual rights because of the informal procedures used in the decision-making process. The combination of these factors poses a threat to the due process rights of the individuals who seek a zoning change.[38] In *City of Eastlake v. Forest City Enterprises, Inc.*[39] the United States Supreme Court considered due process requirements in the context of a legislative zoning decision. The Court upheld an Ohio zoning procedure that permitted rezoning decisions by referendum. The majority found no due process violation in the Ohio ordinance. The Supreme Court deferred to the Ohio Supreme Court's interpretation of rezoning as a legislative act.[40]

More recently, the Fifth Circuit held that decisions that affect zoning variances are presumed valid if the determination has a rational basis.[41] Although the Fifth Circuit recognized an increased property interest in variance requests, the interest was not sufficient to trigger individual due process protections. According to the court, a state's use of a quasi-judicial approach does not, by itself, raise due process issues.[42] Some courts, including the court of appeals in *Hampton*, have expressed concern about the judicial burden that would result from the increased procedural safeguards.[43] South Carolina aligns itself with the majority of states that continue to use a legislative approach for zoning decisions.[44]

Although the South Carolina Supreme Court has not directly addressed the issue, the adoption of a quasi-judicial approach most noticeably would affect the procedural safeguards required in land use decisions.[45] The concerned parties in zoning decisions would have the right to notice, the right to be represented by counsel, the right to cross-examine witnesses, and the right to have the proceedings recorded. The *Fasano* decision also suggested reviews for *ex parte* contacts with zoning board members, conflicts of interest, and other biases to ensure impartial decisionmaking. Because of the increased attention to procedural safeguards, a number of legal scholars and courts find

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38. Comment, *Zoning Amendments - The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 131-32 (1972).

39. 426 U.S. 668 (1976).

40. *Id.* at 674. A distinction exists between decisions that affect comprehensive zoning plans and zoning for specific parcels, and a quasi-judicial scheme affords greater procedural safeguards for those individuals who request zoning changes for specific parcels. *Id.* at 683-86 (Stevens, J., dissenting).

41. Shelton v. City of College Station, 780 F.2d 475 (5th Cir.), *cert. denied*, 477 U.S. 905, *cert. denied*, 479 U.S. 822 (1986).

42. *See id.* at 478-79.

43. *See* Shortlidge, *The "Fasano Doctrine": Land Use Decisions as Quasi-Judicial Acts*, 1985 INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN.

44. *Id.* § 3.03[5], at 3-40.

45. *Id.* § 3.03[2], at 3-27 to 3-33.

the quasi-judicial approach an appealing solution to the due process threats in rezoning decisions.[46]

In *Turner v. Barber* the South Carolina Supreme Court applied the established test for zoning decisions. The court achieved a *Fasano*-like result without expressly commenting on the quasi-judicial approach. The quasi-judicial scheme proposed in *Fasano* offers a reasonable safeguard for due process rights in single tract rezoning decisions and may one day be accepted in South Carolina.

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46. *Id.* § 3.02, at 3-33.