THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-CP-10- 3864

Arkay, LLC and Robert R. Knoth, its member,

Respondents,

v.

City of Charleston, City of Charleston Board of Zoning Appeals, Andrew Pinckney Inn and Michael A. Molony,

Appellants.

Initial Brief of Appellants

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STATEMENT OF THE CASE

This matter arises from an appeal of a decision of the City of Charleston Board of Zoning Appeals – Zoning (herein "Board") denying Arkay, LLC a special exception to install a horse stable at its property located at 45 Pinckney Street, in downtown Charleston.

Under the City of Charleston Zoning Ordinance, a stable cannot be located in a General Business zoning district unless the Board grants a special exception, after finding the proposed stable meets the special exception criteria set forth in the ordinance. One of the criteria for a stable is that it not be located within one hundred (100') feet of a residentially zoned district.

Arkay, LLC owns 45 Pinckney Street. In March, 2013, it applied for a special exception to locate a stable in the building at 45 Pinckney Street to house horses used by an affiliate carriage tour company. The matter came before the Board on April 16, 2013. After hearing from the applicant, the zoning administrator and other interested parties, the Board denied the application, finding the stable did not meet the separation requirement of the special exception

criterion, the Board determining the stable would be within one hundred (100') feet on a residentially zoned district.

Arkay, LLC appealed the decision of the Board to the circuit court. Named as Respondents were the Board and nearby property owners, Andrew Pinckney Inn and Michael A. Molony, personally and as Personal Representative of the Estate of Robert E. Molony and Trustee for Sadie Molony, now deceased. The appeal was heard by the Honorable J. C. Nicholson, Jr. on April 11, 2014. Judge Nicholson overturned the decision of the Board by Order entered on May 30, 2014. Judge Nicholson entered a Corrective Order on June 25, 2014. A motion to reconsider, alter or amend the judgment was denied by Order entered on June 26, 2014. On July 3, 2014, this appeal was filed.

STATEMENT OF FACTS

No. 45 Pinckney Street is located in downtown Charleston and is owned by Arkay, LLC (herein "Arkay"). One building covers the entire site, that is to say, all walls of the building touch the property lines. The building's only access is from Pinckney Street.

To the east of 45 Pinckney is the Andrew Pinckney Inn. To the west is a parking garage, and to the south are Nos. 14 and 16 Hayne Street. Across Pinckney Street to the north, are single family homes.

No. 45 Pinckney Street and all properties abutting it are zoned General Business (GB). The properties immediately across Pinckney Street are zoned Commercial Transitional (CT). The CT zoning district changes to Single, Two Family Residential (STR) at the northern property lines of properties zoned CT. No. 45 Pinckney Street is within 100 feet of this STR zoning district.

(R. Cir. Ct .ROA, Tab 2, Tr. p.6, lines 3-19; Tab 6, p. 1; Tab 8; Tab 9, Arkay Ex. 5).

Arkay purchased 45 Pinckney Street with the intention of establishing a stable to house horses for an affiliate carriage tour business. A stable in a GB district is not allowed as a matter of right. The use of property for a stable in this district requires that the Board grant a special exception, after finding that certain criteria have been met. The Ordinance provides:

"p. Stables shall be permitted in the GB and UC districts as an exception where the Board, after review, finds that:

1. The stable is not located within 100 feet of any residential zone district;
2. The City Tourism Commission has issued a Certificate of Appropriateness for the stable;
3. The stable complies with all city, county and state regulations for stables;
4. A site plan demonstrates that the cleaning/loading and tacking area will not impede traffic flow in the public right-of-way;
5. A written explanation of how refuse will be handled in accordance with city, county, state and federal regulations has been reviewed by the Department of Public Service;
6. A plan showing how drainage is to be collected in accordance with city, county, state and federal regulations has been reviewed by the Commissioners of Public Works and the Department of Public Service; and
7. Buildings are designed utilizing appropriate ventilation to prevent objectionable odors from being emitted."

(R. Cir. Ct. ROA, Tab, Tr. p. 14, line 18 – p. 15, line 2; Tab 13, p. 3).

In March, 2013, Arkay applied to the Board for a special exception to allow a stable at the site.[1] To meet the special exception criterion mandating separation from a residential zone, Arkay proposed to subject 45 Pinckney to a horizontal property regime (herein "HPR"). The first 11.5 linear feet of the building, measured from Pinckney Street, would become Unit B. This unit would contain 435 square feet, and would be used for the offices of the horse carriage business and another business that sanitizes streets where carriage tours are conducted. Unit B would be burdened by an easement to provide access from Pinckney Street to the remainder of the HPR.

The rear 69.51 linear feet of the building would become Unit A. This unit would contain 1639 square feet and have 6 stalls. This is the unit in which horses would be fed, groomed and stored overnight.

Units A and B would be separated by 14 linear feet of General Common and Limited Common areas. The General Common area, measuring 137 square feet, would contain restroom facilities. The Limited Common area, measuring 360 square feet, would be used solely in conjunction with Unit A, as a waiting area for carriage business patrons. The only access from Unit A to Pinckney Street is through this Limited Common area and across Unit B, by way of easement. Per Arkay's proposal, animals would be housed in over sixty (60%) of the building, exclusive of limited and general common areas.

(R. Cir. Ct. ROA, Tab 2, Tr. p. 25, line 25 – p. 26, line 19; Tab 5).

The Board held a hearing on the application on April 16, 2013. Owners of property to the west of the site (owner of Andrew Pinckney Inn) and to the north of the site (owner and/or

[1] No. 45 Pinckney Street was previously used as a stable, including by an affiliate of Arkay. An amendment to the zoning ordinance pertaining to stables was enacted so that now, to establish a stable at this location, a special exception is required. There is no issue of legal nonconforming use in this appeal, as the parties acknowledge that the use of 45 Pinckney as a stable has been discontinued for more than 3 years, and thus any prior nonconforming use of the premises as a stable has lapsed.

personal representative of owner of single family homes) appeared at the hearing in opposition to the application. These property owners, who had first-hand experience with the operation of prior stables at this location, voiced concern about the noise, rodents and odor attendant to a stable. There was a particular concern raised by the owner of the inn regarding the potential for odor wafting through its cinder block wall, the only wall separating it from the proposed stable. Issues were also raised regarding the legality of the proposed HPR. These property owners further contended the stable was within 100 feet of a residentially zoned district and therefore could not, as a matter of law, meet the requirements for a special exception. Significant to this issue was a survey prepared and introduced by Arkay that demonstrated that the building at 45 Pinckney Street was within 100 feet of the STR residentially zoned district.

The Preservation Society of Charleston and the Historic Ansonborough Neighborhood Association also opposed the application, and other interested persons submitted letters in opposition as well.

(R. Cir. Ct. ROA, Tab 2, Tr. p. 52, line 20 – p. 75, line 10).

Arkay argued the separation requirement of the ordinance was to be measured from the area within the building where the horses would be stored, and that area was over 100 feet from a residential district. The Board rejected this argument. It reasoned that 45 Pinckney Street contained but one building, a circumstance not altered by the establishment of a HPR, and that this building was, by Arkay's own evidence, within 100 feet of a residentially zoned district. The Board further noted that access from the Unit where animals were to be housed to Pinckney Street was by way of an easement that was appurtenant to, or part of, that Unit, which easement was within 100 feet of a residential area. The Board issued a written Order on June 4, 2013 denying the application.

(R. Cir. Ct. ROA, Tab 1, Order of the Board).

APPLICABLE LEGAL PRINCIPLES

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the lawmaking body. Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 504, 443 S.E. 2d 401,404 (Ct. App. 1994).

Legislative intent should be ascertained primarily from the plain language of the statute. A primary rule of statutory construction is that words must be given their plain and ordinary meaning without resort to a subtle or forced construction which limits or expands its operation. Abraham v. Palmetto Unified School District No. 1, 343 S.C. 36, 49, 538 S.E. 2d 656, 663 (Ct. App. 2000).

A statute as a whole must receive a practical, reasonable and fair interpretation, consonant with the purpose, design and policy of the lawmakers. Words should be given their plain and ordinary meaning, and courts should not look to impose another meaning. State v. Johnson, 343 S.C. 693, 695, 541 S.E. 2d 855, 857 (Ct. App. 2001).

Deference is given to the decisions of those charged with interpreting and applying local zoning ordinances. Historic Charleston Foundation v. Krawcheck, 313 S.C. at 505, 443 S.E. 2d at 405.

The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled absent a compelling reason. Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 496, 536 S.E. 2d 892, 900 (Ct. App. 2000).

In construing a statute, it is proper to consider other legislation dealing with the same subject matter. Fidelity & Casualty Ins. Co. v. Nationwide Ins. Co., 278 S.C. 332, 335, 295 S.E. 2d 783, 785 (1982).

ARGUMENT

INTRODUCTION

This case concerns the construction of a zoning ordinance. Under the City of Charleston Zoning Ordinance, to establish a stable in a General Business (GB) zoning district, it is necessary for an applicant to secure a special exception from the Board. The Board is charged with making specific findings before a special exception can be granted. One criterion of the special exception is that the stable must be separated from a residentially zoned district by at least 100 feet.

As to this case, these facts are not disputed: No. 45 Pinckney Street, where a stable is proposed to be sited, is located in a GB zone. No. 45 Pinckney Street, where a stable is proposed to be sited, is wholly covered by a single building, none of its walls being set back from any property line. No. 45 Pinckney Street, where a stable is proposed to be sited, is within 100 feet of a residentially zoned district.

The Board refused to grant a special exception to allow a stable to be located at 45 Pinckney Street because a stable there could not meet the separation requirement of the special exception criteria. The circuit court reversed the decision of the Board. A review of the court's reasoning reveals it artificially dissected the building, dividing where the activity of stabling is to occur from the remainder of the building. The circuit court reasoned that, because the animals would be housed in the back of the building at 45 Pinckney Street, and because that portion of

the building was more than 100 feet from a residentially zoned district, the separation requirement of the special exception criteria had been met.

The Order of the circuit court must be reversed because it misapplies principles of statutory construction by failing to accord the term "stable" its plain and ordinary meaning, instead attributing to the term a construction not in keeping with the grammatical context in which it was used. The Order of the circuit court must be reversed because the creation of a horizontal property regime does not result in subdivided land or buildings. It is but a form of ownership. The Order of the circuit court must be reversed because it is inconsistent. On the one hand, the court found the requirements for a stable in the zoning ordinance were "uniquely focused" on stables in the carriage tour business, but then on the other, disregarded the definition of "stable" in the tourism regulations that says a stable is the barn where animals are kept, not the place within the barn where the animals are kept.

I. THE CIRCUIT COURT ERRED IN ITS CONSTRUCTION OF SEC. 54-206 (p) OF THE CITY OF CHARLESTON ZONING ORDINANCE, THE ERROR BEING THE COURT'S ORDER IS PREMISED ON THE TERM "STABLE" BEING LIMITED TO THE ACT OF STABLING, WHEN THE TERM, WHEN READ IN CONTEXT, ENCOMPASSES NOT JUST THE ACTIVITY OF STABLING, BUT ALSO THE BUILDING WHERE THAT ACTIVITY IS TO OCCUR. (Issue 1)

At issue in this case is the legislative intent of the Charleston City Council in its use of the term "stables" and "stable" in Sec. 54-206 (p) of the zoning ordinance. The term "stable" can be used as both a noun and a verb. The circuit court held the term, as used in Sec. 54-206 (p), was intended to be construed only as a verb, to the activity of stabling: "...I conclude it was the intent of City Council to describe 'stable' as a 'use' and not as a physical structure..." (R. Corrective Order, p. 9) This conclusion is erroneous, as it disregards the grammatical context in

which the word was used, and disregards the fundamental underpinning of zoning, that it not just regulates "use", but that it regulates use as it relates to land, building or structures.

In each instance where the word "stable" is used in Sec. 54-206(p), the word is used as a noun. The introductory phrase of the special exception uses the term "Stables": "Stables shall be permitted..." (*underline original*) In subsections (1), (2) and (3), when the term "stable" is used, the term is always qualified by the article "the". The article "the" is used to qualify or mark a noun, adjective or adverb. See Webster's Encyclopedic Unabridged Dictionary of the English Language, New Revised Edition 1996, p. 1470. Here, City Council used the word as a noun, and when so used, a stable is a building. Id. at 1382: "Stable: a building for the lodging and feeding of horses, cattle, etc." City Council did not use the term in its active tense. To accept the circuit court's construction of the term "stable" would require either ignoring the article preceding the term that City Council chose to insert, or by adding after the term the word "use" or "activity", when City Council chose not to. Either scenario violates principles of statutory construction, as it is not within the purview of the court to add or delete words from statutes. Hartford Accident and Indemnity Company v. Lindsay, 248 S.C. 307, 149 S.E. 2d 647 (1979). When reading the ordinance in its entirety and its words in context, as a court is required to do. S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n., 303 S.C. 339, 343, 412 S.E. 2d 377, 379 (1991) (*Clearly, words in a statute must be read in context),* the legislative intent is apparent. City Council did not say "the stable use" or "the stable activity"; it said "the stable".

That City Council meant a building or structure put to use as a stable is further substantiated by its use of the term "buildings" in subpart 7 of the special exception criteria. Buildings used as stables, as 45 Pinckney Street, must be properly ventilated. (R. Cir. Ct. ROA, Tab 13, p. 2) The circuit court's holding that by its use of the term "buildings" in subpart 7, Council intended a

differentiation within a building when it housed a stable and other uses is a leap, at best, requiring a strained, if not tortured, construction of a common word.

The circuit court's reference to other special exception uses, such as cemeteries, churches and gas stations as justification for the term "stable" being intended as a form of activity misses the mark. This becomes patently clear when a criterion of a special exception includes a separation requirement, as with a stable. By way of example, a cemetery is a use permitted by special exception if no "building or parking lot thereof" is located within 100 feet of an adjoining lot. (R. Cir. Ct. ROA, Tab 13, p. 1) As with a stable, City Council contemplated a cemetery as including more than the places where remains are interred, but also its buildings and parking areas. The same holds true for a church. The church, not the activity of worship within it, must be at least 25 feet from an adjoining property line. (R. Cir. Ct. ROA, Tab 13, p. 1) As for a gas station, the special exception criteria encompass far more than the act of supplying or pumping gas. All buildings associated with it must meet separations requirements. (R. Cir. Ct. ROA, Tab 13, p. 2). To follow the reasoning of the circuit court would mean that so long as the place within the building used to support a gas station meets the separation requirements, the building satisfies the special exception criteria. But more to the point, when Council did want to regulate a use in its active form by way of special exception, it specifically did so. Sec. 54-206 (m) governs logging camps and forestry *activities.* Sec. 54-206 (v) governs *mining*, specifically *mining operations*. (R. Cir. Ct. ROA, Tab 13, pp. 2, 3) Had Council intended for a stable to be limited to stabling *activities*, it clearly knew how to do so, and surely would have done so.

Moreover, sight must not be lost of the fact that before the circuit court was the construction of a zoning ordinance. Zoning does not regulate uses in isolation. Zoning regulates uses as they relate to land, buildings or structures. See S.C. Code Ann. § 6-29-720 (Rev. 2004) (*...within*

each district, the governing may regulate: (1) the use of buildings, structures and land.) Because the building at 45 Pinckney Street occupies the entire lot, the lot and building, for purposes of zoning, are one and the same. And the evidence is undisputed but that the lot/ building at 45 Pinckney is within 100 feet of a residentially zoned district. As a result, 45 Pinckney Street does not qualify as a site for a stable, and it was error for the circuit court to hold otherwise.

II. THE CIRCUIT COURT ERRED IN ITS CONSTRUCTION OF, AND RELIANCE ON, THE LAW HORIZONTAL PROPERTY REGIME AS A MEANS OF SATISFYING THE SEPARATION REQUIREMENT OF SEC. 54-206 (p) OF THE CITY OF CHARLESTON ZONING ORDINANCE, THE ERROR BEING THAT A HORIZONTAL PROPERTY REGIME DOES NOT RESULT IN A SUDBIVISION OF LAND OR THE CREATION OF A LOT, AND THE CREATION OF A HORIZONTAL PROPERTY REGIME HAS NO RELEVANCY TO THE COURT'S CONSTRUCTION OF THE ORDIANANCE. (Issues 2 and 3)

That Arkay intends to subject the land and building at 45 Pinckney Street to a horizontal property regime (herein "HPR") is of no moment. A HPR is but a form of ownership within a shared premise.

> ...we agree with the master that...conversion to a condominium divides an *ownership interest* in the *property* but does not subdivide the land itself. In other words, while an owner of an apartment complex grants sole ownership of individual units to purchasers after converting the building to a condominium, the property and common area remain intact and the owner merely grants a share of his ownership interest in the property to purchasers. Thus, the owners of individual units share ownership of the property/common areas as tenants in common. The property itself is not subdivided or replatted, nor does the "footprint" of the property change *(emphasis original)*. Penny Creek Associates, LLC v. Fenwick Tarragon Apartments, LLC, 375 S.C. 267,274 651 S.E. 2d 617, 621 (2007).

Thus, both before and after the creation of a HPR, the building at 45 Pinckney remains but one building. The HPR would merely allocate ownership interests within the building. The building

envelope remains unchanged. The building envelope, where the stable and stabling activities will occur, remains within 100 feet of a residential area.

Even if a HPR could somehow be construed to move the unit where the stable is to be located beyond the 100 foot separation requirement, Arkay still falls short because the access, or doorway, to the stable unit is within the proscribed distance. State law mandates that any apartment created by a HPR have direct access to a public street or to a common area leading to a public street. S.C. Code Ann. § 27-31-20 (a). The unit where animals will be kept (Unit A) will not have direct access to Pinckney Street. Its proposed access to Pinckney Street is by easement, which by law must be appurtenant, or part of, the Unit, and this easement is within 100 feet of a residential zoned district. Even if the easement were to be made common area, the result would be the same. That area is essential to effectuate use of Unit A and is appurtenant to it. It was error for the circuit court to dissect Unit A from its access to justify a holding that the "stable use" met the separation requirement of the ordinance.

This error becomes more patent when consideration is given to the various components of a HPR. Under HPR law, a building is a "structure containing two or more apartments." S.C. Code Ann. § 27-31-20 (b). Under HPR law, the roof and walls of 45 Pinckney Street are areas common to all units. S.C. Code Ann. § 27-31-20 (f). By logic, these elements are essential to the use of the building or any activity in it. This unit, then, where the stable is proposed to be sited, is part of a building that is undeniably within 100 feet of a residentially zoned area. To adopt the circuit court's construction of the effect of a HPR would require that the front part of the building at 45 Pinckney be ignored, despite the fact that its use is essential to access and service the stable in the back half of the building. HPR law provides no safe haven for Arkay.

Arkay's argument, as adopted by the circuit court, is bottomed on the contention that, when measuring the distance of the stable from the residential zone, one starts from where the "use" occurs, and here, that use would be confined to an area of the building beyond 100 feet from the residential district. But if this premise for the measurement is correct, there would be no need to even propose a HPR. Arkay could merely house its horses in the rear of the building. Arkay and the circuit court apparently recognized that such a proposition would run afoul of the intent of the ordinance. A HPR which produces the same effect does so as well.

III. THE CIRCUIT COURT ERRED IN ITS CONSTRUCTION OF THE CITY OF CHARLESTON ZONING ORDINANCE AND TOURISM ORDINANCE BY FAILING TO RECONCILE AND CONSTRUE THEM IN A CONSISTENT MANNER.

A review of the circuit court's order reveals that it heavily relies on regulations applicable to stables used in the horse carriage tour industry to support its conclusion that a stable is a "use", and not the building in which it is located. The court found that Sec. 54-206 (p), the zoning regulations, were "uniquely focused on stables in the horse carriage tour business", and that it was "in this urban context that City Council adopted the Zoning Ordinance relating to stables." (R. Corrective Order, pp.7; 9) If such is the case, the circuit court's error in holding that a stable is not a physical structure is even further compounded.

The Tourism Ordinance leaves no room for interpretation as to what is meant by a stable. The ordinance defines a stable in unequivocal terms. It defines "stable" as the "barn where animals are kept". (R. Cir. Ct. ROA, Tab 9, Arkay Ex. 2, p. 8, Sec. 29-212 (b) (12)). The Tourism Ordinance also defines "stall", that being the "individual space within the barn where the animals are kept". (R. Cir. Ct. ROA, Tab 9, Arkay Ex. 2, p.8, Sec. 29-212 (13)). Thus, there is no doubt but that, under the Tourism Ordinance, a stable is a structure that includes stalls

where the animals are kept. As applied to 45 Pinckney Street, the building there would be the stable (the barn where animals are kept), and Unit A would be the stalls (the place within the barn where the animals are kept). And, reference to other provisions of the Tourism Ordinance specific to stables brings home the point that a stable is a structure: stables must be lighted, ventilated and protected from the weather; stables must be free of leaks, including from roofs or plumbing; the interior and exterior of the stable must be kept clean; and there can be no smoking "in" stables. (R. Cir. Ct. ROA, Tab 9, Arkay Ex.2, pp. 11-12, Sec. 29-212 (i) (1) (a), (e), (i) and (j)) None of these provisions makes sense outside the context of a stable being a structure. The Court's reference to Sec. 29-212 (e) (1) (a) of the Tourism Ordinance for the proposition that the term stable in the Ordinance is not always to be construed as a structure is unavailing because subsection (e) of the ordinance addresses how animals are cared for. It is subsection (i) that defines and addresses what a stable is. In construing statutes, specific statutes are given preference over general ones. Atlas Food Sys & Services v. Crane Nat'l Vendor Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E. 2d 858, 859 (1995) (*The general rule of statutory construction is that a specific statute prevails over a more general one).*

The reasoning of the circuit court is inconsistent. On the one hand, the tourism stable regulations are deemed to be the driving force behind the zoning stable regulations; on the other, the very definition of stable in the tourism regulations is to be ignored for purposes of zoning. Such reasoning does not comport with a standard principle of statutory construction that statutes dealing with the same subject are in *pari materia*, and must be construed together, if possible, to produce a harmonious result. Howell v. United Stated Fid. & Guar. Ins. Co., 370 S.C. 505, 510, 636 S.E. 2d 626, 628 (2006). Such reasoning is inconsistent a standard principle of statutory construction that consideration of legislation dealing with the same subject matter is helpful in

discerning legislative intent. Fidelity Casualty Ins. Co. v Nationwide Ins. Co, *supra*, 278 S.C. at 335, 295 S.E. 2d at 785.

The zoning and tourism stable regulations are complimentary and readily reconcilable. Every stable in a GB district must comply with the zoning criteria of Sec. 54-206 (p). Every stable used in the carriage tour business must comply with the zoning criteria of Sec. 54-206 (p) and the tourism criteria of Sec. 29-212 (i). Compliance with both can be had. Neither is mutually exclusive of the other. And because the ordinances must be harmonized, the definition of stable in the tourism regulations is cogent, if not conclusive, evidence of legislative intent that a stable is a structure.

CONCLUSION

It is submitted that the circuit court erred in its construction of Sec. 54-206 (p) of the Charleston Zoning Ordinance, requiring that its Corrective Order be reversed and the decision of the Board reinstated.

Respectfully submitted,

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