

FILED

JUN 10 2014

Board of Appeals

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 ARKAY, LLC and)
 ROBERT R. KNOTH, its member,)
 Petitioners,)
)
 v.)
)
 CITY OF CHARLESTON,)
 CITY OF CHARLESTON BOARD)
 OF ZONING APPEALS, ANDREW)
 PINCKNEY INN, and MICHAEL A.)
 MOLONY,)
)
 Respondents.)

IN THE COURT OF COMMON PLEAS
 THE NINTH JUDICIAL CIRCUIT
 Case No.: 2013-CP-10-3864

CORRECTED
 ORDER ON APPEAL

JULIE J. ARMSTRONG
 CLERK OF COURT
 2014 JUN 25 PM 4:21

FILED

gm

THIS ORDER SUPERSEDES THE COURT'S ORDER OF MAY 30, 2014.

This case came before me for hearing on April 11th, 2014. Petitioners appeared through the persons of Robert R. Knoth and Richard R. Knoth, and with their attorney, Capers G. Barr, III. Respondent City of Charleston Board of Zoning Appeals appeared through Assistant Corporation Counsel Frances I. Cantwell. Respondent Andrew Pinckney Inn appeared through its attorney Wilbur E. Johnson and Respondent Michael A. Molony appeared with his attorney, Thomas S. Tisdale.


The case presents appeals from two orders of the City of Charleston Board of Zoning Appeals ("BZA"). The first is an order denying a special exception use dated June 4th, 2013. The second is an order denying a variance, also dated June 4th, 2013. The Court is informed that the two orders were decided at separate BZA hearing dates.

Because I find and conclude that the Board of Zoning Appeals order denying special exception use must be reversed, it is not necessary that I rule on the variance

appeal, as my ruling on the special exception use becomes dispositive of the case. My findings and conclusions are based upon the following:

Findings of fact:

Petitioner Robert R. Knoth owns and operates Carolina Polo & Carriage Company, one of five franchised horse carriage tour businesses in the City of Charleston. Mr. Knoth has operated the business, the sole source of his support, since 1990, a period of twenty-four years. From 1990 to 1996 the company and its stable were located at 45 Pinckney Street in the City Market District. The company was relocated to another property at 16 Hayne Street in 1996, after it lost its lease at 45 Pinckney. Other carriage companies continued to operate horse carriage stables from 45 Pinckney Street from 1996 until 2009.

 In 2013 Mr. Knoth lost his lease at 16 Hayne Street, but was able to purchase his former location at 45 Pinckney Street to continue his business. Title to 45 Pinckney Street was taken in the name of Petitioner, Arkay, LLC.

In the mid 1990's, and after Mr. Knoth had last used 45 Pinckney Street as a stable, Charleston City Council enacted legislation under its zoning chapter (chapter 54) and also under its tourism chapter (chapter 29) that affect and regulate the horse carriage tour business in the city. As for zoning, Section 54-206 of the city ordinances provides that certain activities are permitted as "Special Exception Uses", provided that certain criteria are met. Section 56-206.p provides for stable use as a special exception in a General Business district, and represents the issue at the heart of this case, as later discussed.

In oral argument, and from a review of the record, all parties agree that Petitioners comply with six of the seven special exception criteria of Section 54-206.p. The point of dissension is whether Petitioners have complied with Section 54-206.p.1.that “The stable is not located within 100 feet of any residential zone district.”

The property at 45 Pinckney Street is built on the “zero lot line” on each of its four sides. The east, west, and south sides share common walls with its neighbors. The front of the building, its north side, is constructed flush with the sidewalk. Photos depict an arched doorway entrance to the building, wide enough to admit a vehicle.

gen
Because the building must also house the business offices of Carolina Polo and the office of an ancillary business, Mr. Knoth proposes to create a horizontal property regime (“HPR”) at 45 Pinckney Street. A plot plan depicting the HPR shows the building as 37.89 feet wide at the front. The first 11.5 feet into the depth of the building comprises Unit “B” of the HPR. Unit “B” will be used as offices, and under Petitioners’ application would be restricted against use as a stable by recorded deed covenants.

Immediately behind Unit “B” is a common area fourteen feet farther into the building, consisting of a customer waiting area and restrooms. Immediately behind the common area, and twenty-five and a half feet from the front of the building is Unit “A” of the HPR, to be used as a stable. Six stalls will be constructed to keep the horses in Unit “A”. Access to the common, customer waiting area and restrooms, and to the stables in Unit “A” in the rear of the building is obtained over an ingress/egress easement across Unit “B”.

The HPR configuration described above is also depicted on a plot plan dated November 14, 2012, attached as Tab 5 to the Record on Appeal.

Petitioners also procured a survey that measures the closest point from the facade of 45 Pinckney Street to the nearest residential district (Record on Appeal, Tab 5-5). That closest distance is 93.5 feet. In oral argument Petitioners also showed that the north line of 45 Pinckney Street and the south line of the residential district are not parallel, and that they diverge away from each other. Therefore, for approximately one-half of its length, the façade of 45 Pinckney Street is, in fact, one hundred feet or greater from the residential district.

In any event, the measured distance from the residential district to Unit "A" of the HPR, where the property will be used as the stable, is 119 feet.

At hearing before the BZA, Petitioners argued that the one hundred foot distance to the residential district should be measured from the section of 45 Pinckney Street to be "used" as a stable, which is the 119 foot distance to Unit "A"; and that the measurement should not be taken from the front of the building. Petitioners also filed a five page memorandum with the BZA explaining their rationale that the one hundred foot distance measurement should be taken to the "use" as a stable and not to the physical building within which the stable is contained. (Record on Appeal, Tab 5-3).

The City of Charleston Zoning Administrator agreed with Petitioners' interpretation, concluding that Section 54-206.p describes a "use", and not a physical structure; and that the one hundred foot measurement should be made to the use and not to the building within which the use is contained. The Zoning Administrator informed the BZA that: "There are other types of land uses that are identified in the same section of the Zoning Ordinance where the wording is such that it specifies that you measure from the building or from the property line. In this case, there is no mention of a building or property line that...that is

where you should take the measurement from. So I think it is appropriate that we should measure from the use; and if that use is not at the front of the building, then you don't have to measure from the front of the building." (Record on Appeal, Tab 2; Transcript, p. 11, line 21 through p. 12, line 21),

The Board of Zoning Appeals disagreed. Of the seven members of the BZA, one member was absent, and two recused themselves. The remaining four members denied the special exception application by a vote of three to one.

In its Order, the BZA concluded that the one hundred foot set-back requirement must be measured from the front of the building at 45 Pinckney Street because the easement across Unit "B" is "appurtenant to, or a part of, the Unit "A", rendering it within the one hundred foot limitation"; and "this Board cannot discern intent to separate the use from its access, when there is but one access to the building..."

gen

Conclusions of Law:

This appeal presents a question of statutory construction. That is to say, what is the construction and the legislative intent of Section 54-206.p.1. of the City of Charleston Zoning Ordinance in its requirement that "The stable is not located within one hundred feet of any residential zoned district"? The more specific question is whether the one hundred foot measurement is to be taken from the building within which the stable is contained; or is it to be measured from the "use" as a stable where, as here, that use is within a building containing other uses?

Issues involving the construction of an ordinance are reviewed under a broader standard of review than is applied to reviewing issues of fact. *Mikell vs. County of Charleston*, 386 S.C. 153, 687 S.E.2d 326 (S.Ct. 2009). Although great deference is

accorded the decisions of those charged with interpreting and applying local zoning ordinances, “a broader and more independent review is permitted when the issue concerns the construction of an ordinance. The determination of legislative intent is a matter of law.” *Mikell, supra, citing Charleston County Parks and Recreation Commission vs. Somers*, 319 S.C. 65, 459 S.E.2d 841 (1995); *Eagle Container Co., LLC vs. County of Newberry*, 379 S.C. 564, 666 S.E.2d 892 (S.Ct. 2008).

The 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. *Charleston County PRC vs. Somers, supra; City of Columbia vs. Niagara Insurance Co.*, 249 S.C. 388, 154 S.E.2d 674 (1967).

The Plain Language of the Ordinance.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute’s language is plain, unambiguous, and conveys clear meaning, then “the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007).

The ordinance here at issue begins, in pertinent part:

“Sec. 54-206. Special exception uses. (Emphasis added)

“Uses designated in the Table of Permitted Uses and listed below, may be permitted in certain districts where the Board of Zoning Appeals-Zoning after review finds that requirements listed below for such uses are met.” (Emphasis added).

By its plain language, Section 54-206 regulates uses, by allowing such uses where the listed requirements for such uses are met. Following its introductory language the section describes nineteen different uses that are permitted in the City of Charleston as special exceptions under the zoning code, provided the statutorily designated requirements are met.

AM
With only a few exceptions, the nineteen described special uses set out in Section 54-206 describe a specific form of activity as a special use; for example, cemeteries, churches, dairy farms, daycare centers, drive thru tellers, gas stations, and, as relevant to this case, stables.

The special exception requirements for a stable as set forth in Section 54-206.p. are uniquely focused on stables in the horse carriage tour business. For example, Section 54-206.p.2 requires that “The City of Charleston Tourism Commission has issued a Certificate of Appropriateness for the stable”. This Subsection 2 could only apply to tour carriages in the City. The “Certificate of Appropriateness” issued by the Tourism Commission is described in the tourism chapter of the city ordinances in Section 29-212, *et. seq.* The certificate is not issued for a “stable” at all. Rather, it is issued for an “animal drawn vehicle”, i.e. a horse carriage. As it relates to the issue before the court, therefore, the required certificate of appropriateness is but an aspect of the “use” of property in a general

business district as a stable, and has no bearing on the physical structure within which the “use” is contained.

Another provision of Section 54-206.p uniquely relating to the horse carriage tour business is subsection 4 which provides that: “A site plan is provided showing that the cleaning/loading/ tacking area shall not impede traffic flow in the public right-of-way.” Subsection 4 describes another aspect of the “use” of an applicant’s property as a horse carriage tour business, without reference to any structure within which it is contained. For a stable “use” to comply with subsection 4, the process of attaching horses to bridles, reins and carriages, referred to as “tacking” must not impede automobile traffic on the streets.

Finally, from a “plain language” analysis of Section 54-206.p, it is noteworthy that the seventh special exception requirement for a stable use, expressed in Section 54-206.p.7 states: “Buildings are designed utilizing appropriate ventilation to prevent objectionable odors from being emitted.” (Emphasis added.) In discerning legislative intent, the Court must assume that City Council used the word “buildings” in subsection 7 advisedly. If it were the legislative intent that “stable” as used in 54-206.p referred to a physical structure, rather than a “use” associated with a property, City Council would have stated in subsection 7 that “stables are designed utilizing appropriate ventilation...etc.”. However, by using the word “buildings”, I conclude that City Council intended a differentiation, and envisioned a physical circumstance such as is presented in this case, where the use of the property as a “stable” is but one of several uses contained in a larger “building”. It is noteworthy that the subsection at issue in this case, 54-206.p.1, does not provide that the “building” be not located within one hundred feet of any residential zoned district, but that the “stable” be so located. It is the “use” as a stable, and the attendant, potentially obnoxious characteristics of

keeping and maintaining animals, that City Council intended to be at least one hundred feet distant from a residential zone district.

Therefore, from a plain language analysis of 54-206.p of the Charleston City Ordinances, I conclude that it was the intent of City Council to describe “stable” as a “use” and not as a physical structure from which the one hundred foot measurement to a residential zoned district should be made. ~~This order is specific to ordinances concerning horse carriage tour businesses and stables and shall not be construed to apply to other types of businesses, such as an adult entertainment store or the like, or have any effect on other special exception uses defined by the zoning laws. As previously stated, one of the primary purposes of the zoning law in regard to stables is to prevent objectionable odors from being emitted in residential areas. In contrast, zoning laws or ordinances that prohibit the establishment of an adult entertainment store in a residential area are concerned with the business use itself and has a fundamentally different purpose. Thus, this Order shall not be construed in any way to apply to other types of special exception uses or business establishments.~~

gen

The Tourism Chapter of the Code of the City of Charleston.

Although not enacted as a part of the zoning ordinances, Sections 29-201, et. seq. of the City Code provide for regulations governing the “Transportation by Animal Drawn Vehicles for Purposes of Touring” in the City of Charleston.

The zoning ordinance providing for stable use as a special exception requires that it must comply with city regulations, which therefore incorporates the provisions of the tourism chapter, Sections 29-201, et. seq. In the tourism chapter, the term “stable” is used to

describe both a physical thing, as well as a “use”. Section 29-212(b)(12), for example, defines “stable” to mean “the barn where the animals are kept” and in subsection (13), “stall” to mean “individual space where each animal is kept”.

However, “stable” is also used to describe a “use”. Section 29-212(e)(1)(a) provides for “the individual company’s stable (to have) a current written statement by a veterinarian on file that the animal is fit for such work....”. In this context, “stable” is used to describe the ongoing business of the carriage tour company.

The tourism chapter is also relevant to a contextual perspective of the zoning ordinance. Section 29-212(i)(2) of the tourism chapter provides that stables shall be located within “walking distance” of the Medallion Gate at the corner of Church and North Market Streets. The “Medallion Gate” forms the central queue at which laden horse tour carriages must line up to receive from city tourism employees a medallion that assigns each specific, laden horse carriage a sector of the city that the carriage may enter for the purpose of conducting each successive tour. Medallions are assigned by lot. Therefore, no carriage operator, or his passengers, knows in advance, until the carriage receives a medallion, what sector of the city will be assigned for a specific tour. (The device is intended to avoid overcrowding the more favorite historic sections of the city with horse carriages.)

Although “walking distance” is not defined in the tourism ordinance, the ordinance describes the “Market Zone” within which passengers may be loaded or discharged, as being bounded by Pinckney Street to the north, Cumberland Street to south, East Bay Street to the east and Meeting Street to the west. (Section 29-206(b)). It is reasonable to conclude, therefore, that “walking distance” would bear some logical relationship to the

“Market Zone”. Under the tourism chapter stables must be located within “walking distance”; therefore, within the Market Zone.

The record reflects Petitioners’ description to the BZA, as well as to this Court in oral argument, of the physical parameters and composition of the “Market Zone” which surrounds the Medallion Gate at North Market and Church Streets. The Court takes note that the placement of a stable in this dense, urban context is markedly different from a stable placed in a rural setting; and that it was in this urban context that City Council adopted the zoning ordinance relating to stables.

Legislative Intent.

In interpreting a statute the court’s primary purpose is to ascertain the intent of the legislature. *Beattie v. Aiken County Dept. of Soc. Serv.*, 319 S.C. 449, 452, 462 S.E.2d 276, 278 (1995). “A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers.” *Id.* (citing *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992)).

It seems clear to this Court that the intent of Charleston City Council in enacting Section 54-206.p was to ensure that the specific and potentially obnoxious aspects of keeping and maintaining horses in a stable would be maintained at a distance no closer than one hundred feet from a residential zone district. The enumerated aspects of 54-206.p are cleaning/loading/tacking of horses and carriages (but as to this issue, only to ensure that automobile traffic is not impeded)(Subsection (4)); the handling of refuse (Subsection (5)); drainage (Subsection (6)); and ventilation to prevent objectionable odors from being emitted (Subsection (7)).

As for the stable “use” itself, I conclude that it is appropriate to consider the definition from the tourism code (the barn “where the animals are kept”), which is also consistent with a dictionary definition. In this urban context, the operatively important phrase is “where the animals are kept”; “kept”, in this context, meaning “preserved or maintained”.

The area of 45 Pinckney Street where stalls will be constructed, and where horses will be “kept” is Unit “A” of the horizontal property regime depicted on the plot plan in this record. That area, and the “use” of that area, is 119 feet distant from the residential zone district.

I find and conclude that the Board of Zoning Appeals committed an error of law in construing Section 54-206.p.1 otherwise. The one hundred foot measurement to the residential zone district should be made from the “use” as a stable and not from the façade of the building where no such “use” will be conducted; and where, to the contrary, offices will be placed in an area that by deed covenant may not be used as a stable.

As for the BZA’s reliance on the access easement as forming the point of measurement, I likewise conclude that the Board has erroneously construed the ordinance. First, and in addition to my conclusion that the measurement must be taken from the “use” as a stable, the easement is to be titled with Unit “B” of the horizontal property regime and it is not exclusive to Unit “A”. Occupants of the adjoining offices, as well as customers will be utilizing the same easement for ingress and egress to offices, customer waiting area and to restrooms. Secondly, however, the horses will no more be “kept” on the access easement than they would be “kept” on the streets of Charleston through which they come and go every day, and from which they enter 45 Pinckney Street.

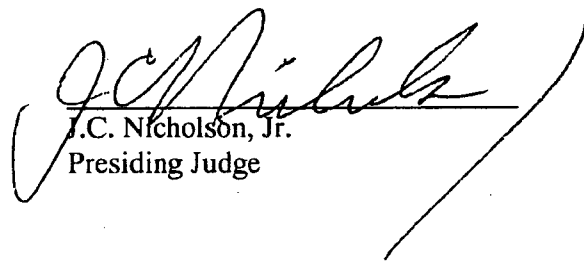
It is a strained and forced construction of Section 54-206.p.1. to say that the potentially obnoxious aspects of maintaining horses in a stable where they are kept, applies as well to the way of their coming and going to the stable; and that is true whether the way be a driveway, street, alley, or, as in this case, a non-exclusive easement also shared with humans.

For the foregoing reasons, it is:

ORDERED AND ADJUDGED that the Order of the Board of Zoning Appeals dated June 4, 2013 on the Application of Petitioners for a Special Exceptions Use be and the same is hereby REVERSED; and it is further,

ORDERED that this cause be remanded to the City of Charleston Board of Zoning Appeals for entry of an order granting the special exception use consistent with the conclusions hereof, and imposing upon Petitioners' special exception use permit such conditions as are consistent with Petitioners' application and with the findings of this Court, including but not limited to the requirement that the Petitioners form and file the horizontal property regime as proposed, as a condition of the special exception use permit.

AND IT IS SO ORDERED.


J.C. Nicholson, Jr.
Presiding Judge

90A Charleston, South Carolina
~~April~~ 19, 2014
JUMB



City of Charleston

WILLIAM B. REGAN LEGAL CENTER

CORPORATION COUNSEL

Charlton deSaussure, Jr.
cdessaussure@hsblawfirm.com

PO Box 340
Charleston, SC 29402
tel 843-722-3366
fax 843-720-4469

ASSISTANT CORPORATION COUNSEL

Frances I. Cantwell
cantwellf@charleston-sc.gov

50 Broad Street
Charleston, SC 29401
tel 843-724-3730
fax 843-724-3706

July 3, 2014

BY HAND DELIVERY

The Honorable Julie J. Armstrong
Clerk of Court for Charleston County
100 Broad Street
Charleston, South Carolina 29401

RE: Arkay, LLC, et al v. City of Charleston, et al
Case No.: 2013-CP-10-3864

Dear Julie:

Enclosed for filing is a Notice of Appeal in the above case.

With kind regards, I am

Yours truly,

Frances I. Cantwell

Frances I. Cantwell

Enclosure

cc: Capers G. Barr, III, Esq.
Wilbur E. Johnson, Esq.
Thomas S. Tisdale, Jr., Esq.