

1979 WL 43617 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 25, 1979

*1 D. Reece Williams, III, Esquire
Assistant County Attorney
Richland County
Post Office Box 4156
Columbia, South Carolina 29240

Dear Mr. Williams:

Frank Sloan has referred your letter of September 7, 1979, to me for reply. You have requested an opinion as to what result should ensue when certain provisions of the state Horizontal Property Act ([§ 27-31-10 et seq., 1976 Code of Laws](#)) and the Richland County Zoning Ordinance conflict. The facts and issues are set forth in the first seven numbered paragraphs of your letter, which are copied below.

'1. Carnaby Square Apartments is a 150 unit apartment complex constructed in Richland County in 1972, prior to the enactment of the Richland County Zoning Ordinance.

2. With the enactment of zoning by Richland County in 1977, the land comprising Carnaby Square Apartments was zoned RG-2, which classification allows a density of 150 units for group housing projects. Either apartments or condominiums are considered to be group housing.

3. The Richland County Zoning Ordinance provides for certain distances between buildings within a group housing project, as set forth in Sections 7-4.3(4), (6) and (7) of the Richland County Zoning Ordinance. Certain of the buildings in the Carnaby Square Apartment complex do not meet the distance requirements set forth in the Act; since the project was constructed prior to the enactment of the Zoning Ordinance, the project is not in violation of the Zoning Ordinance but is considered non-conforming as to certain of the distances between the buildings.

4. The Zoning Ordinance requires that if any non-conforming structure is more than 75% destroyed by fire or other casualty, reconstruction can be accomplished only after a variance is granted by the Richland County Zoning Board of Adjustment (see Section 5-1.2(6) of Richland County Zoning Ordinance).

5. The Horizontal Property Act of South Carolina requires reconstruction of a project unless it is more than two-thirds destroyed by fire or any other disaster. [Section 27-31-250, South Carolina Code of Laws, 1976](#) provides inter alia 'reconstruction shall not be compulsory where it comprises the whole or more than two-thirds of the property.'

6. There are 24 buildings comprising the Carnaby Square Apartment project (soon to be in the Carnaby Square Horizontal Property Regime). In the event any structure is more than 75% destroyed but the entire project is less than 66-2/3% destroyed, the Regime Owner's Association would be required by the Horizontal Property Act to reconstruct any damaged structures as they were originally constructed, while the Richland County Zoning Ordinance would prohibit such reconstruction without first obtaining a variance from the Richland County Board of Adjustment.

7. The owner of the project has been required by a local lending institution to clarify the above conflict of laws question prior to converting the project under the Horizontal Property Act. The Zoning Board of Adjustment has expressed some reluctance to grant a variance as requested prior to the actual destruction of any structure as contemplated in the Zoning

Ordinance. It appears necessary to obtain an opinion of the South Carolina Attorney General as to the conflict of laws involved so that the Richland County Zoning Board of Adjustment may grant a variance prior to any casualty actually occurring.'

*2 This opinion will assume that § 27-31-250 does in fact require reconstruction where the property is adequately insured and less than two-thirds destroyed. The question presented is whether, assuming such to be the case, Richland County may prohibit that which the statute requires, albeit only in cases in which reconstruction would constitute a nonconforming use.

While the question is not entirely free from doubt, it appears that this situation is similar to that in [Law v. County Board of Spartanburg](#), 148 S.C. 229, 146 S.E.12 (1928). In that case, the legislature directed the construction of a tuberculosis hospital in a location in Spartanburg County which was to be determined by the Board of Trustees of the Spartanburg General Hospital. The Trustees selected a site within the City of Spartanburg. The City thereupon enacted an ordinance prohibiting the erection of such a hospital, in effect declaring it to be a nuisance. The Court held as follows: 'That which the State authorizes, directs, requires, licenses, or expressly permits, a municipality is powerless to prohibit.' 148 S.C. 229, at 233.

The key to the matter, it would seem, is that the legislature (under the state of the law which is here assumed) has required reconstruction under certain circumstances with no exception to comply with local zoning regulations. It is therefore the opinion of this Office that Richland County may not require a variance in the event that reconstruction is required under the South Carolina Horizontal Property Act.

Sincerely yours,

Kenneth P. Woodington
Assistant Attorney General

1979 WL 43617 (S.C.A.G.)

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.