

1975 S.C. Op. Atty. Gen. 232 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4175, 1975 WL 22470

Office of the Attorney General

State of South Carolina

Opinion No. 4175

November 6, 1975

*1 A municipality may not place unreasonable restrictions on the use of private property for aesthetic purposes.

TO: Honorable Irene K. Rudnick
Member
House of Representatives
District No. 85, Aiken County

QUESTION PRESENTED:

Is a proposed ordinance for the City of Aiken that would require a landowner to obtain a permit for the removal of trees constitutional?

AUTHORITIES:

South Carolina Code of Laws(1962), Sections 47–61, 47–1323.

McQuillin, Municipal Corporations, Sections 24.15, 30.66, 30.67.

[Henderson v. City of Greenwood](#), 172 S.C. 16; 172 S.E. 689 (1934).

[Plunkett v. City of Aiken](#), 159 S.C. 97, 156 S.E. 245 (1930).

[City of Darlington v. Stanley](#), 239 S.C. 139, 122 S.E.(2d) 207 (1961).

DISCUSSION:

This question involves a proposed city ordinance for Aiken. The proposal is modeled after an ordinance which the City of Fort Lauderdale, Florida enacted in 1974.

The proposed ordinance would be its terms apply to trees, defined as:
any self-supporting woody perennial plant which has a trunk diameter of 3 inches measured 4 ½ feet above grade and has a minimum overall height of 15 feet,

Which are found on the following types of real estate:

- (a) All vacant and undeveloped property.
- (b) All property in all zoning classifications that is intended to be developed.
- (c) The yard areas of all developed property.

(d) All property where there is to be any addition or alteration of a substantial nature. This is to the exclusion of all single family owner occupied dwellings as provided for by the ordinance.

Such trees would be protected by this ordinance from being 'cut down, destroy(ed), remove(d) or move(d), or effectively destroy(ed) through damaging' by requiring a permit to first be issued for a fee, and only under such conditions precedent as specified:

(1) Removal. No permit shall be issued for tree removal unless one of the following conditions exists:

(a) The tree is located in the buildable area or yard area where a structure or improvement is proposed to be placed and it unreasonably restricts the permitted use of the property.

(b) The tree cannot be relocated on or off the site because of the age, type or size of the tree or condition of growth.

(c) The tree is diseased, injured, in danger of falling, too close to existing or proposed structures, creates a traffic hazard or conflicts with other ordinances or regulations.

(d) It is in the welfare of the general public that the tree be removed for a reason other than set forth above.

(2) Relocation or replacement. As condition to the granting of a permit, the applicant may be required, where practical to relocate the tree being removed or required to replace the tree being removed with a tree somewhere within the site of the type that will attain an overall height of 15 feet and a trunk diameter of at least 3 inches, measured 4 ½ feet above grade and shall be a minimum of 8 to 10 feet in overall height when planted.

*2 Additionally, the proposal would require real property owners to plant trees under certain circumstances.

By these terms, the proposed ordinance restricts the rights of real property owners in the use of their property. Whether these restrictions are reasonable, must be measured in light of the benefit that will inure to the general public. In exercising the police power, (South Carolina Code, Section 47-61) certain restrictions can be placed on the use of private property by its owner for the protection of the health, welfare, and safety of the public, but such restrictions must be reasonable and directed to the particular wrong in order to be valid. [Henderson v. City of Greenwood](#), 172 S.C. 16; 172 S.E. 689 (1934).

It would seem that the purpose behind this proposal is aesthetic. The general rule is that aesthetic or artistic objects do not in themselves justify the exercise of the police power that invades or restricts private property. McQuillin, [Municipal Corporations](#), Section 24.15. 'Aesthetic considerations are a matter of luxury and indulgence, rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.' [Passaic v. Patterson Bill Posting, Advertising, and Sign Painting Co.](#), 62 A. 267. (New Jersey)

Nonetheless, outside its exercise of the police power, a city has the power of control over its streets, sidewalks, and parks, to include spaces occupied by trees thereon. This power is paramount to any right that the grower of trees may have. Hence without regard to who owns the trees in the street, the municipality has the right to control them. The same follows as to the trees on property abutting city streets, for it is stated that abutting landowners have equitable easements in such trees. See McQuillan, [Municipal Corporations](#), Sections 30.66, 30.67. For the power to regulate streets and sidewalks, see [South Carolina Code](#), Section 47-1323 (1962). For the broadened authority to regulate trees thereon in South Carolina, see [Plunkett v. City of Aiken](#), 159 S.C. 97, 156 S.E. 245 (1930).

City ordinances will be presumed to have a constitutional purpose, if by any reasonable construction, it can be so harmonized. [City of Darlington v. Stanley](#) 239 S.C. 139, 122 S.E.(2d) 207 (1961). However, it would be extremely difficult

to harmonize this proposed ordinance, with the City's power over trees along streets and sidewalks, as there is no such limitation within the proposed ordinance.

CONCLUSION:

Therefore, it is the opinion of this Office that the ordinance as proposed is an unreasonable exercise of the City's police power, and cannot therefore be sustained.

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