THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2019-CP-10-01434
Appellate Case No. 2019-001910

David Abdo,

Appellant,

v.

City of Charleston and
Board of Zoning Appeals-Zoning,

Respondents.

RETURN TO PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, and the Court's letter of January 20, 2023, Respondents, the City of Charleston (the "City") and the City's Board of Zoning Appeals-Zoning (the "BZA"), submit this return to the petition for rehearing of Appellant, David Abdo ("Mr. Abdo"). Most respectfully, Mr. Abdo's petition for rehearing should be denied, as explained below.

BACKGROUND

Mr. Abdo and his wife own a home in a residential subdivision in the West Ashley area of the City (the "Property"). The Property is zoned SR-8, which is one of the City's single-family residential zoning district classifications. (R. pp. 94, 128:23–25, 130:20–25.)

Section 54-301 of the City's Zoning Ordinance (the "CZO") establishes the maximum height limits for structures[1] in the City's various zoning district classifications, and it limits the height of any structure on real property zoned SR-8 to thirty-five feet (35'). (R. pp. 121, 129:21–130:3, 130:20–25, 131:15–21.)

Section 54-505 of the CZO sets forth exceptions to the height limitations in Section 54-301. Pertinent to this matter is the following language in subsection (a) of Section 54-505:

> The height limitations of this Chapter shall not apply to church spires, belfries, cupolas and domes not intended or used for human occupancy; *monuments*, water towers, observation towers, transmission towers, masts and aerials, provided that such uses are not within the aircraft landing approach zone. Whenever any of the above uses are proposed within aircraft approach zones, an applicant must submit written approval received from the proper aeronautical authorities before a building permit may be issued.

(R. pp. 122, 148 (emphasis added).)

[1] The CZO defines a "structure" as "[a]nything constructed or erected, the use of which demands its permanent location on the land; or anything attached to something having a permanent location on the land." (R. 121.)

Without obtaining a permit from the City, Mr. Abdo constructed a 60-foot-tall flagpole on the Property in April/May of 2018. (R. pp. 30, 129:3–5.) Upon learning of the flagpole via a neighbor's complaint, the City required Mr. Abdo to apply for after-the-fact approval. (R. p. 129:10–16.)

In September of 2018, Mr. Abdo, acting by and through his attorney, submitted an application to erect a "flag monument." (R. pp. 101–107, 129:10–16.) When asked by the City's Zoning Administrator (the "Administrator") why the flagpole should be considered a "monument," Mr. Abdo's attorney responded that Mr. Abdo "installed the monument to honor the military service of his father, his wife's father, their brother-in-law, and all that served in the armed forces." (R. pp. 89, 91.)

On October 17, 2018, the Administrator denied Mr. Abdo's application, explaining:

> I have concluded that the flagpole cannot be considered a 'monument' under the terms of the [CZO]. I believe the exception listed in Sec. 54-505 for 'monuments' is intended to apply to a statue, building, or other structure erected in a public or semi-public space to commemorate a famous or notable person or event. Therefore, the request for a building permit to allow the flagpole will be denied due to the height of the flagpole exceeding the 35 foot height limit set by the zoning ordinance.

(R. p. 89.)

Mr. Abdo appealed the Administrator's decision to the BZA, which heard the matter on December 4, 2018, and voted unanimously to affirm the Administrator's conclusion that Mr. Abdo's flagpole did not constitute a "monument" under Section 54-505(a) of the CZO. (R. pp. 94–99, 111, 126–144, 149.) Thereafter, on February 19, 2019, the BZA heard and, again by unanimous vote, denied Mr. Abdo's request for reconsideration. (R. pp. 150–156, 197.)

On March 20, 2019, Mr. Abdo appealed the BZA's decision to the circuit court, which heard the matter on July 30, 2019, the Honorable Deadra L. Jefferson presiding. (R pp. 15–24,

275–300.) By order filed October 14, 2019, the circuit court affirmed the BZA's decision. (R. pp. 4–14.)

This appeal followed by notice served November 13, 2019. (R. pp. 211–212, 224.) In due course, it was briefed and made ready for decision, and on January 4, 2023, the Court filed its opinion in the matter, affirming the circuit court (the "Subject Opinion").

As explained in the Subject Opinion, Mr. Abdo argued to this Court (1) that the circuit court applied an incorrect standard of review and (2) that the Administrator, the BZA, and the circuit court erred in interpreting the CZO; and this Court rejected those arguments because (1) any error by the circuit court in applying the incorrect standard of review was harmless and (2) there was no error in the Administrator, the BZA, or the circuit court interpreting the term "monument" in the CZO to exclude Mr. Abdo's flagpole.

In the wake of the Subject Opinion, Mr. Abdo filed his petition for rehearing on January 19, 2023. By letter dated January 20, 2023, the Court requested that Respondents' file a return to Mr. Abdo's petition. This return follows.

ARGUMENT

I. The Court correctly affirmed the circuit court, because, even assuming, *arguendo*, the circuit court erred by applying the incorrect standard of review, it was necessarily harmless where (as the Court correctly concluded) there was no error in the Administrator, the BZA, or the circuit court interpreting the term "monument" in the CZO to exclude Mr. Abdo's flagpole.

As an initial matter, according to Mr. Abdo, his appeal of the BZA's decision to the circuit court "involved construction of an ordinance which, as a question of law, should have been reviewed *de novo*." (Pet. for Rehearing p. 4 (emphasis added).) This standard (i.e., the "de novo" standard) is not the applicable standard—and, naturally, the circuit court did not err in not applying it.

While it is true that "issues involving the construction of an ordinance are reviewed as a matter of law under a *broader* standard of review than is applied in reviewing issues of fact,"[2] deference to those who are charged with interpreting and applying the ordinance remains part of the equation and is not wholly displaced in favor of *de novo* review. *See Purdy v. Moise*, 223 S.C. 298, 305, 75 S.E.2d 605, 608 (1953) (finding a municipality's "construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefor").

Here, the circuit court based its affirmance of the BZA on a number of independent grounds,[3] and one of them (set forth in its Conclusions of Law at Roman numeral II) was its conclusion, based not only on the deference doctrine[4] but also on other rules of construction, that the BZA's interpretation of the term "monument" in Section 54-505(a) of the CZO is correct as a matter of law. (R. pp. 11–13.)

But in any event, as this Court correctly concluded, even assuming, *arguendo*, the circuit court erred by applying the incorrect standard of review, it was necessarily harmless, because there was no error in the Administrator, the BZA, or the circuit court interpreting the term "monument" in the CZO to exclude Mr. Abdo's flagpole.

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach*

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[2] *Mikell v. County of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009) (emphasis added) (citing *Eagle Container, LLC v. County of Newberry*, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008)).

[3] (R. pp. 4–14.)

[4] Again, the City would note here that, while our case law is to the effect that a "broader" standard of review applies where the construction of an ordinance is involved, this standard is not so broad as to displace the deference doctrine entirely.

Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000); *see also Mikell*, 386 S.C. at 160, 687 S.E.2d at 330 ("The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature," and "the legislative intent must prevail if it can be reasonably discovered in the language used.").

Words should be given "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006), *overruled on other grounds by Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016). "'Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.'" *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 599, 654 S.E.2d 284, 289 (Ct. App. 2007) (quoting *Collins Music Co., Inc. v. IGT*, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005)). The statutory language must be read in a sense that harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App.1993). And our courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the legislature or it would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

Accordingly, "[t]he true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of

its manifest purpose,"[5] and "[e]very technical rule as to construction of a statute is subservient to and must yield to the expression of the will of the legislature, since all rules of statutory construction have for their sole object the discovery of the legislative intent and are valuable only insofar as in their application they aid the courts in their endeavor to ascertain that intent." *Id.*

Here, Mr. Abdo's view that his 60-foot-tall flagpole somehow comports with the legislative intent in excepting "monuments" from the height limitations in Section 54-301 of the CZO finds no support in the rules of construction. It resorts to a subtle or forced construction of the word "monument" in an effort to expand the ordinance's operation. It refuses to give the ordinance a practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers or to read its language in a sense that harmonizes with its subject matter and accords with its general purpose, and instead, it self-servingly seeks to achieve an absurd result, not in furtherance of, but rather at the expense of the just, equitable, and beneficial operation of the law.[6]

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[5] *City of Columbia v. Niagara Fire Ins. Co.*, 249 S.C. 388, 391–92, 154 S.E.2d 674, 676 (1967); *see also id.* ("[T]he courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent.").

[6] In this regard, Respondents would again note that the context of the "monuments" exception is as follows: "The height limitations of this Chapter shall not apply to church spires, belfries, cupolas and domes not intended or used for human occupancy; *monuments*, water towers, observation towers, transmission towers, masts and aerials, provided that such uses are not within the aircraft landing approach zone." (R. pp. 122, 148 (emphasis added).) "[W]ords in a statute must be construed in context," and "[a]ccording to the doctrine of *noscitur a sociis*, the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Assoc.*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991). Just as all of the terms surrounding "monuments" are marked by their very nature as being inconsistent with structures to be constructed on single-family residential property, so too is the term "monuments" marked by its inclusion among them.

Moreover, Mr. Abdo's view fails under the definition of "monument" that he himself urges, namely, the following definition from the on-line version of the Merriam Webster dictionary: "a 'memorial stone or a building erected in remembrance of a person or event.'" (Pet. for Rehearing p. 9.) Obviously, Mr. Abdo's flagpole is neither a "memorial stone" nor a "building." Of course, on the other hand, even assuming, *arguendo*, Mr. Abdo's flagpole could somehow be deemed a "memorial stone" or a "building," to allow this view to prevail would be to do *lethal violence* to the general purpose of the CZO's height limitations, as seemingly any structure could be made to fit within the "monuments" exception by the owner's mere declaration that it was being erected in remembrance of a person or event.

Accordingly, the Court correctly affirmed the circuit court, because, even assuming, *arguendo*, that the circuit court erred by applying the incorrect standard of review, it was necessarily harmless where (as the Court correctly concluded) there was no error in the Administrator, the BZA, or the circuit court interpreting the term "monument" in the CZO to exclude Mr. Abdo's flagpole.

CONCLUSION

For the foregoing reasons, along with any other or further reasons already set forth in Respondents' brief (or, for that matter, in the Subject Opinion itself), all of which are incorporated herein by reference, Mr. Abdo's petition for rehearing should be denied.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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February 21, 2023

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I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Respondents, hereby certify that the **RETURN TO PETITION FOR REHEARING** was served on February 21, 2023, on all parties to this matter via emailing (see attached) a copy of the same to the following:

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February 21, 2023

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Date:	Tuesday, February 21, 2023 5:13:26 PM
Attachments:	image001.png Abdo v. Charleston (2019-001910) -- Return to Petition for Rehearing.pdf

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Attached please find Respondents' **Return to Petition for Rehearing** in the above-referenced matter.

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