1970

Zoning-Non-Conforming Use, 22 S.C. L. Rev. 844 (1970)

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RECENT DECISIONS

ZONING—Nonconforming Use—Owner of nonconforming use has vested right to extend use from part to entirety of tract after tract has been annexed by municipality and zoned residential. *Conway v. City of Greenville* (S.C. 1970).

Between 1953 and 1957, the plaintiff and her husband purchased a number of plots of land totalling sixteen acres, approximately six acres located within and ten acres without the city limits of Greenville. In 1954 the plaintiff began a construction business on the then acquired portion of this tract. In addition to the company's office and warehouses, she built two small residences for members of the family and developed a small private lake. Since the plaintiff's business was a sizeable one, a large quantity of equipment and materials was stored in the open on the tract, but not all of the tract was actually used for business purposes.

In 1963 the remaining ten acres was annexed to the City of Greenville and, pursuant to zoning ordinances, zoned "A-1 Single-family dwelling district." In response to this, the plaintiff petitioned for a rezoning of the entire tract; however, only a small portion fronting on a heavily travelled highway was rezoned "H Light industrial district." The plaintiff did not appeal, but continued to use the tract for business purposes as she had before. The plaintiff later negotiated an agreement whereby a shopping center fronting on the highway would be built on the tract. The proposed shopping center would, however, extend from the "H Light industrial district" onto the land zoned "A-1 Single-family dwelling district" where it would not be permitted. The plaintiff's application for a rezoning of the area in question to "E-1 Shopping center district" was recommended by the City Planning and Zoning Commission, but was subsequently rejected by the City Council of Greenville. The master in equity for Greenville County filed a report recommending relief, but the trial court reversed and dismissed the plaintiff's complaint. The plaintiff then appealed to the South Carolina Supreme Court where the City of Greenville contended that the plaintiff's business should be confined to its present area and not be allowed to extend to the entire tract.[1]

1. In her appeal to the Supreme Court of South Carolina, the plaintiff asserted that she was entitled to a rezoning as a matter of constitutional right since her property was in use in a higher zoning category at the time the property was annexed into Greenville. She also claimed that the refusal of

The court, however, found for the plaintiff and *held* that the nature of her business was such that she had a vested right to extend her construction business activities to the entire tract. *Conway v. City of Greenville*, 173 S.E.2d 648 (S.C. 1970).

In order to protect property owners from retroactive application of zoning ordinances that destroy existing uses, the law recognizes the nonconforming use.[2] The term, nonconforming use, refers to certain property which is excepted from the application of zoning regulations. Professor Rathkopf, cited by the court in *Conway*,[3] explains the reason for such an exemption:

> If, prior to the adoption of a zoning restriction (either in an original zoning ordinance or an amendment thereto) property was used for a then lawful purpose or in a then lawful manner which the ordinance would render thereafter prohibited and nonconforming, such property is generally held to have acquired a vested right to continue such non-conforming use or non-conforming structure.[4]

In South Carolina the right to continue a nonconforming use of or on one's property is a vested one and was recognized as such in *James v. City of Greenville*.[5] This case dealt with the authority of a municipality to enact a zoning ordinance which would restrict the use of private property. After indicating that the authority to zone is derived from the police power, the *James* court stated that the power to enact zoning ordinances was not unlimited and could not be used to suppress or remove a previously established business from a residential district without a factual showing that the continuation of the "business would be detrimental to the public health, safety, morals or general welfare."[6]

In 1967 the General Assembly of South Carolina passed an act providing for local and regional comprehensive zoning and

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the city council to rezone her property was an abuse of discretion in that it was an arbitrary and unreasonable decision. For these reasons the plaintiff sought to have her application for rezoning approved in accordance with her request for use as a shopping center. The South Carolina Supreme Court limited its decision to a determination of whether or not the plaintiff had acquired a vested right to continue her presently nonconforming use on the entire tract. The court left unanswered the question as to whether or not the plaintiff could now use the tract for a shopping center.

2. 2 A.H. RATHKOPF & C.A. RATHKOPF, THE LAW OF ZONING AND PLANNING ch. 58 § 1 (3d ed. 1966) [hereinafter cited as RATHKOPF].
3. 173 S.E.2d at 651.
4. RATHKOPF ch. 58, § 1.
5. 227 S.C. 565, 88 S.E.2d 661 (1955).
6. *Id.* at 584-85, 88 S.E.2d at 671.

planning programs[7] which enables municipalities and counties to adopt zoning regulations in conformity with the conditions and stipulations of the act. One section of the act describes nonconformities and how they may be regulated.

> The regulations may provide that land, buildings and structures and the uses thereof which are lawful at the time of the enactment or amendment of zoning regulations may be continued although not in conformity with such regulations or amendments, hereinafter called a nonconformity. The governing authority of any municipality or county may provide in the zoning ordinance or resolution for the continuance, restoration, reconstruction, extension, or substitution of nonconformities. Such governing authority may also provide for the termination of any nonconformity by specifying the period or periods in which the nonconformity shall be required to cease or brought into conformance, or by providing a formula whereby the compulsory termination of nonconformities may be so fixed as to allow for the recovery or amortization of the investment in such nonconformity.[8]

This statute in conjunction with the *James* case, which requires a factual showing that a nonconforming use would be "detrimental to the public health, safety, morals or general welfare"[9] before the use may be removed, provides guidelines for the judiciary in South Carolina to determine whether a nonconformity may or may not be eliminated depending on the factual situation and circumstances.

In dealing with nonconforming uses, the South Carolina Supreme Court must, therefore, balance two opposing interests. First, the court is under a duty to ensure that the vested rights of an individual property owner are protected from unconstitutional infringement resulting from the restrictive provisions of a zoning ordinance passed after the owner has commenced his presently nonconforming use of the property. Second, the court must help promulgate the general policy of restricting and eliminating nonconforming uses in order to promote the general zoning scheme.[10] The *Conway* case reflects the court's continu-

7. S.C. CODE ANN. §§ 14-341 to -350.46 (Supp. 1969).
8. S.C. CODE ANN. § 14-350.17 (Supp. 1969).
9. 227 S.C. at 584-85, 88 S.E.2d at 671.
10. RATHKOPF ch. 60, § 1.

ing attempt to maintain this balance by resorting to a determination based on the facts of a given situation.

In reaching its decision in *Conway*, the South Carolina Supreme Court employed a flexible formula which was first stated in the New Jersey case of *Gross v. Allan*.[11] In that case the Appellate Division of the Superior Court of New Jersey held that a property owner's display of single used automobiles at his service station from time to time, prior to the enactment of a zoning ordinance, did not establish a nonconforming use of the property as a used automobile sales lot. The New Jersey court stated:

> The criterion is whether the nature of the incipient nonconforming use, in the light of the character and adaptability to such use of the entire parcel, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance.[12]

The South Carolina Supreme Court reviewed the facts surrounding the case and found that the extension of the plaintiff's use to the entire tract was implied, given the "character of the tract as business property and its adaptability to such use."[13] The court concluded, therefore, that an appropriation of the entirety for the plaintiff's use prior to the adoption of the zoning ordinance was implied from the facts and circumstances of the case.

After deciding that a nonconforming use within a single tract of land may be extended to the entire tract, the *Conway* court elaborated on the powers of the judiciary to review discretionary decisions of local zoning authorities. Prior to this case, the South Carolina court gave great weight to the findings of local authorities and stated that the court would only exercise its power to declare an ordinance invalid if the ordinance or regulation was so unreasonable as to impair or destroy constitutional rights; even then the power would be exercised "carefully and cautiously."[14] In *Conway* the court appears to have exerted its power of review with less restraint. Citing *James v. City of*

11. 37 N.J. Super. 262, 117 A.2d 275 (1955); Annot., 87 A.L.R.2d 22 (1963); 58 AM. JUR. *Zoning* § 151 (1948); 101 C.J.S. *Zoning* § 192 (1958); RATHKOPF ch. 60, § 2.

12. 37 N.J. Super. at 272, 117 A.2d at 280.

13. 173 S.E.2d at 651.

14. 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); Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, 174, 72 S.E.2d 66, 70 (1952).

Greenville, the *Conway* court emphasized that "the determination of whether such ordinances deprive a citizen of constitutional rights is a judicial function and not legislative."[15] In accounting for its power of review, the court made no mention of a presumption in favor of local authorities or of the careful and cautious exercise of the power of review as the earlier cases had.[16] It seems probable that the court, in so doing, was qualifying its previous decisions by stating that it would intervene when it sensed a serious injustice had been forced upon an individual because of an indiscretion or an unreasonable or arbitrary decision by a local authority.

The court in *Conway* concluded that a property owner has a vested right to pursue his nonconforming use by extending the use from a part to the entirety of the parcel; however, he may do so only if the entire parcel is adaptable to the use which predominated in the previously limited portion.[17] The court left open the question of whether or not the "A-1 Single-family dwelling district" should be rezoned for commercial purposes so as to allow the construction of the proposed shopping center. Whether the plaintiff now has a right to use the tract for the construction of a shopping center is for the City of Greenville to determine, subject once again to the review of the courts. Should the city refuse to grant a rezoning and claim that a willful discontinuance of the plaintiff's current nonconforming use (removal of her construction business in order to build a shopping center) extinguishes that use, the South Carolina Supreme Court may have the opportunity to review the case again in light of these possible developments.

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15. 173 S.E.2d at 652.
16. *See* note 14 *supra*.
17. 173 S.E.2d at 651.