1975 WL 29820 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
May 19, 1975

***1** Honorable William Y. Edens
Mayor
City of Forest Acres
4405 Bethel Church Road
Columbia, S. C. 29206

Dear Mayor Edens:
You have asked an opinion from this Office on the validity of some form of 'contract zoning', to wit, a contract whereby the landowner or developer contracts and agrees to abide by the plans which he submits to the city to acquire rezoning, and whereby if such developer or landowner 'materially varies' from such a plan the city could require him or her to 'cease making changes or revoke the zoning because of breach of contract'.

The obvious benefit of such a 'contract zoning' plan is that prevention of rather than punishment for zoning violations would be gained, and this is the keynote of zoning administration. However, it should be noted that the present laws on point in this State provide adequate implementation of just such a policy. The Code of Laws of South Carolina § 14-350.31, provide that no plot of a subdivision of land within the jurisdiction of the various authorities may be filed or recorded until it has been approved, and the possibility of criminal sanction therein also exists. Moreover, the developer or landowner can be denied a building permit, municipal services, and financing.

Thus the zoning enabling act of this State provides that a violation of a zoning ordinance is a crime, and that a municipality may provide for punishment of an offender. The basic issue is whether the customary remedy of accusation, trial, and punishment is adequate. If so then the equitable remedy of an injunction may not be available. In zoning matters the usual answer is that the remedy is inadequate and action for an injunction will lie. In other words, if the wrong complained of in injurious to property interests or civil rights, or if it is a public nuisance, the fact that it is also a violation of a criminal statute or ordinance does not rescind the power of a court of civil jurisdiction to prevent the injury or abate the nuisance. New Orleans v. Liberty Shop, Ltd., 156 La. 26, 101 So. 798, 40 ALR 1136, (1924) Anderson, The American Law of Zoning § 23.13 (1968), noted 38 Harvard Law Rev. 692 (1925).

In such a suit to enjoin the zoning violation, the courts have continued to invoke the nuisance rationale. State ex rel. Jacobsen v. New Orleans, 166 So.2d 520 (La.App., 1964). The right to resort to civil proceedings to avert a threatened violation is also based upon the fact that while criminal proceedings may punish the offender, they are not adequate to protect property rights of others within the community or to protect the comprehensive zoning plan of the community. It should also be noted that while private citizens cannot ordinarily invoke the aid of courts to punish a violator of the zoning ordinance by a criminal proceeding or action to recover a penalty, those persons specifically and materially damaged by a violation existing on, or a use intended to be made of, another's land, may maintain an action to restrain such violation, existing or threatened. Welton v. 40 E. Oak St. Bldg. Corp., 70 F.2d 377 (7 Cir., 1934), cert. denied, 293 U.S. 590, 55 S.Ct. 105 (1934). Momeier v. John McAllister, Inc., 193 S.C. 422, 8 S.E.2d 737 (1939). Rathkopf, The Law of Zoning and Planning, § 66-20 (1974).

***2** Turning specifically to the South Carolina law, you, as Mayor, or any other appropriate official may take action against a joining violator by: (a) rescinding his building permit, (b) have him arrested and charged with a misdemeanor (each day he violates it is a separate offense), (c) obtain an injunction and have the violator removed from the building

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or have construction stopped, and (d) have property owners join in the injunction. These actions which are open to you, set out in § 14-350.26 Code of Laws of South Carolina (as amended, 1975 Supp.), have been upheld as properly within constitutional bounds. Wells v. Finley, 260 S.C. 291, 195 S.E.2d 623 (1973). Since this is the only section of our laws which deals with the power of municipalities to enforce zoning regulations, it would seem that unless this law is changed to further allow the enforcement method about which you have inquired, any action on your part to carry out 'contract zoning' would not be barked up by law. And may it be said also that with an injunction you will be forcing the developer to comply with the zoning law or else quit the premises, while with a 'breach of contract' action the developer could simply pay damages and continue his non-compliance. Hence the injunction is a much mere efficacious means of enforcement.

The conclusion to be reached therefore is that while if § 14-350.25 were changed to allow the 'contract zoning' then it would certainly be allowable the efficacy of such an enforcement scheme would not be nearly as great as the use of an injunction.

If we can be of any further help, please let us know.
Very truly yours,

M. Elizabeth Crum
Assistant Attorney General

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