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Property Law

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PROPERTY LAW

I. COURT FINDS ABUSE OF PROCESS IN FILING OF SUIT FOR SPECIFIC PERFORMANCE AND LIS PENDENS

In *Broadmoor Apartments v. Horwitz*[1] the South Carolina Supreme Court held that the trial court properly submitted the issue of abuse of process to the jury.[2] The trial court denied the defendants' motion for a directed verdict because there was sufficient evidence that all of the defendants had participated or aided in the abuse of process.[3]

Defendant, Max Schlopy, offered to purchase an apartment complex from Broadmoor Apartments of Charleston ("Broadmoor"). The sales contract required a $75,000 deposit, which the Broadmoor principals later reduced to $50,000 at Schlopy's request. Schlopy never made the deposit, so Broadmoor notified Schlopy that it had rejected his offer. Broadmoor refused Schlopy's request for an additional reduction of the deposit.[4] Nevertheless, Schlopy attempted to assign the contract to Berkeley Square Associates, Inc. ("Berkeley").[5] Broadmoor refused to consent to the assignment, which included provisions stating that the contract was valid and that the agreed-upon deposit was $25,000. Horwitz, Berkeley's president, then issued a $50,000 draft to cover the deposit, but the account on which he made the draft had a balance of only $10. Subsequently, Horwitz sued Broadmoor for specific performance of the contract and filed a notice of lis pendens against the property. The court found that there was no enforceable contract. Broadmoor then sued Berkeley, Horwitz, and Schlopy for slander of title and abuse of process.[6] The trial court dismissed the slander of title action by directed verdict, but the jury returned a $750,000 verdict for the Broadmoor on the abuse of process claim.[7]

The *Broadmoor* court noted that the defendants' actions satisfied the elements required for an abuse of process action: "(1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the

1. 413 S.E.2d 9 (S.C. 1991).
2. *Id.* at 12.
3. *Id.*
4. *Id.* at 10.
5. *Id.* at 10 & n.1.
6. *Id.* at 10-11.
7. *Id.* at 11.

regular conduct of the proceedings."[8] The defendants' ulterior purpose was to tie up the property while they obtained additional financing and to force Broadmoor to contract with them on more favorable terms.[9] The defendants knew that there was no contract, that they had neither paid nor possessed the funds to pay the security deposit, and that they never had a loan commitment for the purchase.[10] Thus, a jury question existed as to whether the defendants willfully used the process as a form of extortion instead of as a method to protect a genuine claim on a valid contract.[11]

Some lis pendens statutes have been invalidated as unconstitutional takings because the statutes deprived property owners of the right of alienation without due process.[12] Ordinarily, an owner cannot sell or mortgage property encumbered by a lis pendens because the lis pendens makes title to the property uninsurable, thereby rendering the property unmarketable.[13] While the action related to the lis pendens proceeds through a crowded court system, a property owner may be deprived of the right of alienation without a hearing for several years.[14] "[T]he filing of a lis pendens can become a pernicious practice that has the same

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8. *Id.* (citing Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967)); *see also* Sierra v. Skelton, 414 S.E.2d 169 (S.C. Ct. App. 1992); RESTATEMENT (SECOND) OF TORTS § 682 cmt. b (1976). *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 121, at 898 (5th ed. 1984).

9. *Broadmoor*, 413 S.E.2d at 12.

10. *See id.*

11. *Id.*; *see also* S.C. CODE ANN. § 15-11-10 (Law. Co-op. 1976) ("In an action affecting the title to real property the plaintiff . . . may file . . . a notice of the pendency of the action . . . ."); Lebovitz v. Mudd, 293 S.C. 49, 358 S.E.2d 698 (1987) (holding that lis pendens was properly filed against property that was the subject of a fraudulent conveyance action); Armstrong v. Carwile, 56 S.C. 463, 35 S.E. 196 (1900) (holding that lis pendens is authorized only when action affects real estate); Hursey v. Hursey, 284 S.C. 323, 326 S.E.2d 178 (Ct. App. 1985) (holding that lis pendens is proper to protect property during pendency of divorce action). *See generally* KEETON ET AL., *supra* note 8, at 898.

12. *See, e.g.,* Connecticut v. Doehr, 111 S. Ct. 2105 (1991) (holding unconstitutional a lis pendens statute authorizing an *ex parte* prejudgment attachment of real estate without requiring prior notice, a pre-attachment hearing, or a showing of exigent circumstances). *See generally* Valerie L. Castle, Note, *After* Malcom v. Superior Court *and* Peery v. Superior Court*: A Due Process Analysis of California Lis Pendens*, 70 CAL. L. REV. 909, 919-28 (1982) (discussing California lis pendens statute and due process).

13. *See Doehr*, 111 S. Ct. at 2113; DeLeo v. Anthony A. Nunes, Inc., 546 A.2d 1344, 1347-48 (R.I. 1988), *cert. dismissed and cert. denied*, 489 U.S. 1074 (1989).

14. *See generally* Castle, *supra* note 12, at 911.

effect as attaching one's property without the benefit of a court hearing."[15]

Because a lis pendens prevents alienation of property, it has the potential for abuse. A party may file a groundless suit using a lis pendens as leverage to force a property owner to settle a claim that may be unrelated to the property.[16] However, filing a lis pendens without a colorable claim "is done at the filer's peril";[17] if the underlying suit is without merit, the property owner can file an abuse of process suit to recover any damages resulting from the owner's inability to convey the property while encumbered by the lis pendens.[18] In *Broadmoor*, for example, the lis pendens effectively tied up Broadmoor's property for one and one-half years, although the suit brought by the defendants was without merit.[19] Broadmoor's $750,000 verdict is a warning for plaintiffs to file a lis pendens only when they have a colorable claim to the property, else face the risk of being liable to the owner for abuse of process.[20]

An unsettling aspect of *Broadmoor* is the court's extension of liability to those who "knowingly participate, aid, or abet in the abuse," as well as to joint tortfeasors who advise, consent or ratify the acts.[21] This liability generally does not extend to an attorney unless the attorney willingly institutes a malicious action for her client;[22] however, the exact line between legitimate advocacy and malicious prosecution is unclear. In *Gaar v. North Myrtle Beach Realty Co.*[23] the South Carolina Court of Appeals held that an attorney is immune from liability to third

15. *DeLeo*, 546 A.2d at 1347.

16. *See* Ruiz v. Varan, 797 P.2d 267 (N.M. 1990) (noting that defendant's action for breach of contract to recover a real estate commission did not concern a claim of title to the property; however, because defendant filed a lis pendens, property owner was unable to sell the property, obtain title insurance, or use it as collateral for about thirty-three months).

17. *DeLeo*, 546 A.2d at 1348.

18. *Id.* at 1347 (noting that defendant filed lis pendens not to protect a property right, but to derail a land parcel's development).

19. Broadmoor Apartments v. Horwitz, 413 S.E.2d 9, 11 (S.C. 1991).

20. The verdict in *Broadmoor* was based upon a reduction in the value of the property from the time Schlopy agreed to purchase it to the time of trial. Record at 620.

21. *Broadmoor*, 413 S.E.2d at 11-12.

22. *See* Gaar v. North Myrtle Beach Realty Co., 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986); *see also* Hoppe v. Klapperich, 28 N.W.2d 780, 791 (Minn. 1947). *See generally* 1 AM. JUR. 2D *Abuse of Process* § 19 (1962).

23. 287 S.C. 525, 339 S.E.2d 889 (Ct. App. 1986).

persons if the attorney performs authorized activities in good faith.[24] Judge Bell, writing for the court, noted that holding an attorney liable to a third party for malicious prosecution when the attorney overzealously advocates his client's position would inhibit free access to the courts.[25] Nevertheless, a plaintiff may bring a cause of action for abuse of process against the attorney's client; the client may in turn sue her attorney for malpractice if the attorney negligently filed an unwarranted claim.[26] Furthermore, an attorney who knowingly and in bad faith files a frivolous claim may be subject to discipline.[27]

The South Carolina Supreme Court recognizes an action for abuse of process when a party willfully uses process for an ulterior purpose not proper in the regular conduct of the proceedings.[28] A lis pendens is especially susceptible to abuse because of its ability to prevent a conveyance of property for a long period without a hearing. An attorney who advises her client to file a lis pendens should examine whether the underlying claim is meritorious; otherwise, the attorney could face a malpractice suit or perhaps disciplinary action.

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II. DEVELOPER NOT ENTITLED TO VESTED RIGHTS IN ZONING CLASSIFICATION

In *DeStefano v. City of Charleston*[29] the South Carolina Supreme Court held that a developer does not acquire vested rights in a zoning classification when a change in the zoning would cause no hardship for the developer.[30] In addition, the court held that a municipality is not estopped from downzoning a developer's property after the developer relied on statements of city officials who were acting beyond the scope

24. *Id.* at 528-29, 339 S.E.2d at 889.

25. *Id.* at 529, 339 S.E.2d at 889 (citing Cisson v. Pickens Sav. & Loan Ass'n, 258 S.C. 37, 186 S.E.2d 822 (1972)).

26. *Id.* at 530, 339 S.E.2d at 890.

27. *Id.*; *see also* S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT 3.1 & cmt. (stating that an action is frivolous if the client brings it "for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action by a good faith argument for an extension, modification or reversal of existing law").

28. *Broadmoor*, 413 S.E.2d at 11.

29. 304 S.C. 250, 403 S.E.2d 648 (1991).

30. *Id.* at 255, 403 S.E.2d at 651.

of their governmental authority.[31] The *DeStefano* court relied on *Friarsgate, Inc. v. Town of Irmo*[32] and adopted the majority rule for determining when a landowner acquires vested rights in a zoning classification.[33]

DeStefano, a developer, bought a tract of land on James Island. The City of Charleston ("City") annexed the land[34] and zoned the property for multifamily residences. Thereafter, the City Engineering Department approved the plans for DeStefano's proposed forty-lot subdivision, and the City Planning and Zoning Commission ("Commission") approved the plat for this development. DeStefano never recorded this plat because an adjacent property owner disputed the boundary where DeStefano planned to grant a drainage easement to the City. DeStefano subsequently relinquished his claim to the disputed property, believing that the City would not require a drainage easement from him if he no longer owned the ditch. The Deputy City Engineer erroneously affirmed DeStefano's belief.[35]

After DeStefano revised the previous plat by omitting the easement and adding twelve new lots, he submitted this new plat for recording. Unaware that the revised plat was different from the previously approved one, the Zoning Administrator mistakenly told the Deputy City Engineer that the Commission had approved the plat. The Deputy City Engineer, ignorant of the added lots, stamped the plat for recording. DeStefano recorded the revised plat and began to transfer lots from the new plat. However, the City Staff subsequently noticed that the revised plat had never been properly approved, so the Staff submitted the plat to the Commission for the necessary approval.[36]

At the Commission's meeting to approve the revised plat, residents living near the development expressed concern that the development might aggravate drainage problems in the area. Because of these concerns, the Commission postponed approval of the plat and refused to issue any new building permits in the subdivision until DeStefano granted the City a drainage easement. DeStefano replatted the subdivision for single family residences and agreed to provide a drainage easement. The Commission conditionally approved this third plat subject to final

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31. *Id.* at 257-58, 403 S.E.2d at 653.

32. 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986).

33. *See infra* notes 50-53 and accompanying text (discussing the *Friarsgate* decision and the "majority view").

34. DeStefano sought the annexation into the City because of the tougher drainage requirements of the County of Charleston. *DeStefano*, 304 S.C. at 251, 403 S.E.2d at 649.

35. *Id.* at 251-52, 403 S.E.2d at 649-50.

36. *Id.* at 252-53, 403 S.E.2d at 650.

verification of the new drainage calculations. DeStefano never recorded this plat, but the City subsequently rezoned the property for single-family residences.[37]

DeStefano brought suit against the City challenging the rezoning of the property and the refusal to issue building permits.[38] The trial court ruled for the City on all issues.[39] On appeal, DeStefano claimed that he had a vested right in the original multifamily classification.[40] In addition, DeStefano claimed that the City was estopped from refusing to issue new building permits because he had relied on the City's erroneous recordation of the second plat under the multifamily zoning classification.[41]

The supreme court held that DeStefano did not acquire vested rights in the multifamily zoning classification because "DeStefano suffered no hardship from rezoning."[42] The court noted that DeStefano had voluntarily changed the subdivision to single-family lots and that, because he had made only preliminary improvements to the development, he could sell the land to a variety of potential buyers.[43]

The court also rejected DeStefano's estoppel argument. The court held that the City was not estopped from rezoning the property because the Zoning Administrator and the Deputy City Engineer acted beyond the scope of their governmental authority by allowing DeStefano to record the revised plat.[44] As the court noted: "'No estoppel can grow out of dealings with public officers of limited authority, and the doctrine of

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37. *Id.* at 253, 403 S.E.2d at 650-51.

38. *Id.* at 253, 403 S.E.2d at 651.

39. *Id.*

40. *Id.*

41. *Id.* at 257-58, 403 S.E.2d at 653. DeStefano also argued that the rezoning of his property was arbitrary and capricious, but the court held that the City's decision to rezone to single-family residential was a "fairly debatable" government decision. *Id.* at 255-56, 403 S.E.2d at 652 (citing Rushing v. City of Greenville, 265 S.C. 285, 217 S.E.2d 797 (1975)). Finally, DeStefano claimed that the City's refusal to issue additional building permits was a temporary taking. However, the court dismissed this claim as without merit because DeStefano did not show that the City's actions on the drainage problem were unwarranted. *Id.* at 253-55, 403 S.E.2d at 652-53.

42. *Id.* at 254, 403 S.E.2d at 652 (citing Friarsgate v. Town of Irmo, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986)).

43. *Id.* at 254-55, 403 S.E.2d at 651; *see also* F.B.R. Investors v. County of Charleston, 303 S.C. 524, 402 S.E.2d 189 (Ct. App. 1991) (holding that a developer did not acquire vested rights in property that was rezoned prior to the second phase of development because the developer had not obtained building permits and had done little work on phase two in reliance on the original zoning classification).

44. *DeStefano*, 304 S.C. at 257, 403 S.E.2d at 653.

equitable estoppel cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of . . . one of its officers or agents.'"[45]

Unfortunately for developers, *DeStefano* leaves unclear exactly what a landowner must do to establish a nonconforming use and thereby acquire vested rights in a zoning classification. For years South Carolina subscribed to a variation of the minority rule that rights may vest despite a municipality's failure to issue a building permit.[46]

In *Pure Oil Division v. City of Columbia*[47] the South Carolina Supreme Court held that property owners acquired vested rights in the prior zoning classification before a permit was issued because the landowners substantially altered their position in reliance on the original zoning classification.[48] The court concluded that there is "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 property owner relies on the right to use his property in

45. *Id.* at 257-58, 403 S.E.2d at 653 (quoting Farrow v. City Council, 169 S.C. 373, 382, 168 S.E. 852, 855 (1933)). However, the court stressed that "'[a] governmental body is not immune from the application of the doctrine of estoppel *where its officers or agents act within the proper scope of their authority.*'" *Id.* at 258, 403 S.E.2d at 653 (quoting South Carolina Coastal Council v. Vogel, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987)); *cf.* Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S.E.2d 716 (1979) (holding that a municipality was estopped from refusing to issue a building permit). *See generally* Grayson P. Hanes & J. Randall Minchew, *On Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373 (1989) (discussing the doctrine of zoning estoppel).

46. *See, e.g.*, Pure Oil Div. v. City of Columbia, 254 S.C. 28, 173 S.E.2d 140 (1970); *see* discussion *infra* notes 47-49 and accompanying text. *See generally* Lynn Ackerman, Comment, *Searching for a Standard for Regulatory Takings Based on Investment-Backed Expectations: A Survey of State Court Decisions in the Vested Rights and Zoning Estoppel Areas*, 36 EMORY L.J. 1219 (1987) (providing an excellent overview of vested rights approaches in different jurisdictions); DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 434 (3d ed. 1990). Absent a countervailing public interest, under the minority rule rights vest when a landowner files a building permit application that adheres to then-existing zoning ordinances. The property owner is deemed to have relied on the prior zoning classification, and the government is estopped from denying the permit. Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 396 (Utah 1980). *But cf.* Hanes & Minchew, *supra* note 45, at 379 ("Vested rights and estoppel law are so amorphous that attempts to delineate majority and minority rules are practically useless.").

47. 254 S.C. 28, 173 S.E.2d 140 (1970).

48. *Id.* at 33-34, 173 S.E.2d at 142-43.

accordance with zoning regulations applicable at the time of an application for the permit.[49]

In its analysis, the *DeStefano* court ignored *Pure Oil* and based its decision on *Friarsgate, Inc. v. Town of Irmo*.[50] The *Friarsgate* court applied what many commentators call the "majority rule," under which the landowner acquires vested rights to the zoning classification if, "'in reliance upon a permit *validly issued*, he has, in good faith, (1) made a substantial change of position in relation to the land, (2) made substantial expenditures, or (3) incurred substantial obligations.'"[51] The court determined that, because the developer failed to obtain permits for all fourteen buildings at once, the developer was not obligated to build the entire project; therefore he acquired no vested rights.[52]

Ironically, both *Friarsgate* and *DeStefano* concluded that a developer's cautious business attitude indicated that the developer was not committed to completing the development under the original zoning classification.[53] Thus, developers are faced with a dilemma because "there is no predictable point short of adjudication which separates reliance that is less than 'substantial' from the reliance sufficient to result in a vested right or to support an estoppel."[54] Developers must either construct projects rapidly, or assume the risk that a municipality might downzone the property.

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49. *Id.* at 34, 173 S.E.2d at 143.

50. 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986). In *Friarsgate* a developer purchased a tract of land in a municipality before the municipality had enacted any zoning regulations. After the developer completed plans for a condominium project, prepared the land, acquired building permits for five units (one building), and began constructing the piers and foundation of the complex, the municipality enacted zoning regulations that prohibited condominiums. *Id.* at 268, 349 S.E.2d at 892-93.

51. *Id.* at 269, 349 S.E.2d at 893 (emphasis added) (quoting 4 EDWARD H. ZEIGLER, JR. ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 50.03[3] (1986)).

52. *Id.* at 272, 349 S.E.2d at 895; *see also* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 553 P.2d 546 (Cal. 1976) (holding that, under the majority rule, a developer's expenses of $2,082,070 and liabilities of $740,468 were not sufficient to establish vested rights absent the issuance of building permits), *cert. denied* 429 U.S. 1083 (1977).

53. *See Friarsgate*, 290 S.C. at 272, 349 S.E.2d at 895 (noting that Friarsgate's "decision to build the entire project was contingent on the financial success of the first five units. If market response to the first units was poor, the project would not be completed."); *DeStefano*, 304 S.C. at 255, 403 S.E.2d at 651 ("It appears that DeStefano was responding to what the market would bear, as opposed to pursuing a comprehensive development scheme.").

54. Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 392 (Utah 1980).

South Carolina needs a more equitable and more predictable vested rights rule. The *Friarsgate* approach, which requires both "substantial" obligations or expenditures and the issuance of a permit, offers no predictability for developers who must spend large sums of money on projects before obtaining building permits. Developers' losses caused by this unsettled law may ultimately stifle economic development and increase housing costs. Nonetheless, local governments must retain zoning powers to screen potential nuisances and environmental hazards. Although the "majority rule" used in South Carolina fails to meet these goals, approaches that allow rights to vest without the issuance of building permits lack the predictability necessary to protect both the public and private sectors.[55]

One of many possible solutions to South Carolina's problematic vested rights law is the development agreement.[56] A development agreement is a contract between a municipality or county and a developer, which allows a developer to "insulate a development project from a change in regulations."[57] These agreements allow local governments and residents to voice their concerns before the developer expends substantial time and money on a development project.[58] Several states have adopted this approach in their attempts to solve the continuing problem of vested rights.[59] Given the current state of South Carolina vested rights law, legislative involvement may be the best solution to this real estate development problem.

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55. *See, e.g.*, Russell v. Guilford County, 397 S.E.2d 335 (N.C. 1990) (holding that the issuance of a building permit is not the determinative factor because a sufficient amount of reliance on the zoning classification is all that is necessary to acquire vested rights in that classification). The North Carolina standard is essentially the same as South Carolina's under *Pure Oil*, discussed *supra* notes 47-49 and accompanying text. Similarly, Georgia does not require that a permit be issued in order for zoning rights to vest. *See, e.g.*, City of Atlanta v. Westinghouse Elec. Corp., 246 S.E.2d 678 (Ga. 1978) (holding that a land owner has a vested right in the zoning classification at the time the land owner applies for a permit).

56. *See generally* CHARLES L. SIEMON ET AL., VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS 48-88 (1982) (discussing development agreements and other approaches to vested rights problems).

57. SIEMON ET AL., *supra* note 56, at 84.

58. *See* MANDELKER & CUNNINGHAM, *supra* note 46, at 437-38.

59. *See, e.g.*, FLA. STAT. ANN. ch. 163.3225(1) (Harrison 1989) (providing for "at least two public hearings").