1978 WL 35112 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
September 14, 1978

***1** James A. Bell, Esquire
216 Parler Avenue
Post Office Box 905
St. George, South Carolina 29477

Dear Mr. Bell:
In response to your request for an opinion concerning the authority of either the Dorchester County Council or the Subdivision Review Board to grant variances to the 'Design Standard' restrictions contained in the Subdivision Review Act (Act No. 463 of 1967), particularly the minimum width requirement set out in Section 4. III. D.2 thereof, my opinion is that neither the Council nor the Board possesses the authority to grant such a variance.

Since Dorchester County has not availed itself of the provisions of Sections 6-7-310 et seq., CODE OF LAWS OF SOUTH CAROLINA, 1976, permitting the creation of a local planning commission, this question is governed exclusively by the terms of Act No. 463 of 1967. That Act states specifically that '[i]t shall be the duty of the [Subdivision Review] board to administer the provisions of this act and to enforce the regulations set out in Section 4 . . ..' The act further provides that:
After the effective date of this act [June 29, 1967], any tract or parcel of real estate situate in Dorchester County shall meet the requirements of the following regulations for the control of the subdivision of land . . .. [Emphasis added.]

The regulations contained in the Act are intended to be mandatory rather than permissive, and neither the Board nor the Council is granted discretion in the application and enforcement of those regulations. The particular regulation at issue is equally clear, requiring that 'the minimum width of a residential lot shall be sixty feet for at least two-thirds of the lot depth.' No provision is made in the Act for variances or exceptions to the stated regulations.

Act No. 463 is, in essence, a zoning or land use statute. The general rule is that such legislation:
. . . cannot be varied by municipal boards or officials unless the law authorizes it. Exceptions and variances can be allowed only in particular situations specified in the zoning ordinance. Furthermore, it is usually essential that grounds for exceptions and variances be expressly set forth in the zoning ordinances, under the fundamental rule that ungoverned and unbridled discretion cannot be vested in either legislative or administrative bodies or officials; a uniform rule or standard to govern their grant or denial in all cases must be established by a zoning ordinance. 8 McQUILLIN, MUNICIPAL CORPORATIONS § 26.165 (3d ed. 1976).

Thus, the granting of a variation would seem to be precluded in this case by the failure of the Act to authorize it. Although the authority to grant variances has been implied from zoning statutes, Merriam Park Community Council, Inc. v. McDonough, 297 Minn. 285, 210 N.W.2d 416, this view is the minority one and derives no support from South Carolina case law or from the language of the Act.

Even if such variances were authorized by the Act, it is questionable whether the present situation would qualify. Usually a variance can be granted only in 'extraordinary or exceptional' circumstances, with unnecessary hardship as opposed to mere general hardship required. In re Julian, 53 Del. 175, 167 A.2d 21 (1960); Hodge v. Pollock, 223 S.C. 342, 75

S.E.2d 752 (1953). 'The general rule is that variances and exceptions are to be granted sparingly, only in rare instances and under peculiar and and exceptional circumstances.' 8 McQUILLIN, MUNICIPAL CORPORATIONS § 25.162.

***2** The sole remaining question concerns the effect of prior ultra vires variances granted by the Board to the King's Grant and Tranquil Acres Townhouses. Although such action may raise certain equitable defenses (e.g., estoppel), the 'administrative construction of a zoning ordinance is neither conclusive or binding upon the court.' 8 McQUILLIN, MUNICIPAL CORPORATIONS § 25.74. Failure to comply with zoning regulations cannot be justified by the existence of prior violations, and the inaction of municipal authorities would not preclude legal action by an adjacent property owner to force compliance. Momeier v. John McAlister, Inc., 203 S.C. 353, 27 S.E.2d 504 (1943).

Admittedly, this construction of Act No. 463 may result in harsh consequences; however, absent amendment by the General Assembly it is the only possible construction. Although perhaps due to legislative oversight, the term 'residential' as employed in Section 4. III. D.2. necessarily includes both single and multi-family dwellings. Nevertheless, until amendatory legislation is enacted or until Dorchester County creates a local planning commission superseding the Subdivision Review Board pursuant to Chapter 7 of Title 6, CODE OF LAWS OF SOUTH CAROLINA, 1976, neither the Dorchester County Council nor the Subdivision Review Board can grant variances to the regulations set forth in Act No. 463 of 1967.

With kind regards,

Karen LeCraft Henderson
Senior Assistant Attorney General

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