1976 WL 30827 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
October 12, 1976

***1** 1. City zoning ordinances must be premised on purposes authorized by the General Assembly for such ordinances.

2. Legal terms in ordinances will be construed by their established meaning absent intent to the contrary.

Mr. Henry W. Cheney
Chairman
Clemson Planning Commission

QUESTIONS PRESENTED:

1. Is a proposed city ordinance placing limitations on clear cutting of land for development, and the cutting of trees over a certain trunk diameter permissible in light of Dunbar v. City of Spartanburg?

2. Should a proposed city ordinance prohibiting the development of land in a manner which would 'constitute a nuisance' be more specific?

AUTHORITIES:

Section 14-350.16, S. C. Code of Laws (1962) as amended.

Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848 (1976).

82 C.J.S. Statutes § 330.

DISCUSSION:

The City of Clemson proposes to adopt an ordinance regulating land development within its boundaries. The two questions set out above concern portions of this proposal.

The first question involves Section 1100-4 of the proposal, which would provide:
Existing Natural Resources. Development shall be undertaken only in conformance with the following provisions:
1. The developer shall take measures to minimize the disruption of natural vegetation or show plans for installation and maintenance of up-graded vegetation.

2. Clear-cutting on any site is prohibited unless it can be demonstrated that such action is necessary for the success of the proposed development. No clear-cutting shall be undertaken for the sole purpose of land sale.

3. The developer shall identify and locate all specimen trees and trees larger than eighteen inches (18) in diameter. Such trees shall not be removed unless it can be demonstrated that such action is necessary for the success of the proposed development.

4. The development shall not increase, directly or indirectly, the erosion of land or its potential for erosion.

5. The developer shall take all reasonable measures to reduce soil loss and contain sediment during construction. Exposed soil shall be stabilized within ninety (90) days of completion of construction.

It shall be the responsibility of the developer to show that the development meets the provisions of this section.

Whether this section is permissible will depend primarily on whether it is within the authority granted to the municipality by the General Assembly.

The authority, if it is to be found, lies in South Carolina Code, § 14-350.16 (1962) as amended. Section 14-350.16 provides: For the purposes of guiding development in accordance with existing and future needs and in order to protect, promote and improve the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare, the governing authorities of municipalities and counties may, in accordance with the conditions and procedures specified in this chapter, regulate the location, height, bulk, number of stories, and size of buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density and distribution of populations, and the uses of buildings, structures, and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, protection against floods, public activities, and other purposes. The regulation shall be made in accordance with the comprehensive plan for the jurisdiction as described in this chapter and shall be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers, to promote the public health and the general welfare, to provide adequate light and air; to prevent the over-crowding of land; to avoid undue concentration of population; to protect scenic areas; to facilitate the adequate provision of transportation, water, sewerage, schools, parkes, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of each area and its peculiar suitability for particular uses, and with a view to promoting desirable living conditions and the sustained stability of neighborhoods, protecting property against blight and depreciation, securing economy in governmental expenditures, conserving the value of land and buildings, and encouraging the most appropriate use of land and buildings and structures.

***2** Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848 (1976) inter alia involved the permissibility of a City of Spartanburg tree protection ordinance enacted 'to encourage the preservation and protection of trees within the City of Spartanburg, and to prevent their unnecessary destruction.' The ordinance would have required a developer of real estate to retain 15% of the trees in the tree protective zone, or five trees per acre, which ever was greater, and when their retention was not possible, the planting of replacements was required. The Supreme Court, while conceding that § 14-350.16 is broad in its scope, stated, 'In the absence of language clearly indicating that the legislature intend that the City could forbid landowners to cut trees and require landowners to plant trees in replacement we hold that the tree protection ordinance, as written, has not been authorized by the General Assembly.' (Emphasis added) Supra at 119.

The Supreme Court's language in Dunbar with the words 'as written' leaves open the question of whether any ordinance protecting trees is permissible. Hence, any opinion on this question is subject to attack.

However, as noted by William H. Ledbetter, Jr., in Zoning Law of South Carolina at pp 30-33, although Courts have traditionally found aesthetics an impermissible purpose for zoning, such purposes may be achieved when premised on recognized objectives. It is generally recognized that trees and other natural vegetation play a significant role in flood protection, for example. This purpose is specifically set forth in S. C. Code § 14-350.16. Thus, rewording the proposed ordinance section 1100-4, to reflect this purpose or some other recognized purpose may cure objections to it both as to reasonableness, and as to legislative authority.

In summary, it is recommended that proposed ordinance section 1100-4 be reworded, so that is is premised on some purpose specifically set forth in S. C. Code, § 14-350.16. However, whether it would then be permissible is a question that cannot be definitely resolved absent further judicial interpretation of this statute.

The second question is addressed to whether proposed ordinance section 1100-5 should include a definition of 'nuisance', with respect to the following language:
'(1) By development of the land, the developer will not . . . constitute a nuisance . . .'

The term 'nuisance' has a well-known common law meaning. In the absence of a definition, or other intent to the contrary by the enacting body, as evident from the context, this term will be given its established meaning. 82 C.J.S. Statutes § 330. For a discussion of this established legal meaning, your attention is directed to Black's Law Dictionary or Words and Phrases.

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