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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2018-CP-10-00851
Appellate Case No. 2019-000728

National Trust for Historic Preservation in the United States and the City of Charleston,

Respondents/Appellants,

v.

City of North Charleston,

Appellant/Respondent.

THE CITY OF CHARLESTON'S REPLY TO THE RETURN TO ITS PETITION FOR REHEARING

CLEMENT RIVERS, LLP
Wilbur E. Johnson (SC Bar No. 3062)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
wjohnson@ycrlaw.com
rhines@ycrlaw.com
(843) 720-5488

and

Frances I. Cantwell (SC Bar No. 1121)
Julia P. Copeland (SC Bar No. 77199)
CITY OF CHARLESTON
Legal Department
50 Broad Street
Charleston, South Carolina 29401
fcantwell054@gmail.com
copelandj@charleston-sc.gov
(843)-724-3730

Attorneys for the City of Charleston

Pursuant to Rules 221(a) and 240(f), SCACR, in further support of its pending petition for rehearing of this matter (the "Petition"), Respondent/Appellant the City of Charleston ("Charleston") submits this reply to the return to the Petition filed by Appellant/Respondent, the City of North Charleston ("North Charleston").

Pointing to the language in Rule 221(a) that "[a] petition for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court," the gist of the return is North Charleston's contention that the Petition should be denied for noncompliance with Rule 221(a), because it "doesn't hone in on any particular point this Court got wrong" and "regurgitate[s] [Charleston's] ENTIRE argument from the original appeal." (Return p. 3 (emphasis in original).) Respectfully, this contention is unavailing, as it is based on a misapprehension of both Rule 221(a) and the Petition itself.

The same rules of construction used to interpret statutes apply to the interpretation of court rules. *Huck v. Oakland Wings, LLC*, 422 S.C. 430, 435, 813 S.E.2d 288, 290 (Ct. App. 2018). Thus, court rules must be given a reasonable and practical construction and read in a sense that harmonizes with their subject matter and accords with their general purpose. *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 621–22, 611 S.E.2d 297, 301–02 (Ct. App. 2005). Additionally, with particular respect to procedural rules, they "should not be written or interpreted to create a trap for the unwary lawyer or party . . . ." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004).

North Charleston's criticism of the Petition is misplaced. Besides its reliance on an unduly narrow view of Rule 221(a), it overlooks the interplay between Rule 221(a) and Rule 242, SCACR (addressing certiorari to the Court of Appeals), which, in subsection (d)(2), expressly limits the questions that may be presented in a petition for a writ of certiorari to "[o]nly

those questions raised in the Court of Appeals and in the petition for rehearing . . . ." Indeed, in its order limiting extensions of time in cases seeking certiorari to review a decision of the Court of Appeals, the Supreme Court specifically cites Rule 242(d)(2) in support of its reasoning for why less time should be needed to prepare a cert petition, because of the necessary overlap between the content of the cert petition and what was already argued to the Court of Appeals. (S.C. Sup. Ct. Order No. 2014-07-16-01 (filed July 16, 2014) ("Under Rule 242(d)(2), SCACR, '[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.' Therefore, in most cases, the preparation of the petition and return will involve no more than taking the arguments already made in the briefs before the Court of Appeals, putting in the additional case history information, and updating and checking the citations.").)

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended *their argument*." *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a)) (emphasis added). Far from being improper under the South Carolina Appellate Court Rules, the so-called "regurgitat[ion]" of Charleston's appellate arguments in the Petition is indeed necessary, both for it to attempt to demonstrate to this Court that it has overlooked and/or misapprehended them and for it to preserve them for potential Supreme Court review.

Moreover, the Petition does in fact identify the points that Charleston respectfully contends the Court overlooked and/or misapprehended. (*See, e.g.,* Charleston Petition for Rehearing p. 11 ([Re: Argument I.A.] "In affirming the circuit court, this Court dismissed the Overlapped Areas as a mere boundary dispute . . . ."); *id.* at p. 17 ([Re: Argument I.B.] "In affirming the circuit court, this Court . . . overlooked and/or misapprehended the posture of this

case . . . ."); *id.* at p. 20 ([Re: Argument I.C.] "In affirming the circuit court, this Court overlooked and/or misapprehended the import of undeniable facts in the record as it pertained to standing . . . ."); *id.* at p. 23 ([Re: Argument I.D.] "Here, again, in affirming the circuit court, the Court overlooked and/or misapprehended the import of the undeniable facts in the record as it pertained to standing . . . ."); *id.* at p. 28 ([Re: Argument I.E.] "In affirming the circuit court, the [C]ourt overlooked and/or misapprehended the application of the public interest doctrine.").

Lastly, North Charleston is mistaken in suggesting that its position is supported by case law instructing that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." (Return pp. 6–7 (quoting *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 and *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011)).) This is simply an expression of the fundamental principle that appeals are not re-trials and an appealing party cannot raise a point for the first time on appeal, much less for the first time in a petition for rehearing. The principle is of no help to North Charleston here, where, as indeed North Charleston itself goes to great length to show, it is in no way violated by the Petition.

So, again, for the foregoing reasons, along with those already set forth in the Petition—as well as any other or further reasons set forth in the reply of Respondent/Appellant National Trust for Historic Preservation in the United States, the entirety of which Charleston adopts to the extent not inconsistent with its position in this matter[1]—Charleston asks this Honorable Court to grant the Petition, to rehear this matter, to withdraw the Subject Opinion, and to decide this

[1] *Cf.* Rule 208(b)(6), SCACR ("In cases involving more than one appellant or respondent, including cases consolidated for appeal, any number of parties may join in a single brief, and any party may adopt by reference all or any part of the brief of another.").

appeal anew via an opinion that reverses the circuit court's determination that it lacks standing to challenge the Contested Ordinance.

Respectfully submitted,

By: s/Russell G. Hines

CLEMENT RIVERS, LLP
Wilbur E. Johnson (SC Bar No. 3062)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
wjohnson@ycrlaw.com
rhines@ycrlaw.com
(843) 720-5488

and

Frances I. Cantwell (SC Bar No. 1121)
Julia P. Copeland (SC Bar No. 77199)
CITY OF CHARLESTON
Legal Department
50 Broad Street
Charleston, South Carolina 29401
fcantwell054@gmail.com
copelandj@charleston-sc.gov
(843)-724-3730

Attorneys for the City of Charleston

Charleston, South Carolina

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PROOF OF SERVICE

CLEMENT RIVERS, LLP
Wilbur E. Johnson (SC Bar No. 3062)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
wjohnson@ycrlaw.com
rhines@ycrlaw.com
(843) 720-5488

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Frances I. Cantwell (SC Bar No. 1121)
Julia P. Copeland (SC Bar No. 77199)
CITY OF CHARLESTON
Legal Department
50 Broad Street
Charleston, South Carolina 29401
fcantwell054@gmail.com
copelandj@charleston-sc.gov
(843)-724-3730

Attorneys for the City of Charleston

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for the City of Charleston, hereby certify that **THE CITY OF CHARLESTON'S REPLY TO THE RETURN TO ITS PETITION FOR REHEARING** was served on April 4, 2023, on all parties to this matter via emailing (see attached) a copy of the same to the following:

Frances I. Cantwell, Esquire
fcantwell054@gmail.com
Julia P. Copeland, Esquire
copelandj@charleston-sc.gov

Additional Counsel for the City of Charleston

G. Trenholm Walker, Esquire
walker@wglfirm.com
Ann E. Nelson, Esquire
anelson@savingplaces.org

Attorneys for the National Trust for Historic Preservation in the United States

J. Brady Hair, Esquire
brady@bradyhair.com
Derk Van Raalte, IV, Esquire
dvanraalte@northcharleston.org

Attorneys for the City of North Charleston

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)

Attorneys for the City of Charleston

Charleston, South Carolina

April 4, 2023

Hines, Russell

From: Hines, Russell
Sent: Tuesday, April 4, 2023 4:04 PM
To: 'dvanraalte@northcharleston.org'; 'brady@bradyhair.com'; 'walker@wglfirm.com'; 'anelson@savingplaces.org'
Cc: 'dvrpalmetto@gmail.com'; 'njdennis@wglfirm.com'; 'jcopeland@lawyershmp.com'; Russell, Karen; Bell, Pollyana (Polly); 'fcantwell054@gmail.com'; 'copelandj@charleston-sc.gov'; Johnson, Wilbur; Justman, Aimee
Subject: National Trust for Historic Preservation v. City of North Charleston (2019-000728) -- The City of Charleston's Reply to the Return to Its Petition for Rehearing
Attachments: Nat'l Trust v. N. Chas. (2019-000728) -- Reply to Return to Pet. for Rehearing.pdf

Attached regarding the above-referenced matter please find **The City of Charleston's Reply to the Return to Its Petition for Rehearing**.

Russell G. Hines
CLEMENT RIVERS, LLP
www.ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
Phone: (843) 720-5488
Fax: (843) 579-1327
Email: rhines@ycrlaw.com

CLEMENT RIVERS, LLP
25 Calhoun Street • Suite 400 • Charleston, SC 29401
ycrlaw.com