

South Carolina Law Review

Volume 44
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA
LAW*

Article 3

Fall 1992

Administrative Law

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Recommended Citation

Joseph Lee Snitzer, et. al., Administrative Law, 44 S. C. L. Rev. 1 (1992).

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Seitzer et al.: Administrative Law

SOUTH CAROLINA LAW REVIEW

VOLUME 44

AUTUMN 1992

NUMBER 1

ADMINISTRATIVE LAW

I. COURT RECOGNIZES MUNICIPALITIES' CONTROL OVER ELECTRIC SERVICE PROVIDERS

In *Berkeley Electric Cooperative v. South Carolina Public Service Commission*¹ the South Carolina Supreme Court held that a municipality may, by franchise agreement, designate an electric supplier to provide service to a newly annexed area.² The court recognized that municipalities have broad discretion to determine which suppliers may provide electricity within the corporate limits of the municipality.³

Electric service area rights have been the subject of a nearly continuous struggle for many years in South Carolina among municipalities, cooperatives, and private companies. Historically, private power companies were reluctant to provide electricity to rural areas in South Carolina and other states. Consequently, small municipalities began to combine to create public utility districts to serve people beyond the city limits.⁴ South Carolina authorized the formation of public utility districts for electric power in 1933.⁵ One successful effort to provide electricity to small collections of municipalities was the Santee-Cooper Project, which, like the Tennessee Valley Authority, purchased distribution facilities from private companies and resold those facilities to cooperatives.⁶

In May, 1935, President Roosevelt established the Rural Electrification Administration (REA) "to initiate, formulate, administer, and supervise a program of approved projects with respect to the generation, transmission, and distribution of electric energy in rural areas."⁷

1. 304 S.C. 15, 402 S.E.2d 674 (1991).

2. *Id.* at 20, 402 S.E.2d at 677.

3. *See id.* at 19, 402 S.E.2d at 677 (citing S.C. CONST. art. VIII, § 15).

4. THE RESEARCH STAFF, THE TWENTIETH CENTURY FUND, ELECTRIC POWER AND GOVERNMENT POLICY 388-89 (1948) [hereinafter ELECTRIC POWER].

5. *Id.* at 389 & n.39.

6. *Id.* at 559-60.

7. Exec. Order No. 7037 (May 11, 1935). *See generally* RICHARD HELLMAN, GOVERNMENT COMPETITION IN THE ELECTRIC UTILITY INDUSTRY 28 (1972) (explaining the impetus for forming the REA).

Concurrently, South Carolina created its own rural electrification authority to build 2,400 miles of electric lines to serve rural areas.⁸

In the second half of the twentieth century, South Carolina experienced growth in business development, and rural areas became more attractive to private electric suppliers. This expanding urban growth and rural development resulted in continuous conflict between nonprofit electric cooperatives and private power companies for opportunities to provide electric service in developing areas.

In 1969 the South Carolina legislature attempted to resolve these conflicts by passing the Territorial Assignments Act,⁹ which generally provided for the establishment of service area rights for power companies and electric cooperatives, called "electric suppliers." First, the Act authorized the Public Service Commission (PSC) to assign service areas outside of municipalities.¹⁰ Most of the assignments resulted from private agreements between electric suppliers that were approved by the PSC.¹¹ The Act also established "corridor rights" that provided electric suppliers the exclusive right to serve premises within 300 feet on either side of the provider's existing power lines or lines the provider was authorized to construct.¹² In the event that different electric suppliers had overlapping corridor rights, the customer was given a choice of suppliers.¹³

In assigning service areas in the early 1970s, the PSC left unassigned much of the territory in the vicinity of cities that owned and operated their own electric systems. Extensions of municipal electric systems in areas outside municipal limits often require the approval of the PSC under statutes predating the Territorial Assignments Act.¹⁴ Municipalities continue to expand into once-rural areas, much like private electric companies prior to the Territorial Assignments Act.¹⁵

Prior to 1984 the law was ambiguous with respect to the service area rights assigned by the PSC to areas which were subsequently annexed by a municipality. The General Assembly then amended the Territorial Assignments Act to clarify the respective rights of municipalities and

8. ELECTRIC POWER, *supra* note 4, at 458 n.70.

9. No. 432, 1969 S.C. Acts 740 (codified as amended at S.C. CODE ANN. §§ 58-27-610 to -670 (Law. Co-op. 1976 & Supp. 1991)).

10. S.C. CODE ANN. § 58-27-640 (Law. Co-op. 1976).

11. ELECTRIC POWER, *supra* note 4, at 559-60.

12. S.C. CODE ANN. § 58-27-620(1)(b) & (c) (Law. Co-op. 1976).

13. *Id.* § 58-27-620(1)(d).

14. See S.C. CODE ANN. §§ 58-27-1220 to -1280 (Law. Co-op. 1976 & Supp. 1991).

15. Annexation is the statutory means by which municipalities enlarge. See S.C. CODE ANN. §§ 5-5-10 to -20 (Law. Co-op. 1976 & Supp. 1991) (setting forth annexation process).

electric suppliers in areas annexed by municipalities.¹⁶ In light of this background, one can better understand the significance of *Berkeley Electric Cooperative v. South Carolina Public Service Commission*.¹⁷

In July 1987 the town of Summerville annexed an undeveloped parcel of land located within 300 feet of a power line owned by Berkeley Electric Cooperative ("Berkeley"). Subsequently, a developer built a restaurant on the parcel and requested electric service from South Carolina Electric & Gas Co. (SCE&G), which had an exclusive franchise agreement with Summerville.¹⁸ Berkeley filed a complaint with the PSC contending that its "corridor rights" under the Territorial Assignments Act superseded any rights of SCE&G as Summerville's franchisee.¹⁹ Berkeley also argued that, although a municipality itself may provide electric service within corporate limits, the municipality may not designate a supplier by franchise.²⁰ The PSC dismissed the complaint.

On appeal, the supreme court held that, although the Territorial Assignments Act entitles electric suppliers to provide service to premises within 300 feet of its electric lines in place on July 1, 1969, the provision applies only to premises outside the corporate limits of municipalities.²¹ Consequently, "[a]lthough [Berkeley's] lines were in place on July 1, 1969, . . . [the 'corridor rights' provision] is not applicable as the premises in question, following annexation, were *within* corporate limits."²²

Berkeley also argued that a municipality may not designate another supplier to serve within the municipality's corporate limits through a franchise agreement.²³ The court disagreed: "[Berkeley's] contention that a municipally *franchised* utility should be distinguished from a municipally-*owned* utility effectually denies Summerville's right of consent, leaving Summerville with the sole alternative of permitting [Berkeley] to provide the service."²⁴ The court concluded that SCE&G could continue to provide electric service to the newly annexed parcel.²⁵

16. Act of June 6, 1984, No. 431, 1984 S.C. Acts 1165 (codified at S.C. CODE ANN. §§ 58-27-650 to -690 (Law. Co-op. 1976 & Supp. 1991)).

17. 304 S.C. 15, 402 S.E.2d 674 (1991).

18. *Id.* at 17, 402 S.E.2d at 675.

19. *Id.* at 17-18, 402 S.E.2d at 675-76. "Corridor rights" are the rights of an electricity provider to provide service to an area within 300 feet of the provider's existing electricity lines. *Id.* at 17 & n.1, 402 S.E.2d at 675 & n.1; *see also* S.C. CODE ANN. § 58-27-620(1)(b) & (c) (Law. Co-op. 1976).

20. *Berkeley*, 304 S.C. at 17, 402 S.E.2d at 675.

21. *Id.* at 18, 402 S.E.2d at 676 (construing S.C. CODE ANN. § 58-27-620 (Law. Co-op. 1976)).

22. *Id.*

23. *Id.*

24. *Id.* at 20, 402 S.E.2d at 677.

25. *Id.*

In *Berkeley* the supreme court recognized its holdings in *City of Abbeville v. Aiken Electric Cooperative*²⁶ and *Blue Ridge Electric Cooperative v. City of Seneca*²⁷ as controlling.²⁸ In *Abbeville* the court held that an electric supplier operating in a PSC-assigned service area that is later annexed can continue to serve existing customers.²⁹ However, the court also noted that a supplier cannot extend or expand its service in an annexed area without the municipality's consent.³⁰ In *Blue Ridge* the supreme court held that a municipality could either supply electricity itself to new customers in annexed areas or consent to expanded service by the previously assigned electric supplier.³¹

Notably, the *Berkeley* court failed to cite *City of Rock Hill v. Public Service Commission*,³² an earlier case in which the supreme court held that cooperatives could not assert "corridor rights" against a municipality because such rights "may be asserted only against 'electrical suppliers' which, by definition, excludes municipalities."³³ The *Berkeley* court's reliance on article VIII, section 15 of the South Carolina Constitution makes it more difficult for a legislative change to protect "corridor rights" from municipal intrusion.³⁴

In some respects, *Berkeley* seems to limit the PSC's assignment power by allowing a municipal franchisee to extend its services into a newly annexed area regardless of a prior assignment. However, in *South Carolina Electric & Gas Co. v. Berkeley Electric Cooperative*,³⁵ the supreme court recognized a municipality's right to grant nonexclusive franchise agreements to more than one provider, thereby giving its citizens a choice of electric suppliers.³⁶ Because a franchisee must

26. 287 S.C. 361, 338 S.E.2d 831 (1985) (per curiam).

27. 297 S.C. 283, 376 S.E.2d 514 (1989) (per curiam).

28. *Berkeley*, 304 S.C. at 18-20, 402 S.E.2d at 676-77.

29. *Abbeville*, 287 S.C. at 370, 338 S.E.2d at 836.

30. *Id.* at 371, 338 S.E.2d at 836.

31. *Blue Ridge*, 297 S.C. at 289, 376 S.E.2d at 518. This decision relied on *Abbeville* and on the South Carolina Constitution, which states in pertinent part: "No law shall be passed by the General Assembly granting the right to construct and operate . . . on public property . . . [an] electric plant . . . without first obtaining the consent of the governing body of the municipality in control of the . . . public places proposed to be occupied for any such or like purpose . . ." S.C. CONST. art. VIII, § 15.

32. 299 S.C. 95, 382 S.E.2d 888 (1989).

33. *Id.* at 98, 382 S.E.2d at 889 (citing S.C. CODE ANN. § 58-27-610(1) (Law. Co-op. 1976)). The *Rock Hill* court relied on § 58-27-610(1) instead of the municipality's constitutional rights as applied in *Abbeville* and *Blue Ridge*.

34. Cf. *City of Aiken v. Aiken Elec. Co-op.*, 305 S.C. 466, 409 S.E.2d 403 (1991) (suggesting that a municipality's right to assign service areas within incorporated areas parallels the PSC's right to make assignments outside the incorporated area).

35. 411 S.E.2d 218 (S.C. 1991).

36. *Id.* at 219.

periodically renew its franchise agreement, the franchisee may offer a municipality concessions for the right to provide services.³⁷

Berkeley may also affect prior decisions such as *City of Newberry v. Public Service Commission*.³⁸ In *Newberry* the supreme court held that the Home Rule Act³⁹ repealed the right of a municipality under the Territorial Assignments Act⁴⁰ to serve industrial premises outside the corporate limits of the municipality.⁴¹ Following *Berkeley*, however, *Newberry* could have annexed the area and then served the area as part of its municipality.⁴²

The irony of this line of South Carolina cases is that private power suppliers, originally reluctant to enter rural regions, are now battling over those territories with the cooperatives that were created to fill the void, and are doing so as beneficiaries of municipal franchises. The municipality, once the weakest entity involved in the battle, is now a major decision-maker in allocating the right to provide electric service in areas that were once within the exclusive jurisdiction of the PSC. In addition, the General Assembly recently passed an act amending section 4-9-41 of the South Carolina Code to provide for joint administration of the functions of political subdivisions and adding a chapter to title 4 to provide for the consolidation of political subdivisions.⁴³ This newly enacted legislation may alter a municipality's power to control which suppliers will provide electric power within the corporate limits of the municipality.

Joseph Lee Snitzer

II. PROXIMITY TO CHURCH, SCHOOL, OR RESIDENCE ALONE SUFFICIENT GROUND FOR DENIAL OF BEER AND WINE PERMIT

In *Byers v. South Carolina Alcoholic Beverage Control Commission*⁴⁴ the South Carolina Supreme Court held that the South Carolina Alcoholic Beverage Control Commission ("Commission") may deny an application for an off-premises beer and wine sales permit based solely on the proximity of the proposed location to a church, school, or

37. See generally *ELECTRIC POWER*, *supra* note 4, at 109.

38. 287 S.C. 404, 339 S.E.2d 124 (1986).

39. See S.C. CODE ANN. § 58-27-620(2) (Law. Co-op. 1976).

40. See S.C. CODE ANN. § 5-7-60 (Law. Co-op. 1976).

41. *Newberry*, 287 S.C. at 407, 339 S.E.2d at 125.

42. *But cf.* *Duke Power Co. v. Public Serv. Comm'n*, 300 S.C. 210, 387 S.E.2d 241 (1989) (holding that, without a certificate of public convenience and necessity, a municipality could not serve contiguous territory already being served by a private utility company).

43. Act of Apr. 8, 1992, No. 319, 1992 S.C. Acts 1936.

44. 305 S.C. 243, 407 S.E.2d 653 (1991).

residence.⁴⁵ The court found that the 1986 amendment to section 61-9-320 of the South Carolina Code⁴⁶ overruled *Port Oil Co. v. Allen*.⁴⁷ Accordingly, the supreme court's holding significantly expands the discretion of the Commission to decide whether a proposed location is sufficiently suitable for beer or wine sales.⁴⁸

The respondent, William Byers, applied to the Commission for a permit to sell beer and wine for off-premises consumption at his convenience store. Many residents of the surrounding community opposed Byers's application. At the Commission's hearing on the application, citizens offered evidence that Byers's store was located within one mile of a church, a school, a children's playground, and private residences.⁴⁹ The citizens also offered evidence that only two sheriff's deputies were available to patrol the 400-square-mile county in which the store was located and that the county was already experiencing trouble with littering, vandalism, and drag racing.⁵⁰ Based on this evidence, the Commission denied Byers's application.⁵¹

Thereafter, Byers petitioned the circuit court to review the Commission's decision.⁵² Byers requested that the court remand the case to the Commission so that he could introduce additional evidence to rebut the citizens' assertions that the proposed location was incompatible with the welfare of the surrounding rural community.⁵³ Although he was

45. *Id.* at 246, 407 S.E.2d at 655.

46. Act of Apr. 21, 1986, No. 374, 1986 S.C. Acts 2654 (codified as amended at S.C. CODE ANN. § 61-9-320 (Law. Co-op. 1990)). Section 61-9-320 provides: "No permit authorizing the sale of beer or wine may be issued unless: . . . (6) The location of the proposed place of business of the applicant is in the opinion of the Alcoholic Beverage Control Commission a proper one" S.C. CODE ANN. § 61-9-320. The Commission retains sole discretion for granting permits for the sale of alcoholic beverages. *Id.* § 61-9-340.

47. 286 S.C. 286, 332 S.E.2d 787 (Ct. App. 1985) (holding that proximity to a church, school, or residence is not, standing alone, sufficient grounds for denying a permit to sell beer and wine), *overruled by Byers*, 305 S.C. 243, 407 S.E.2d 653.

48. *See Byers*, 305 S.C. at 246, 407 S.E.2d at 655. *Byers* does not present the Establishment Clause issues addressed by the United States Supreme Court in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (invalidating a Massachusetts statute that afforded churches and schools discretion effectively to veto applications for liquor licenses within 500 feet of the church or school).

49. *Byers*, 305 S.C. at 244, 407 S.E.2d at 654.

50. *Id.*

51. Record at 12.

52. *Byers*, 305 S.C. at 244, 407 S.E.2d at 654. Under § 1-23-380(a), "[a] party who has exhausted all administrative remedies available within the agency" may petition the circuit court for review of the agency's decision. S.C. CODE ANN. § 1-23-380(a) (Law. Co-op. 1986).

53. *Byers*, 305 S.C. at 244, 407 S.E.2d at 654. An aggrieved party may petition the circuit court to present additional evidence before the agency. S.C. CODE ANN. § 1-23-380(e) (Law. Co-op. 1986).

represented by counsel at the first hearing,⁵⁴ Byers claimed that he had no notice of the citizens' allegations prior to the hearing and, therefore, had no fair opportunity to offer rebuttal evidence.⁵⁵ The court remanded the case to the Commission to allow Byers an opportunity to introduce evidence to refute the claims of littering, vandalism, drag racing, and inadequate police protection in the area.⁵⁶

The Commission appealed the circuit court's order,⁵⁷ claiming the court erred in remanding the case to the Commission.⁵⁸ The Commission argued that additional evidence on the suitability of the proposed location would be immaterial and that Byers did not demonstrate a legitimate reason for failing to present this evidence at the first hearing.⁵⁹ Concluding that the trial court erred in remanding the case to the Commission, the supreme court reversed the lower court's decision.⁶⁰

The supreme court determined that the trial judge's reliance on *Port Oil Co. v. Allen*⁶¹ was an error of law because the supreme court concluded that the 1986 legislative amendment to section 61-9-320 of the South Carolina Code⁶² overruled *Port Oil*.⁶³ The court concluded that additional evidence would be immaterial to the Commission's determination because the Commission properly could have denied Byers's application solely on the basis of the store's proximity to a church, school, or residence.⁶⁴

The *Byers* decision gives virtually unbridled discretion to the Commission in issuing beer and wine permits. Accordingly, the court's interpretation of the 1986 amendment seems overly broad. Although the

54. Record at 1.

55. *Byers*, 305 S.C. at 244, 407 S.E.2d at 654.

56. *Id.* at 244-45, 407 S.E.2d at 654.

57. *Id.* at 244, 407 S.E.2d at 654.

58. Brief of Appellant at 1.

59. *Id.* at 1, 3-7. The circuit court may remand the case to the Commission to present additional evidence only if "it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency." S.C. CODE ANN. § 1-23-380(e) (Law. Co-op. 1986).

60. *Byers*, 305 S.C. at 244-45, 407 S.E.2d at 654-55. "In considering such an application, 'the [sic] taking of additional evidence is a matter within the sound discretion of the trial [sic] judge.'" *Id.* at 245, 407 S.E.2d at 654 (quoting *Cloyd v. Mabry*, 295 S.C. 86, 90, 367 S.E.2d 171, 173 (Ct. App. 1988)).

61. 286 S.C. 286, 332 S.E.2d 787 (Ct. App. 1985), *overruled by Byers*, 305 S.C. 243, 407 S.E.2d 653.

62. Act of Apr. 21, 1986, No. 374, 1986 S.C. Acts 2654 (codified as amended at S.C. CODE ANN. § 61-9-320 (Law. Co-op. 1990)).

63. *Byers*, 305 S.C. at 246, 407 S.E.2d at 655.

64. *Id.* Because the court determined that additional evidence would be immaterial to the Commission's determination, the court found it unnecessary to consider whether the respondent had a good reason for failing to introduce the evidence at the first hearing. *Id.*

legislature amended section 61-9-320 apparently in response to the *Port Oil* decision,⁶⁵ it is not clear that the legislature intended for proximity to a church, school, or residence to be the sole basis for denial of a beer and wine permit. A careful reading of the statute indicates that the legislature intended such proximity to be only one factor, not necessarily the determinative factor, in evaluating the suitability of a proposed location.⁶⁶

In *Moore v. South Carolina Alcoholic Beverage Commission*⁶⁷ the South Carolina Court of Appeals addressed essentially the same issue confronting the *Byers* court, but the court of appeals reached exactly the opposite conclusion.⁶⁸ The court in *Moore* interpreted the 1986 amendment⁶⁹ as merely allowing the Commission to consider the proximity of churches and schools as one factor in determining the suitability of the proposed business.⁷⁰ The court refused to hold "that the mere proximity of a school or church to the location is a sufficient basis on which to deny a permit."⁷¹ Judge Goolsby, writing for the court in *Moore*, reasoned that, had the legislature intended for closeness to a church or school alone to be a sufficient ground for denial of a beer and wine permit, it would have used language similar to that in the statute governing the issuance of licenses for the retail sale of alcoholic liquors.⁷² Arguably, because the legislature did not adopt such a fixed

65. *Id.* at 245-46, 407 S.E.2d at 655. The legislature amended § 61-9-320 in its session following the *Port Oil* decision. *Id.* at 245, 407 S.E.2d at 655.

66. "[T]he Commission may consider, among other factors, as indications of unsuitable location, the proximity to residences, schools, playgrounds, and churches" S.C. CODE ANN. § 61-9-320(6) (Law. Co-op. 1990) (emphasis added).

67. 304 S.C. 356, 404 S.E.2d 714 (Ct. App. 1991), *vacated*, 417 S.E.2d 555 (S.C. 1992).

68. *Id.* at 360, 404 S.E.2d at 716.

69. Act of Apr. 21, 1986, No. 374, 1986 S.C. Acts 2654 (codified as amended at S.C. CODE ANN. § 61-9-320 (Law. Co-op. 1990)).

70. *Moore*, 304 S.C. at 360, 404 S.E.2d at 716. The *Moore* court determined that proximity to a church or school could be a legitimate basis for denial of a beer and wine permit "only when the commission, after considering all pertinent circumstances, makes findings of fact, supported by substantial evidence, that the sale of beer or wine at the location is likely to be detrimental to the public interest because of its proximity to a school or church." *Id.* at 361, 404 S.E.2d at 717.

71. *Id.* (citing *Smith v. Pratt*, 258 S.C. 504, 189 S.E.2d 301 (1972); *Port Oil Co. v. Allen*, 286 S.C. 286, 332 S.E.2d 787 (Ct. App. 1985)).

72. *Id.* Section 61-3-440 of the South Carolina Code provides that no license for the retail sale of alcoholic liquor shall be granted "if the place of business is within three hundred feet of any church, school, or playground situated within a municipality or within five hundred feet of any church, school or playground situated outside of a municipality." S.C. CODE ANN. § 61-3-440 (Law. Co-op. 1990). See generally 48 C.J.S. *Intoxicating Liquors* §§ 95, 96 (1981) (discussing restrictions on liquor business based on proximity to schools or churches); 45 AM. JUR. 2D *Intoxicating Liquors* §§ 140-42 (1969) (same).

standard for the sale of beer and wine, it believed that the retail sale of beer or wine, unlike liquor, "is not necessarily obnoxious to a school or church under all conditions and in every instance."⁷³

Byers is inconsistent with other previous South Carolina decisions relating to the issuance of retail beer and wine permits. For example, in *Kearney v. Allen*⁷⁴ the court expressly declared that the determination of the suitability of a location for the sale of beer and wine "is not solely a function of geography. It involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact on the community wherein it is to be situated."⁷⁵

The *Byers* decision attempts to clarify the proper grounds on which the Commission may find a proposed location unsuitable for beer and wine sales. However, the court may have gone beyond the legislative intent of section 61-9-320. After *Byers*, a practitioner representing an applicant for a beer and wine permit in South Carolina must persuade the ABC Commission at the initial hearing that the proposed location is proper despite the location's proximity to a church, school, or residence. Once the Commission determines that the location is improper because of the closeness to a church, school, or residence, a reviewing court likely will not disturb that finding.

David E. Rothstein

III. PHYSICIAN ENTITLED TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS IN REAPPLICATION FOR HOSPITAL PRIVILEGES

In *Huellmantel v. Greenville Hospital System*⁷⁶ the South Carolina Court of Appeals held that a physician's interest in reappointment to a hospital staff is a property interest that may not be denied without due

73. *Moore*, 304 S.C. at 360-61, 404 S.E.2d at 716-17 (citing *Stewart v. Delaware Liquor Comm'n*, 74 A.2d 472 (Del. Ct. Gen. Sess. 1950)).

The *Byers* court's interpretation of § 61-9-320 as amended would allow the following illogical result: The Commission could deny a beer and wine permit for an establishment because it is situated one-half mile from a church and seven-tenths of a mile from a school, *see supra* text accompanying note 49; however, the Commission could grant a liquor license to the same business because the church and school are more than five hundred feet from the proposed location. *See* S.C. CODE ANN. § 61-3-440 (Law. Co-op. 1990). It is doubtful that the legislature intended to provide a community greater protection from beer and wine outlets than from retail liquor establishments. *See, e.g., Smith v. Pratt*, 258 S.C. 504, 510, 189 S.E.2d 301, 303 (1972).

74. 287 S.C. 324, 338 S.E.2d 335 (1985).

75. *Id.* at 326-27, 338 S.E.2d at 337 (citing *Schudel v. South Carolina Alcoholic Beverage Control Comm'n*, 275 S.C. 138, 142, 276 S.E.2d 308, 310 (1981)).

76. 303 S.C. 549, 402 S.E.2d 489 (Ct. App. 1991) (per curiam).

process.⁷⁷ The court generally discussed acceptable hospital procedures, but did not significantly modify this area of the law in South Carolina.

In May 1988, Dr. Alan B. Huellmantel applied for reappointment to the medical staff of the Greenville Hospital System ("Hospital"). The application asked Huellmantel whether he had voluntarily relinquished his staff privileges or had them revoked at any member hospital. Dr. Huellmantel responded negatively to these questions. However, the Hospital inquired about Dr. Huellmantel's status at St. Francis Hospital in Greenville and discovered that St. Francis terminated Dr. Huellmantel's privileges in July 1987 for failure to comply with recordkeeping procedures.⁷⁸

On July 12, 1988, Dr. Huellmantel met with Dr. Chandler, the chairman of the Hospital's Credentials Committee. At the meeting Dr. Huellmantel denied being terminated by St. Francis and promised to provide documents that would clarify the situation. However, Dr. Chandler had not received these documents when the Credentials Committee met approximately two weeks later. After considering Dr. Huellmantel's application and Dr. Chandler's report of his meeting with Dr. Huellmantel, the Credentials Committee recommended that the application be denied.⁷⁹

Dr. Huellmantel then requested a hearing, which was held on October 18, 1988 before a panel of five physicians. The Hearing Committee recommended denial of Dr. Huellmantel's application. Furthermore, it recommended that Dr. Huellmantel not be allowed to reapply for a period of one year and that he be required to undergo psychiatric evaluation and treatment before reapplying.⁸⁰ The Hospital's Medical Staff Council adopted the recommendations of the Hearing Committee, and Dr. Huellmantel appealed to the Hospital's Board of Trustees. After the Board approved the recommendation of the Medical Staff Council, Dr. Huellmantel brought an action alleging that the Hospital's actions deprived him of his due process rights.⁸¹ The trial court found that the Hospital had not denied Dr. Huellmantel's due process rights.⁸²

The court of appeals affirmed in part and reversed in part.⁸³ First, the court recognized that physicians have a property interest in being

77. *Id.* at 553, 402 S.E.2d at 491. The Fourteenth Amendment provides that no state shall "deprive any person of . . . property without due process of law." U.S. CONST. amend XIV, § 1.

78. *Huellmantel*, 303 S.C. at 551, 402 S.E.2d at 490. St. Francis also indicated that Dr. Huellmantel may have provided substandard care to patients. *Id.*

79. *Id.*

80. *Id.* at 551-52, 402 S.E.2d at 491.

81. *Id.* at 552, 402 S.E.2d at 491.

82. *Id.* at 551, 402 S.E.2d at 490.

83. *Id.* at 555, 402 S.E.2d at 493.

reappointed to a hospital's staff, and that a hospital may not deny privileges without complying with the procedural and substantive due process requirements of the Fourteenth Amendment.⁸⁴ Although procedural due process requirements are not technical, the following elements must be present: "(1) adequate notice, (2) adequate opportunity for a hearing, (3) the right to introduce evidence, and (4) the right to confront and cross-examine witnesses."⁸⁵ The court further noted that substantive due process requires only that a public hospital refrain from denying privileges to a physician "by rules or acts which are unreasonable, arbitrary, capricious or discriminatory."⁸⁶ Thus, if a hospital follows the procedural requirements and does not act in an arbitrary or capricious manner, the court will not examine the hospital's administrative decisions.⁸⁷

The court held that the Hospital afforded Dr. Huellmantel due process before denying his application for reappointment and requiring that he wait a year before reapplying.⁸⁸ The court reasoned that the Hospital gave Dr. Huellmantel thirty-days notice of the time and place of his hearing and adequate notice of the charges against him. The Hospital also provided Dr. Huellmantel with copies of the documents that the Medical Staff Council considered in making its decision. Additionally, the Hospital gave Dr. Huellmantel the opportunity at the hearing to introduce evidence and call witnesses, and to cross-examine the Hospital's witness.⁸⁹ Furthermore, the record contained no evidence that the Hospital acted in an unreasonable, arbitrary, or capricious manner. The Hospital based its decision on reports from another hospital, the testimony of unbiased physicians, and Dr. Huellmantel's admission that he had placed an incorrect answer on his application. Accordingly, the court held that the Hospital's denial of reappointment and the one-year waiting period before reapplication did not violate Dr. Huellmantel's due process rights.⁹⁰

However, the court held that the Hospital did violate Dr. Huellmantel's procedural due process rights by requiring him to undergo a psychiatric evaluation and treatment before he could reapply for staff privileges.⁹¹ The court focused on the fact that Dr. Huellmantel had no

84. *Id.* at 553, 402 S.E.2d at 491 (citing *In re Zaman*, 285 S.C. 345, 329 S.E.2d 436 (1985)).

85. *Id.* (citations omitted).

86. *Id.* at 553, 402 S.E.2d at 492 (citing *Zaman*, 285 S.C. at 347, 329 S.E.2d at 437).

87. *Id.* (citing *Lew v. Kona Hosp.*, 754 F.2d 1420 (9th Cir. 1985)).

88. *Id.*

89. *Id.* at 553-54, 402 S.E.2d at 492.

90. *Id.*

91. *Id.* Although the court did not specify that the Hospital violated only Dr. Huellmantel's procedural due process rights, its discussion supports this contention. See *id.* at 555, 402 S.E.2d at 492.

notice that his mental stability was in question or that psychiatric evaluation might be a prerequisite for reappointment.⁹² Moreover, the structure of the Hospital's hearing process prevented Dr. Huellmantel from receiving a full and fair hearing on his mental stability once his application reached appellate review before the Hospital's Board of Trustees.⁹³

The due process guidelines applied by the *Huellmantel* court are generally consistent with other jurisdictions.⁹⁴ However, South Carolina courts have offered very few policy reasons to support these guidelines. For example, the *Huellmantel* court cited *In re Zaman*⁹⁵ for the proposition that a physician has a property interest in being appointed to a hospital staff, but *Zaman* neither states this proposition directly nor provides any policy arguments to support the proposition.⁹⁶

In contrast to the absolute property right that the South Carolina courts seem to have granted to physicians, the Eleventh Circuit has required that a physician show his interest in obtaining additional hospital privileges is constitutionally protected: A physician "must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."⁹⁷ Under this test, a physician must show an entitlement under state law, *e.g.*, a contractual right, to the privilege before the physician may assert a claim for a due process violation of that privilege.⁹⁸ In *Todorov* the court disallowed the physician's due process claim because the physician failed to show that he was entitled under state law to obtain additional staff privileges.⁹⁹

Furthermore, South Carolina courts have not addressed the important balance between the physician's interests and the public's interest. In *Rhee v. El Camino Hospital District*¹⁰⁰ the California Court of Appeals reasoned that "[a] physician's right to pursue his livelihood free from arbitrary exclusionary practices must be balanced against other competing interests: the interest of members of the public in receiving

92. *Id.* at 554, 402 S.E.2d at 492.

93. *Id.* at 555, 402 S.E.2d at 492. Under the Hospital's appellate procedure, Dr. Huellmantel could not call witnesses to support his mental stability. *Id.*

94. *See, e.g.*, *Branch v. Hempstead County Memorial Hosp.*, 539 F. Supp. 908 (W.D. Ark. 1982) (mem.); *Huntsville Memorial Hosp. v. Ernst*, 763 S.W.2d 856 (Tex. Ct. App. 1988).

95. 285 S.C. 345, 329 S.E.2d 436 (1985).

96. *Id.* at 347, 329 S.E.2d at 437.

97. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1462-63 (11th Cir. 1991) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

98. *Id.* at 1463.

99. *See* <https://scholarcommons.sc.edu/sclr/vol44/iss1/3>

100. 247 Cal. Rptr. 244 (Ct. App. 1988).

quality medical care, and the duty of the hospital . . . to provide competent staff physicians.”¹⁰¹

Although the South Carolina Supreme Court has previously stated that “licensed physicians do not have an unqualified right to practice medicine in public hospitals,”¹⁰² neither the supreme court nor the court of appeals has elaborated upon what those qualifications are. The *Huellmantel* decision does not enumerate the situations in which a physician has a property interest in staff privileges, nor does the opinion address the possible conflicts arising between a physicians’s property right and the public’s right to quality medical care. The decision, therefore, adds little to this area of the law in South Carolina.

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