

The State of South Carolina



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March 15, 1990

The Honorable Glenn F. McConnell
Senator, District No. 41
613 Gressette Building
Columbia, South Carolina 29202

Dear Senator McConnell:

By your letter of February 22, 1990, you have referenced Section 6-7-710 of the Code of Laws of South Carolina (1976, as amended) relative to the power of counties and municipalities to enact zoning regulations and have asked: "Does the presence of a requirement that local zoning regulations be designed to 'lessen congestion in the streets' prevent the use of the zoning regulations to rezone land to a higher use category with the expectation that unmitigated traffic congestion will result in certain places?" You ask if such is the case under current law; if it is not, you ask for an explanation as to why.

Section 6-7-710

The relevant portion of Section 6-7-710 of the Code provides:

The regulations [relative to zoning] must be made in accordance with the comprehensive plan for the jurisdiction as described in this chapter and must be designed to lessen congestion in the streets; [and to accomplish other objectives encompassing health, safety, aesthetic, and other considerations].

While such does not appear from the face of the original enabling legislation, Act No. 487, 1967 Acts and Joint Resolutions, it appears from the language of this State's zoning enabling act, compared to the zoning enabling acts of other jurisdictions, that our zoning enabling act may be an adaptation of the Standard State Zoning Enabling Act. The identical language cited above appeared in

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many decisions from other jurisdictions which had adopted the standard act; thus, those decisions are very helpful in construing this State's law.

Discussion

One purpose of zoning is to provide for adequate streets and highways. Bringle v. Bd. of Supervisors of County of Orange, 54 Cal.2d 86, 351 P.2d 765 (1960). Lessening traffic congestion has been recognized as an important consideration in zoning, rezoning, and considering applications for variances and special exceptions. Amalgamated Trust and Savings Bank v. County of Cook, 82 Ill. App. 3d 370, 402 N.E.2d 719 (1980); Forestview Homeowners Ass'n v. County of Cook, 18 Ill. App. 3d 230, 309 N.E.2d 763 (1974); Jarvis Acres, Inc. v. Zoning Commission of East Hartford, 163 Conn. 41, 301 A.2d 244 (1972); Vece v. Zoning and Planning Comm'n of West Haven, 148 Conn. 500, 172 A.2d 619 (1961). Some decisions say that zoning regulations cannot be used to regulate traffic problems, 1/ while recognizing that traffic regulation must be a by-product of zoning, Pure Oil Div. of Union Oil Co. v. City of Brook Park, 26 Ohio App. 2d 153, 269 N.E.2d 853 (1971); but other decisions hold that the impact of traffic would be a sufficient basis to deny a request for variance, special exception, or the rezoning of a specific parcel of property. Gowl v. Atlantic Richfield Co., 27 Md. App. 410, 341 A.2d 832 (1975); Templeton v. County Council of Prince George's County, 21 Md. App. 636, 321 A.2d 778 (1974).

In determining whether the impact on traffic would constitute a sufficient basis to deny such a request, courts have looked at many factors. Several decisions noted that the important consideration was not the overall volume of daily traffic but actual congestion, or density, in the streets. Jarvis Acres, Inc., supra; Lathrop v. Planning and Zoning Comm'n of Town of Trumbull, 164 Conn. 215, 319 A.2d 376 (1973); Stiles v. Town Council of Town of West Hartford, 159 Conn. 212, 268 A.2d 395 (1970). Further, "the provision that the zoning ordinances be 'designed to lessen congestion in the streets' is not violated by a simple increase in traffic, but it may be violated if the traffic increase results in intensified congestion or a hazard." Camara v. City of Warwick, 116 R.I. 395, 358 A.2d 23, 30 (1976). If a particular locality is already burdened with heavy traffic, some courts have found that the additional congestion was not overly important. Pure Oil Div. of Union Oil Co., supra; Bogert v. Township of Washington, 25 N.J. 57, 135 A.2d 1

1/ See also 82 Am.Jur.2d Zoning and Planning §45 and 101A C.J.S. Zoning and Land Planning §38 as to such matters being police problems rather than zoning problems.

(1957). The "creation of a particular traffic problem connected to a particular use at a particular location" could be sufficient to deny a request for rezoning. Amalgamated Trust and Savings Bank, supra, 402 N.E.2d at 730. Finally, the community as a whole and not merely an isolated part of the community is to be considered. Bogert and Forestview, both supra.

If traffic congestion is anticipated to be a problem if a rezoning request is granted, the zoning authority can require reasonable assurances that provisions will be made for the highway and traffic flow changes, to alleviate the expected congestion. Jarvis Acres, Inc., supra. Such could include widening roads or otherwise improving them as a condition of granting the rezoning request, for example. Bringle, supra. Where, however, the widening or improving of a road would be dependent upon the affirmative actions of persons or governmental entities over which the zoning commission (or other rezoning authority) has no authority or control, a change of zoning dependent upon those affirmative actions will most probably not be sustained unless the necessary action appears to be a probability rather than a possibility. Jarvis Acres, Inc., supra. The court in Jarvis Acres, Inc. would look for, as examples, testimony of highway department officials, correspondence or an official statement from the highway department, testimony of traffic experts, evidence of traffic studies or projections, executed contracts, definite starting and ending dates for road projects, and evidence that road improvements, if undertaken, would alleviate the problem, to establish necessity and probability as noted.

Increased traffic or congestion is sometimes authorized by the zoning commissions involved and then the courts, upon appeal. In Rushing v. City of Greenville, 265 S.C. 285, 217 S.E.2d 797 (1975), the court described the traffic flow at the intersection of U.S. Highway 25 on Augusta Street and U.S. Highway 29 and I-185 on Church Street in Greenville:

An average of thirteen vehicles a minute pass the Augusta Road frontage of all three landowners and an additional eleven vehicles a minute pass on the Church Street side of the Rushing property. Traffic flows day and night and vehicle lights constantly sweep the respondents' lots. Vibrations and noise from heavy trucks, motorcycles and other automotive traffic are every [sic] present.

Id., 265 S.C. at 287-88 (emphasis in original). After discussing the commercial uses to which the property adjoining the respondents' residential lots were put, the court noted that "[t]he increased traffic, noise and encroaching commercial development have all been

sanctioned by the City by zoning changes." Id. While the particular zoning enabling act followed by the City is not noted in the opinion, the court, if not the City, considered the increased traffic in allowing the respondents' lots to be rezoned.

In Pure Oil Div. of Union Oil Co., supra, the court described the property subject to the rezoning request (from residential to commercial) as "bordered by commercially zoned property on two of three sides at the intersection of two highly congested, four lane roads." Id., 269 N.E. 2d at 856. The court stated:

[Z]oning laws cannot be used to regulate traffic. In State ex rel. Killeen Realty Co. v. East Cleveland (1959), 169 Ohio St. 375 at 386, 160 N.E.2d 1, at 8, the court stated: "Nonetheless, traffic regulation must remain a by-product of zoning activities, and the primary product must always be to insure the greatest enjoyment of one's land***." Cf. Brockman v. Morr (1960), 112 Ohio App. 445, 168 N.E.2d 892. Admittedly, traffic patterns should be taken into consideration when a municipality designs a comprehensive zoning plan. However, when, as here, the subject property is located in an area burdened with heavy traffic, and the conclusion has been reached that the property can be used commercially only, the problem of additional traffic hazards must be secondary to the rights of a property owner to have the use of his property in a manner that is consistent with its location.

Id. Thus, where an area is already heavily burdened and the subject property is appropriate only for a use which will only increase the burden, the zoning board or the court will permit that use in spite of the additional traffic which will result.

Similarly, the rezoning of a parcel to a higher zoning category with considerations for impact on traffic was examined in Bogert, supra. The court stated:

The municipality contends that by placing Block 1202 in the one-acre zone it will lessen congestion at the intersection of Weirmus and Washington Avenues, which is a dangerous corner, and that by permitting a more intensive development of the appellants' property it would increase the traffic at that corner. The corner is a naturally dangerous one and a little additional

congestion does not seem to us to be overly important. At least, it is nothing that a traffic light or signs would not cure. Municipalities must expect to incur additional expense from minor traffic problems in rapidly growing communities, and they have ample power to regulate such problems by means other than attempting to eliminate such minor traffic problems, rather than by the restrictive use of the zoning power. This zoning power should only be used to deal with such problems in their major aspects as they affect the entire community or major portions thereof.

Id., 135 A.2d at 5. From a summary of witnesses' testimony at 135 A.2d at 4, it appeared that the township was subject to a zoning ordinance meant to, inter alia, lessen congestion. Exactly what the court meant by "a little additional congestion" or "minor traffic problems" is not detailed in the decision, unfortunately; the court apparently did consider the overall impact on the entire community or a major portion thereof in discounting additional traffic problems.

Conclusion

Based on the foregoing, this Office concludes that the impact of traffic (i.e., increased congestion) is a sufficient basis to deny a request for rezoning, a variance, or a special exception. Thus, the requirements of Section 6-7-710 of the Code that zoning regulations be designed to lessen congestion in the streets, among other requirements, would be met by considering traffic implications and acting accordingly. The critical factors identified by courts of other jurisdictions, to be considered in the decision-making process, include the density of traffic rather than overall volume, the extent of congestion under the present zoning scheme, the intensity of the increased traffic (as opposed to merely a simple increase), and the impact on the community as a whole or a major part thereof as opposed to only a small part. If the area in question is already burdened with traffic, then the courts are more likely to weigh more heavily the right of the property owner as opposed to the increase in traffic. Many factors must be considered, but in some instances zoning boards (and appellate bodies, including the courts) have disregarded the impact of traffic, or increased congestion, in rezoning property. Finally, as noted earlier, some courts have held that traffic problems are more appropriately resolved by use of the police power rather than zoning regulations.

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The foregoing is intended to be a general review of the law relative to your question. The Office has not reviewed any particular decision by a political subdivision to rezone a particular parcel of property and indeed has a strict policy of declining to do so, leaving zoning decisions and appeals therefrom to the appropriate bodies. If you need additional assistance or clarification, please advise.

With kindest regards, I am

Sincerely,

Patricia D. Petway
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Assistant Attorney General

PDP/nnw

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions

cc: The Honorable Robert A. Barber, Jr.