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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

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2022-000392

Wolfe Marie Vernon Trust, Appellant/Petitioner,

v.

The Town of Mount Pleasant and The Mount Pleasant Board of Zoning Appeals,
Respondents.

PETITION FOR REHEARING

Rehearing is warranted where this Court has misapprehended or overlooked the applicable law. *See* Rule 221, SCACR. Here, the instant Petition for Rehearing should be granted because:

1. **This Court's reasoning is backward**. This Court's opinion suggests it began its analysis by opining on the result it believed should be reached under the purported purpose of the SR2-OD, and then interpreted the definition of Building Line and Setback to meet that desired outcome. However, the tail cannot wag the dog. This Court has misapprehended that the law requires its analysis start, and in this case end, with the plain language of the Ordinance.

2. **This Court's interpretation renders portions of the Ordinance meaningless surplusage**. This Court found the definition of Building Line and Setback does not apply to the location of the Building Line and Setback in this case, but instead only applied to distinguishing the Lot's long and short dimension. However, this Court acknowledged this interpretation left certain provisions—*i.e.*, those to ignore lot and building orientation and maximizing buildable area—to be redundant and meaningless. This Court has overlooked that the law prohibits this Court from interpreting an ordinance in a manner that renders portions of the language meaningless surplusage.

3. **This Court failed to strictly interpret the Ordinance in favor of the Owner**. This Court determined that the Ordinance was silent as to determination and location of the front and rear Building Lines and Setbacks. It therefore created a way to apply the Ordinance based on

nothing more than a zoning official's opinion regarding building and lot orientation as informed by unspecified factors related to the architectural characteristics. This Court condones this being done in a manner that minimizes, rather than maximizes, buildable area, even though none of these factors or directives appear anywhere in the Zoning Ordinances. However, to the extent the Ordinance is silent about the location of the front yard Building Line, this Court's decision is contrary to the law that zoning ordinances be strictly construed in favor of the landowner and interpreted to give the Town only that limited authority which is clearly and expressly set out in the Ordinance.

RE-INTRODUCTION

This appeal arose from a determination by the Board of Zoning Appeals ("BZA") for the Town of Mount Pleasant (the "Town"). The question at issue concerned the location of the "Building Line" or "Setback" on Petitioner's "Lot," at 520 Whilden Street in the Town's Special Residential Overlay District ("SR2-OD").

The SR2-OD contemplates setbacks of 15' for a "front yard" and a 25' for a "rear yard." The location of the Setbacks are delineated by the "Building Line." The Town's zoning Ordinance defines the "Building Line" and "Setback" synonymously as follows:

> *BUILDING LINE* (includes *SETBACK*). That line which represents the minimum distances, when measured at right angles, which a building or structure must be placed from a lot line in accordance with the terms of this chapter. Front and rear yards should be located along the width of the lot (shorter dimension) and side yards should be located along the length of the lot (longer dimension), **both regardless of lot and building orientation so as to provide the greatest amount of buildable area**.

M.P. Zoning Code. § 156.007 (emphasis added).

At issue is whether the Building Line on the Lot should be located 15' from the Eastern boundary and 25' from the Western boundary, or visa-versa. The BZA determined the Building Line was to be 25' from the Eastern boundary—as a "rear yard" setback—based on the belief that the Western façade of the house would typically be considered the "front." Owner/Petitioner takes the position that Building Line should be 15' from the Eastern boundary because this is the only way to give effect to the plain language of the Ordinance which defines the Building Line and

Setback by including a directive that it be "regardless of lot and building orientation," and to "provide the greatest amount of buildable area." (*Id.*).

THIS COURT'S OPINION

On November 13, 2024, this Court issued Opinion No. 2024-UP-383 affirming the BZA's decision to apply the 15' front yard setback to the Western boundary rather than the Eastern boundary. Importantly, this Court recognizes that its decision **does NOT provide the greatest amount of buildable area** as directed by the ordinance. (Order p. 3) (stating "we acknowledge" that "under this interpretation and application" buildable area is not maximized). Further, it cannot be disputed that this Court's decision is based on the orientation of the Lot and building.(Order p. 4) (This Court rationalizing its decision because the "the driveway enters the lot on the western boundary" and because the "primary entrance and the typical architectural characteristics associated with the front of a house are located on the 'west-facing' side of the [] house.").

This Court's reasoning takes the following steps. First this Court opines as to what it believes the proper result should be in the context of the SR2-OD. (Order p. 2) ("we must first determine the [SR2-OD]'s purpose"). Then this Court proceeds to interpret the definition of Building Line and Setback in a manner that obtains the desired result. In doing so, this Court is left to find that the provisions of the Ordinance to ignore lot and building orientation and maximize buildable area only applied to distinguishing the longer versus the shorter dimension. (Opinion pp. 3-4). Finally, this Court concludes the Ordinance is silent on how to distinguish the front from the rear, and therefore "common sense" directs that it be based on lot and building orientation. (Order p. 4) (concluding "because neither the [SR2-OD] nor the definition [of Building Line and Setback]

provide us with guidance on how to determine the front versus rear of a lot, we must use a common sense understanding of the 'front' of the *house*"[1]).

ARGUMENT

This Court's Opinion effectively ruled the definition of Building Line and Setback does not apply to questions concerning the location of Building Lines and Setbacks. Instead, this Court holds these provisions only apply to the long and short dimensions. Under this flaw approach this Court directs the determination of front versus rear can, and ostensibly must, be based on lot and building orientation and can minimize buildable. *See* (Order) (finding the same). The practical effect of this Court's ruling is to re-write the Ordinance as if it said the Front Yard / Front Building Line should be located outside the front façade of the house. Of course, the Town could have written an Ordinance that provided for this, but it did not. Therefore, this Court should grant the instant Petition for Rehearing. *See e.g., Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 39, 766 S.E.2d 707, 720-21 (2014) ("Our role is to apply and interpret, not rewrite, regulations" and interpretation and application of statutes should be based on the plain language in accordance with its literal meaning).

1. **This Court erred because its analysis fails to start with the plain language of the Ordinance**.

This Court's reasoning begins with the assertion that "we must **first** determine the [SR2-OD] ordinance's purpose." (Opinion p. 2) (emphasis added). To the contrary, the law of this State

[1] It is telling that this Court suggests the decision should be based on the "front of the *house*." Plainly, this Court acknowledges the possibility that a house may be situated such that its front façade is oriented toward the "side" of the lot. Moreover, it cannot be forgotten that questions concerning the location of the Building Line and Setback could also arise before any house is built on a lot. Apparently, the Ordinance would be interpreted and applied differently in that case. This just goes further to demonstrate this Court's analysis is merely an exercise in creating a means to reach the end.

directs the analysis must start with the plain language of the definition of Building Line and Setback.[2] The Supreme Court of South Carolina has made clear a that a Court "**must first attempt to construe a statute according to its plain language**, and if the language of a statute is plain, unambiguous, and conveys clear meaning, **[then] 'the rules of statutory construction are not needed** and the court has no right to impose another meaning'." *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 310, 831 S.E.2d 429, 432 (2019); *citing Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The analysis is not limited to the context of the SR2-OD. The definition of Building Line and Setback applies to all parts of the zoning code and all zoning districts, not just the SR2-OD. The force and effect of this definition must be interpreted regardless of the SR2-OD as it applies universally. If Building Line and Setback were intended to have a distinct meaning and interpretation within the context of the SR2-OD then the Town Council would have provided a separate definition within the SR2-OD. But it did not.

Here the plain language of the applicable definition is clear when considered in the context of all other related definitions in the Ordinance. The "front yard" is defined as the space between the lot line and the "front **building line**," and similarly, the "rear yard" is defined as the space between the lot line and the "rear **building line**." *See* M.P. Zoning Code. § 156.007 (emphasis

[2] None of the cases cited by this Court stand for the proposition that the analysis must begin with a broad analysis of purpose rather than with an analysis of the actual language of the statutory provision at issue. This Court first cites *Arkay, LLC v. City of Charleston,* 418 S.C. 86, 93, 791 S.E.2d 305, 309 (Ct. App. 2016). However, in *Arkay,* the court resorted to the rules of statutory construction to interpret the meaning of an **undefined** term. In the case at hand the terms Building Line, Setback, Front Yard and Rear Yard are all defined. Therefore, unlike *Arkay,* this case does not concern interpretation of an undefined term. This Court also cites *Mikell v. Cty. of Charleston*, 386 S.C. 153, 160, 687 S.E.2d 326, 330 (2009) and *City of Myrtle Beach v. Juel P. Corp*., 344 S.C. 43, 47, 543 S.E.2d 538, 540 (2001) neither of which support an analysis that does not begin with the plain language of the subject ordinance/statute.

added). Similarly, the "Buildable Area" is defined by reference to the applicable "**setback.**" *See* M.P. Zoning Code. § 156.007 (defining "Buildable Area" as "[t]he maximum two-dimensional space on a lot within which a structure or structures can be built, as permitted by applicable **setback**") (all emphasis added).

Because the relevant terms Front Yard, Rear Yard, and Buildable Area are all defined in reference to the defined terms "Building Line" and "Setback" (which the Ordinance defines synonymously in a single section) the analysis must start there. This Court overlooked this. Had this Court properly started with the plain language of the definition of Building Line/Setback, it would have been apparent this Court's forced interpretation and application is inconsistent with the plain language of the Ordinance.

2. This Court improperly interpreted the definition of Building Line and Setback in a manner that is inconsistent with the plain language of the Ordinance and contrary to the law concerning the interpretation of an Ordinance.

The plain language of the definition of Building Line/Setback directs:

> *BUILDING LINE* (includes *SETBACK*). That line which represents the minimum distances, when measured at right angles, which a building or structure must be placed from a lot line in accordance with the terms of this chapter. Front and rear yards should be located along the width of the lot (shorter dimension) and side yards should be located along the length of the lot (longer dimension), **both regardless of lot and building orientation so as to provide the greatest amount of buildable area**.

This Court has previously held that "we must read [a] statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law." *Lemmons v. Maced. Water Works, Inc.*, 431 S.C. 186, 197, 847 S.E.2d 471, 477 (Ct.

App. 2020) (citation omitted) (quoting *State v. Sweat*, 379 S.C. 367, 377, 382, 665 S.E.2d 645, 651, 654 (Ct. App. 2008).

In its opinion, this Court opined that the Ordinance's directive to disregard lot and building orientation and to provide the greatest amount of buildable area only applicable to the determination of distinguishing a lot's long dimension from its short dimension. As Petitioner has previously explained, the determination of the long versus short dimension cannot possibly be affected by the lot or building orientation. (App. Rep. Br. pp. 9-12); (App. Br. pp. 11-12). Moreover, the long dimension cannot be distinguished from the short dimension in any way that affects the buildable area of a lot—much less in a way that maximized buildable area. (Id.). Thus, to find that these provisions only apply when distinguishing the long from the short dimensions is tantamount to holding these provisions are meaningless. (App. Rep. Br. pp. 10-12).

In fact, this Court concedes its interpretation of the Ordinance does exactly that, stating, "we acknowledge the definition is somewhat redundant in explaining how to determine the sides versus front and rear." (Order p. 4).

As Petitioner's argument makes clear, it is certainly possible to interpret this definition in a manner that does not make these provisions redundant. Instead, this Court *created* the redundancy by suggesting the definition of Building Line and Setback only applies to distinguishing the long from short dimensions. Herein lies the flaw of this Court's backward reasoning. These provisions are only redundant because this Court has made them so by forcing a result to match this Court's desired "purpose" rather than gleaning the purpose from the plain language as the law requires. (*supra*).

This redundancy does not exist in the plain language, nor does this redundancy exist under the interpretation of the Ordinance proposed by Petitioner. Under the Ordinance there is no such

thing as a "long dimension Building Line" or "long dimension Setback;" nor is there such a thing as a "short dimension Building Line" or "short dimension Setback." It is unnecessary for these provisions to apply to something that is not contemplated by the Ordinance.

This is particularly true where the Ordinance does contemplate Setback for a "front yard," "rear yard," and two side yards, and Building Lines for the front, rear, and two sides. In other words, by definition, Building Line and Setback applies to all **four** boundaries of a lot, not just the two long and short dimensions. It only makes sense that the provisions of this definition must also apply to all four sides, not just the two of the long and short dimensions.[3] Had this Court interpreted the definition of Building Line and Setback to apply to the actual Building Lines and Setbacks for the front, rear and two sides rather than the short and long dimensions, there would be no redundancy. This is contrary to how the law directs a court to interpret and apply an ordinance. *See Lawrence v. Gen. Panel Corp.*, 425 S.C. 398, 402, 822 S.E.2d 800, 802 (2019) ("[T]he Court should seek a construction that gives effect to **every word** of a statute.") (emphasis added).

At bottom, this Court has overlooked that the interpretation advanced by Petitioner provides a way to interpret the definition so as not to be redundant. Therefore, this Court should grant the instant Petition for Rehearing.

3. This Court's opinion fails to strictly construe the Ordinance.

Here, this Court concludes the Ordinance provides no guidance on how distinguish the location of the front Building Line from the location of the Rear Building Line, and therefore this

[3] As a practical matter, there can be no real debate over the long versus short dimension. This is a purely objective measure. Moreover, the concepts of long and short dimensions are separately defined under the Ordinance as "Lot Width" and "Lot Depth." M.P. Zoning Code § 156.007. If the provisions to disregard lot and building orientation and maximize buildable area only apply to the long and short dimensions, why do these provisions not appear in the definition of Lot Width and Lot Depth? *See* (App. Rep. Br. p. 9). This Court ignores this.

Court directs the determination be made based on "a common sense understanding of the 'front' of a house." (Order p. 4). Even if this Court were correct that the Ordinance is silent on this point, the approach this Court invents and adopts to resolve this question is wholly inconsistent with the law's directive that an ordinance be strictly construed in favor of the landowner.

Specifically, the approach created by this Court to settle the front versus back, directs that it should be based on the orientation of the house and lot and condones applying this approach in a manner that minimizes buildable area and the utility of the lot. The considerations this Court sets out include the location of the "primary entrance," "the typical architectural characteristics," the location of the driveway, and the location of the nearest street. (Order p. 4). However, none of these factors appear anywhere in the Ordinance, nor is there any explanation of how these factors are to be weighed or how to resolve debate if these factors are not agreed upon. Further, this Court's approach would leave the interpretation and application of the statute to yield a different result if there were no house on the lot. Moreover, this Court seemingly leaves the determination and weighing of these factors to the unrestricted discretion of the zoning employee making the determination.

This Court has overlooked that unless a zoning ordinance clearly articulates this approach, the law prohibits the ordinance from being interpreted to give such broad and undefined discretion to the Town. Instead, where the ordinance is silent, it must be interpreted in favor of the owner. This Court has recognized that

> "statutes or ordinances in derogation of natural rights of persons over their property are to be **strictly construed** as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It [therefore] follows that the **terms limiting the use of the property must be liberally construed for the benefit of the property owner**."

Helicopter Sols., Inc. v. Hinde, 414 S.C. 1, 13, 776 S.E.2d 753, 759 (Ct. App. 2015) (*quoting Purdy v. Moise*, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) (emphasis added). "[W]hile [l]ocal governments have wide latitude to enact ordinances regulating what people can do with their property, **they must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize its highest utility**." *Id.* (*quoting Keane/Sherratt P'ship by Keane v. Hodge*, 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct. App. 1987) (emphasis added).

In this case, rather than look to the plain language of the definition of Building Line and Setback, this Court took a backward approach. Crafting an interpretation of the definition that conformed to its desired result, rather than applying the plain language of the Ordinance, this Court created a redundancy in the Ordinance rather than interpreting the Ordinance in a way that avoided this redundancy. This improper approach failed to strictly interpret the Ordinance in favor of the homeowner as required by law. *See id.* In doing so this Court has left the Town's Zoning Ordinances regarding Building Lines and Setbacks to apply based on nothing more than the whims and opinions of the employees of the zoning department. That is not how the law works.

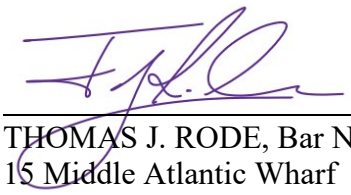
CONCLUSION

For these reasons, together with those set forth in Petitioner's Appellate Brief and Reply Brief (which are incorporated herein by reference) this Court should grant the instant Petition for Rehearing and reissue an opinion finding the Building Line is located 15' from the Eastern boundary.

[signature to follow]

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



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PROOF OF SERVICE

The undersigned certifies that she served a copy of the foregoing **Petition for Rehearing** to all counsel of record on December 16, 2024, by mailing a copy of the same, electronically or with proper postage affixed thereto, as follows:

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