IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2015-001230

Town of Sullivan's Island Board of Zoning Appeals
And Town of Sullivan's Island, Appellants,

v.

Paul Boehm, Respondent.

INITIAL REPLY BRIEF OF APPELLANTS TOWN OF SULLIVAN'S ISLAND BOARD OF ZONING APPEALS AND TOWN OF SULLIVAN'S ISLAND

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November 16, 2015

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I. Respondent's version of the facts should be rejected because the BZA's findings were fully supported by the record, the BZA's findings are entitled to the deference afforded a jury verdict, and Respondent's version of the facts is only supported by Respondent's own self-serving testimony at the BZA hearing.

Respondent Paul Boehm ("Respondent" or "Boehm") presents a one-sided version of the facts, which omits important facts and relies mostly on Boehm's own self-serving testimony at the Town of Sullivan's Island Board of Zoning Appeals ("BZA") hearing. For example, Boehm boldly asserts that "[i]n 2013, Mr. Boehm asked Randy Robinson, the then Zoning Administrator, if the Zoning Ordinance allowed him to elevate the roof of 2720B by two (2') feet, and Robinson told him that he could elevate the ceiling/roof." **(Brief of Respondent, p. 5)**. Respondent also states that "[i]n review of other properties on Sullivan's Island containing two or more dwellings, the Town has routinely allowed property owners of secondary dwellings to increase the heated square footage, porches and decks, as well as to elevate them, even allowing owners to add a loft or a 2nd floor where there had only been one floor." **(Brief of Respondent, p. 5)**. Both of these assertions were refuted by Mr. Robinson's testimony at the BZA hearing. Mr. Robinson's testimony about the two assertions above is telling:

> MR. ROBINSON: . . . Paul [Boehm] made some statements about what I said and also about some other structures. You know, that was -- and I don't know exactly how to say it except ***that was history according to Paul***. You know if we -- dissect every different property and every different situation, they're all different. . . .

(TOSI-BZA 118) (triple emphasis added). As aptly described by Mr. Robinson at the BZA hearing, Respondent's factual account in his brief is "history according to Paul." Respondent's arguments are based upon his own testimony and should be rejected.

Respondent urges this Court to ignore the findings by the BZA and adopt "history according to Paul." Respondent's argument is unsupported by South Carolina law, which does not support a court adopting a contrary version of facts when the BZA's factual finding were supported by the record. See Rest. Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (stating that a court hearing an appeal from a board of zoning appeals should give deference to the findings by that body and not simply substitute its own judgment for that of the board's); Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004) (". . . [A] decision of [the BZA] will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion."). Furthermore, Respondent's argument ignores that, under South Carolina law, the BZA's findings of fact are to be treated as findings of fact by a *jury*. see S.C. CODE §6-29-840(A)("...The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, . . . In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.").

It is worth noting that each of the BZA's factual finding were based upon the evidence presented at the hearing, such as the certificate of occupancy for Unit B stating that the building was a garage **(TOSI-BZA 0001)**; the inspection ticket approving the non-conforming residential use of the apartment over the garage **(TOSI-BZA 0079)**; the photos and design documents showing design of the structure as a two bay garage with a side staircase leading to a non-conforming residential unit above the garage **(TOSO-BZA 0141, 0035)**; and Boehm's own testimony regarding his real estate company's description of the property as follows: "a garage for two cars, a storage/workshop area for your favorite

hobbies. Instead of cars put a pool table and ping pong table in the garage" **(TOSI-BZA 0017).**

This Court should not indulge the *de novo* review of the BZA's findings of fact that Respondent's arguments require, because a *de novo* review is not permitted under South Carolina law. The Court should review the BZA's factual findings, find that they were supported by the record at the BZA hearing, and reverse the Circuit Court, which ignored the BZA's findings of fact and substituted its own judgment for that of the BZA.

II. The Circuit Court committed error of law in substituting its own judgment for that of the BZA's in finding that Unit B, a non-conforming structure with a non-conforming residential use on the second floor, could be expanded.

Unit B's residential use is a non-conforming use, regardless of whether Unit B is an accessory structure (as found by the BZA) or a second principal building (as found by the Circuit Court)[1]. See **(TOSI Ordinance § 21-150(F))** ("[i]n the event that two or more Principal Buildings occupy a single lot, said occupancy shall constitute a non-conforming use. One structure shall be designated conforming and the other(s) shall be non-conforming. . . ."). Respondent argues, as the Circuit Court found, that the non-conforming use is the presence of two principal buildings and because Boehm's requested improvements "do not contemplate the addition of another residence . . . there is no increase in the extent of the non-conformity." **(Brief of Respondent, p. 14).** This expansive interpretation ignores the plain language of the zoning ordinance, which provides that the residential occupancy of a second principal building is a non-conforming use that "shall

[1] The Circuit Court erred in finding that Unit B was a non-conforming second principal building and should have affirmed the BZA's decision that Unit B was an accessory structure with a legal non-conforming residential use on the second floor. However, for purposed of determining whether Boehm can expand the non-conforming residential use, the difference is immaterial.

not be expanded except to eliminate or reduce the nonconforming aspects." **(TOSI Ordinance § 21-150(F) & § 21-150(B))**.

Respondent argues that nothing short of adding an additional residential unit would be considered an expansion of the non-conforming residential use. Respondent's position is dangerous, at odds with the zoning ordinance, ignores the standard of review applicable to the decisions of boards of zoning appeals, and would allow any and all expansions of non-conforming second principal buildings that did not include the additional of an entirely new residence. The proposed expansions clearly expand the residential aspects of the apartment. For example, Boehm seeks to raise the roof, increasing the space of the apartment. See **(TOSI-BZA 0111)** (Boehm testifying at the BZA hearing that raising the roof would increase the interior volume of the apartment). Boehm also seeks to add deck space to the apartment increasing the outdoor living area for the non-conforming apartment. The Circuit Court should be reversed because these types of expansions are precluded by the zoning ordinance – the proposed expansions increase the extent of the non-conformity.

Respondent tries to distinguish the cases demonstrating that South Carolina Courts have recognized the need to enforce local land use ordinances precluding the expansion or rebuilding of non-conforming uses or non-conforming structures See Christy v. Harleston, 266 S.C. 439, 223 S.E.2d 861 (1976); Historic Charleston Found. v. Krawcheck, 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994) (recognizing, as stated in Christy, that "the intention of all zoning laws, as regards a nonconforming use of property, is to restrict and gradually eliminate the nonconforming use."). However, Respondent cites no cases or

ordinances condoning the type of broad expansion of non-conforming uses that Respondent urges the Court to find permissible.

This Court should uphold the Town of Sullivan's Island's (the "Town") prohibition on the expansions of non-conforming uses that do not reduce or eliminate the non-conformity and the BZA's enforcement of the Town's zoning ordinance precluding such expansions. See **(TOSI-BZA 0128-0129)** ; **(TOSI Ordinance § 21-150(B))**; see also, **(TOSI Ordinance § 21-149 (B))** (". . . it is the general policy of the Town to allow uses, structures, signs, lots and other situations that came into existence legally, in conformance with then-applicable requirements, to continue to exist and be put to productive use, but to bring as many aspects of such situations into compliance with existing regulations as is reasonably possible.")

III. The Circuit Court committed error of law in substituting its own judgment for that of the BZA's in finding that the BZA acted arbitrarily, capriciously, and abused its discretion in determining that Unit B is properly classified as an accessory structure with a non-conforming residential use on the second floor.

Respondent argues that the Circuit Court correctly found that the Unit B was second principal building, even though the BZA found that it was an accessory structure. It is undisputed that Unit B is a garage on the first floor and an apartment on the second floor. A garage is either (1) "[a]n accessory building" or (2) a "portion of a Principal Building." **(TOSI Ordinance §21-203).** The BZA determined that Unit B was an accessory structure and that the apartment use of the second floor was a non-conforming residential use of that portion of the accessory structure. The BZA's decision was consistent with the Town's zoning ordinance stating that a garage can be an accessory structure and was based upon an extensive factual record an approximately two hour public hearing. See **(TOZI-BZA 0103)** (BZA finding that Unit B is a "nonconforming garage (structure)" and affirming the

denial of the permit); **(TOSI-BZA 0103-0129)** (hearing transcript indicating that the public hearing lasted approximately two hours; two witnesses testified; twenty-one exhibits were introduced; and public comments were invited and made by members of the public); **(BZA order issued February 12, 2015)**.

The Circuit Court erred in adopting Respondent's argument that the garage was a portion of a second principal building. **(Brief of Respondent, p. 10)**; **(Order filed May 4, 2015, p. 5)** (holding that "Because 2720B contains a residence, it cannot be a garage. Because it contains a residence, it must be a principal building."). The Circuit Court decision ignores that a garage can be an accessory structure and incorrectly finds that a non-conforming residential use converts the structure into a second principal building. This is the tail wagging the dog; the non-conforming use should not be permitted to redefine the structure under the zoning ordinance.

The BZA ruling that Unit B is an accessory structure is supported by the record and the Circuit Court committed error of law by reversing it and substituting its own judgment for that of the BZA members. See Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004) (providing the applicable standard of review); see also, Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 236, 642 S.E.2d 565, 568 (2007) (noting that the decisions of those charged with interpreting and applying zoning ordinances "should be given some consideration and not overruled without cogent reason therefore."). Therefore, because the Circuit Court wrongfully substituted its judgement for that of the BZA, this Court should reverse the Circuit Court's decision.

In arguing that Unit B is a second principal building under the zoning ordinance, Respondent asserts, as an additional affirming ground, that this Court should find that

Appellants are estopple from taking the position that Unit B is an accessory structure.[2] Respondent's argument is based solely upon his self-serving account of a conversation with the Town's prior Zoning Administrator, Kent Prause, more than a decade ago. **(TOSI-BZA 106)**. The BZA, which heard this testimony was unconvinced. Even in Boehm's version of his conversation with Mr. Prause, Mr. Prause did not say that Unit B was a second principal building under section 21-150(F), he simply told Boehm that of the main building was conforming and Unit B was non-conforming. See **(TOSI-BZA 106)**. Boehm went on to state that he would not have bought the property if Unit B was an accessory structure. See **(TOSI-BZA 106)**. However, he never explained why it was important to him that Unit B be a non-conforming second principal building, rather than an accessory structure with a non-conforming residential use on the second floor. His uncorroborated account of a conversation wherein Prause told him that the residential use of Unit B was non-conforming is insufficient to establish estoppel.

First, it is important to note that Boehm does not allege that he received an official determination of the status of Unit B from the Town's Zoning Administrator. In the case cited by Respondent, the zoning administrator issued an official letter regarding the zoning of the property in question and the court found that the property owner was entitled to rely upon that official representation. See Abbeville Arms v. Abbeville, 273 S.C. 491, 494, 257 S.E.2d 716, 718 (1979) (stating that "there is no evidence whatsoever that the City Zoning

[2] Respondent does not include this additional affirming ground as one of his issues on appeal as required under the rules and the Court should exercise its discretion to decline to rule on this issue. S.C.R. App. P. 208(b)(1)(B)(stating that "Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal"); 208(b)(2).

Administrator was acting outside the scope of his authority in issuing the letter confirming that the property was zoned R-6 High Density Residential on the Official Zoning Map.").

In addition to failing to prove any an official determination of status of Unit B was conveyed to him, Boehm fails to point to any evidence of reliance or prejudice. See e.g., Abbeville Arms, at 491, 494, 257 S.E.2d at 718 (discussing the "three essential elements necessary to invoke the doctrine of estoppel": the relying party's lack of knowledge of the true facts, reliance by the party invoking the doctrine, and a showing that the party invoking the doctrine would be prejudice). The only evidence of reliance pointed to by Respondent is his own unexplained testimony that he would not have purchased the property if he had known that Unit B was an accessory structure with a non-conforming residential use on the second floor, rather than a second-principal building (which is non-conforming by virtue of the residential occupancy). Respondent offers no explanation as to how or why he relied upon this distinction. Similarly, because the non-conformity exists under either scenario, Respondent cannot show any prejudice.

Respondent claims that the BZA's denial of a 2009 variance request confirmed that Unit B was a second principal building because the order cited to 21-150(F). However, the 2009 BZA order also cited to 21-150(B) which states generally that "A Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspects." Any argument that the BZA confirmed Respondent's understanding of the status of Unit B under the zoning ordinance is once again, "history according to Paul." What the 2009 order did confirm was that Respondent could not expand his non-conforming residential apartment, without seeking a variance from the BZA, and that the BZA may deny such a

variance request. **(TOSI-BZA 0041)** (BZA Order affirming denial of a permit request to expand Unit B by connecting the slat house to the deck of Unit B).

IV. Respondent's alternative affirming ground—that the Town's Ordinance provisions relating to expansions of non-conforming structure are void for vagueness—should be rejected because it was not preserved for appeal in that it was not included in the petition appealing the BZA's decision. Alternately, Respondent's alternative affirming ground fails on the merits.

Respondent's argument that the Town's zoning ordinance provisions relating to expansions of non-conforming structures are void for vagueness should be rejected because the argument is unpreserved. By statute, a person who may have a substantial interest in any decision of the board of zoning appeals may appeal from a decision of the board to the circuit court by, within thirty days of the mailing of the decision of the board, "filing with the clerk of the court ***a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law***." South Carolina Code § 6-29-820(A) (double emphasis added). This Court has found that compliance with the statutory requirement of filing a petition setting for the reasons why the decision is contrary to law is required to preserves an appellant's issues for appeal: ". . . the sole preservation requirement for a first-level appeal of a zoning board's decision is that an appellant must set forth his issues on appeal in a written petition and file that petition with the circuit court before the thirty-day filing period expires." Newton v. Zoning Bd. of Appeals for Beaufort County, 396 S.C. 112, 117, 719 S.E.2d 282, 284, (Ct. App. 2011) (holding that issues need not be raised at the board hearing if they are included in a party's petition filed with the circuit court). Here, Respondent did not preserve this argument by including the issue in his petition, as required by statute. See **(Notice of Appeal and Petition filed February 20, 2015 in 2015-CP-10-1103)**.

Additionally, even if the issue were included in Respondent's petition and preserved for appeal, Respondent's argument fails on the merits. Zoning ordinances are presumed valid and the party attacking a zoning ordinance bears the burden of proving its invalidity. See generally, Historic Charleston Found. v. City of Charleston, 400 S.C. 181, 185, 734 S.E.2d 306, 308 (2012) (noting that "[e]ven if we were to find the ordinance constituted spot zoning, we must exercise judicial restraint before declaring it unlawful, keeping in mind the particular circumstances of the case. Zoning ordinances are presumed valid and the person attacking one bears the burden of showing the zoning decision is arbitrary, unreasonable, and unjust." (internal citation omitted)); See also generally, Bob Jones University, Inc. v. Greenville, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963) ("There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application . . . [l]ikewise, the power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously. . .") Here, Respondent has failed to carry that burden.

First, it is worth noting that Respondent does even specifically identify what "zoning ordinance provisions" he challenges as void for vagueness, except to say those provisions relating to "expansions of nonconforming structures." Second, this case includes the expansion of a non-conforming use and Respondent has specifically argued that TOSI Ordinance §21-151 concerning nonconforming structures "is not applicable". **(Brief of Respondent, p. 13).** Third, Respondent's only support for his argument that the unidentified ordinance provisions are void for vagueness is that his own review of other properties has led him to conclude that "[t]here appears to be much confusion as to the

meaning of these provisions of the Zoning Ordinance." **(Brief of Respondent, 15);** See **(TOSI-BZA 118)** (Randy Robinson responding to Boehm's testimony that he has located examples of similar situations by stating: "that was history according to Paul. You know if you – dissect every different property and every different situation, they're all different. . . ."). Finally, Respondent fails to explain how any provision of the Town's zoning ordinance is vague—an ordinance is not unconstitutionally vague under a void-for-vagueness analysis when the ordinance provides fair warning to the ordinary citizen of what conduct is proscribed. See generally, Grayned v. City of Rockford, 408 U.S. 104, 108-9, 92 S.Ct. 2294, 2299 (1972). Under the zoning ordinance, non-conforming structures cannot be expanded except when the proposed expansion will not increase the extent of the non-conformity and non-conforming uses cannot be expanded except to eliminate or reduce the non-conforming aspects. See **(TOSI Ordinance § 21-151(B)(1))** (stating that "[s]tructural alterations, including enlargements, are permitted unless the structural alteration does not increase the extent of nonconformity."); **(TOSI Ordinance § 21-150(B))** (stating that ("[a] Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspects."). Nothing about these sections is vague or unclear and the ordinary citizen is on notice that if they own a structure that is a non-conforming structure, it cannot be altered if the proposed alteration will increase the extent of the non-conformity. It is equally clear that a non-conforming use cannot be altered except to reduce or eliminate the extent of the non-conformity. Therefore, the Court should reject Respondent's argument that the zoning ordinance provisions relating to expansions of non-conforming structures are void for vagueness and uphold the clear language of the zoning ordinance provisions applicable to this case.

CONCLUSION

For the reasons stated above and in Appellant's brief, the Circuit Court's decision should be reversed and the BZA's decision affirmed in full.

Respectfully Submitted,

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PROOF OF SERVICE

I, Amanda Smith, of Pratt-Thomas Walker, P.A., hereby certify that I have served a true and accurate copy of the Initial Reply Brief of Appellants Town of Sullivan's Island Board of Zoning Appeals and Town of Sullivan's Island by U.S. Mail on November 16, 2015 to counsel of record as shown below:

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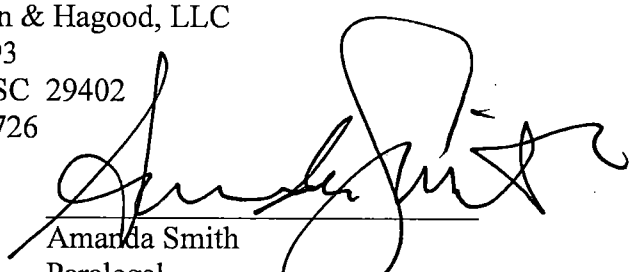

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The Honorable Jenny Abbott Kitchings
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Re: **Town of Sullivan's Island Board of Zoning Appeals and Town of Sullivan's Island, Appellants, v. Paul Boehm, Respondent**
Appellate Case No. 2015-001230
Our File No.: 6670-010

Dear Ms. Kitchings,

Enclosed please find for filing the Initial Reply Brief of Appellants Town of Sullivan's Island Board of Zoning Appeals and Town of Sullivan's Island.

Thank you for your assistance. Please contact us if you have any questions.

With kindest regards,
PRATT-THOMAS WALKER

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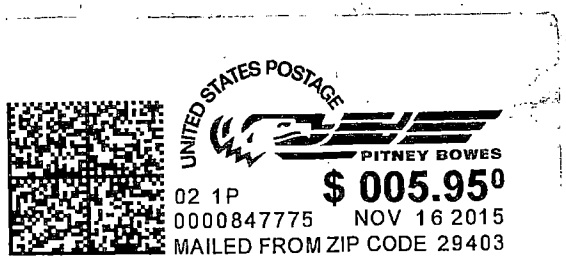
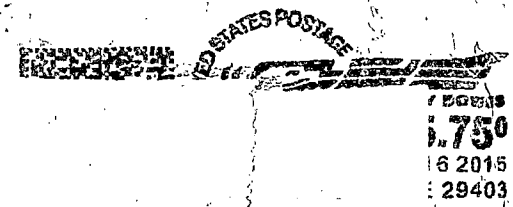
c: Alice Paylor, Esq. (w/encl.)





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