80223

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

RECEIVED
JUL 14 2016
SC Court of Appeals

Case No. 2013-CP-10- 3864
Appellate Case No: 2014-001466
Opinion No: 5419, filed June 29, 2016

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.

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING *EN BANC*

Capers G. Barr, III
SC Bar No: 00542
Barr, Unger and McIntosh
11 Broad Street (29401)
P.O. Box 1037
Charleston, SC 29402
Telephone: 843-577-5083
Facsimile: 843-723-9039
Attorney for Respondent Arkay, LLC and Robert R. Knoth, its member

Respondents Arkay, LLC and Robert R. Knoth, its member, Petitioners herein, ("Petitioners") hereby petition for a rehearing pursuant to SCACR Rule 221(a) and suggest the desirability of a rehearing, *en banc*, pursuant to SCACR Rule 219(b).

Introduction and Overview:

This case presents a question of statutory construction.

Petitioners are one of five horse tour carriage businesses licensed to operate in the City of Charleston. They seek to locate their stable for the keeping of horses to the property at 45 Pinckney Street. Stables are permitted in the zoning district including 45 Pinckney Street as a Special Exception Use, provided that they meet seven factual criteria set forth in City Ordinance 54-206(p).

The parties agree that Petitioners meet six of the seven criteria. At issue here is whether 54-206(p)(1) has been met. It provides: "Stables shall be permitted with in the GB and UC District as an exception where the Board, after review, finds that: 1. The stable is not located within 100 feet of any residential zoned district...".

The property at 45 Pinckney Street consists of a large, open warehouse, used in previous times as an automobile garage and at one time as a horse carriage stable. The building is constructed to the zero lot line on all four sides.

The surveyed distance from the closest point of 45 Pinkney Street to the nearest residential zone district is 93.5 feet, 6.5 feet short of the required 100 feet. In fact, the entire façade of the building does not run parallel with the lines of the residential zoned district, so that the farthest point between the residential district and the building façade is greater than 100 feet.

Petitioners propose to locate their horse stable in the rear-most part of the building, 25.5 feet from the building façade. The front of the building on Pinkney Street will consist of two business offices (and one is in existence today), separated by an open, arched entrance way between the two business offices, permitting access to the areas of the building, to the rear. The stable comprises the width of the building, 37.26 feet, and 69.5 feet deep. The offices in the front of the building are each approximately 12 feet wide by 12 feet deep. Between the offices, and the stable in the rear, is a 14-foot deep common area which will house restrooms and a waiting area for tour carriage customers. (See R.p. 375 for a depiction of the plot plan).

Accordingly, the nearest distance from the Residential Zone District to the stable in the rear of 45 Pinckney Street where horses will be kept, is 119 feet at its closest point.

Petitioner argued to the Board of Zoning Appeals that the 100-foot separation should be measured to the stables in the rear of the building. The BZA found, however, that the distance should be measured from the façade of the building, itself. The Special Use Application was denied.

The Circuit Court reversed the Board of Zoning Appeals, holding the measurement should be taken from the point 119 feet away from the residential zoned district, to the place where the horses are kept. This court reversed the Circuit Court in a 2 to 1 opinion filed June 29, 2016, Opinion No. 5419.

Discussion:

Petitioners seek re-hearing, and respectfully suggest a rehearing, *en banc.*

The majority opinion in this case found that the business offices in the front section of 45 Pinkney Street, and the customer waiting area and restrooms in the center of

the building, are "commonly associated with horse stables". Respectfully, there is no basis to support that finding, either in the record of this case or as a matter of common knowledge. The finding is an important one because, as discussed in the dissent, and as found by the Circuit Court, and as argued by Petitioners, to include such areas in any definition of "stable" merely because they are housed in the same structure is not supported by any grammatical analysis or by any construction of any provision in the Charleston City Code.

The context of the legislation at issue is that it was enacted to regulate stables in an urban setting, and more specifically in the horse tour carriage business. No other stable in the City, for example, would have need to obtain a Certificate of Appropriateness from the City Tourism Commission other than a tour carriage stable (See 54-206(p)(2)), and few other stables would require policing to ensure that cleaning/loading/tacking would not impede traffic flow in a public right of way. (See 54-206(p)(4)).

And horse tour carriage stables must be located in the Market District in the City of Charleston, where building space is at a premium.

These facts were known to City Council when it enacted 54-206(p). It is therefore more than fair to conclude that Council contemplated that "stables" would be located in buildings along with other uses. This fact is acknowledged in the record of this case. The zoning administrator, Mr. Batchelder, told the BZA: "Could be that, for instance if the—if the First Baptist gymnasium located a half block away was renovated and turned into multiple commercial tenant spaces, which it could be because that is a commercially zoned property, and you place a stable in one of those spaces but then had offices and restaurants and shops and other tenant spaces, that you would measure from the space

that was actually occupied by the stable use and not from the building. So I think it is appropriate to do that in this case...". (R.p. 268, line 141 to R.p. 270, line 24).

The majority opinion in this case also found: "The obnoxious elements – no matter how minimal in scope Arkay claims they will be – are still likely to accumulate in these areas (referring to the offices, customer waiting area, and restrooms) and escape through the front gate abutting Pinckney Street, the building's only point of access." Respectfully, there is no support in the record for this finding, either. Moreover, the 6.5 feet at issue in this case would make absolutely no difference even if the finding were supported by facts. Any propensity to accumulate obnoxious elements would exist. In fact, in the proposal made by Petitioners, the possibility of those occurrences is pushed back, at least by 25 feet.

Importantly, the office spaces to the front of the building are to be enclosed, separated by partition walls from the remainder of the building. It seems equally an absurd result, therefore, to suggest that no person may smoke in those offices, because the building is a "stable". Or that no animal excrement may be accumulated in those offices; not that any such circumstance could possibly occur—thus, another absurdity.

The plain language construction of 54-206(p) should prevail, without the need for any rules of statutory construction. The plain language construction supports the conclusion that City Council contemplated a "stable" to be included in this concentrated urban setting, as a use in a larger building consisting of multiple uses. There is no need to resort to an *in pari materia* analysis as to this question because the construction may be made from the words of the statute itself. Whereas 54-206(p)(1) requires "stables" to be

100 feet distant from neighborhoods, 54-206(p)(7) provides that "buildings" be designed utilizing appropriate ventilation to prevent objectionable odors from being emitted.

Here, Petitioners respectfully ask the majority of the Court to reconsider their position. The Circuit Court, the Dissent, and Petitioners in their briefs, have argued that City Council used the term "buildings" in 54-206(p)(7) advisedly, for a reason, and to distinguish "buildings" from "stables". The majority of this Court has rejected the argument because "building" can also mean a "stable". But the terms are synonymous still does not address the point. Even if a "stable" can be a "building", why did City Council use the term "building", at all? To say that the terms are synonymous does not answer the question.

It is never to be supposed that a single word was inserted in the law of this State without the intention of thereby conveying some meaning. *Davenport vs. City of Rock Hill, 315 S.C. 114, 117, 432 S.E.2d 451,453 (1993).*

Respectfully, this Court must not conclude that City Council wrote the statute in a casual fashion, but rather that "building" in 54-206(p)(7) was used deliberately, and as concluded by the Trial Court, was intended to encompass the circumstance presented here, where a "stable" is merely part of a larger "building".

To conclude that "building" and "stable" are synonymous in the ordinance would be to render one word or the other meaningless, thus ignoring the distinction made by City Council, and further ignoring the clear principle of statutory interpretation that no word should be deemed meaningless. See *FRE, LLC vs. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (SCt 2001); Hembree vs. $1,847.00, 404 S.C. 241, 743 S.E.2d 864 (Ct.App. 2013).*

Conclusion.

For the reasons set forth, it is submitted that a second look at Opinion No: 5419 is warranted, and this Petition for a Rehearing be granted. Further, and because of the split decision of the Court, the suggestion for a rehearing *en banc* should be given due consideration by this Court.

Petitioners suggest that the Court must conclude the term "building" was used for a reason, to distinguish from a "stable" and, further, that City Council wrote the statute in a deliberate fashion and not casually. The use of "building" 54-206(p)(7) was intended to encompass the circumstances presented here, where a "stable" is merely a part of a larger "building". To conclude otherwise would render one term or the other, meaningless.

Respectfully submitted,

Capers G. Barr, III
SC Bar No: 00542
Barr, Unger and McIntosh
11 Broad Street (29401)
P.O. Box 1037
Charleston, SC 29402
Telephone: 843-577-5083
Facsimile: 843-723-9039
Attorney for Respondents Arkay, LLC and Robert R. Knoth, its member

Charleston, South Carolina
July 13, 2016

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
Appellate Case No: 2014-001466
Opinion No: 5419, filed June 29, 2016

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.

PROOF OF SERVICE

I certify that I have served a copy of the Respondent's Petition for Rehearing and Suggestion for Rehearing *en banc* on Appellants, by depositing a copy of same in the United States Mail, postage prepaid, on July 13th, 2016, addressed to the following:

Frances Isaac Cantwell, Esq.
City of Charleston
50 Broad Street
Charleston, SC 29401

Wilbur E. Johnson, Esq.
Young Clement Rivers, LLP
P. O. Box 993
Charleston, SC 29402-0993

Thomas S. Tisdale Jr., Esq.
Hellman, Yates & Tisdale, PA
145 King Street, Suite 102
Charleston, SC 29401

Signature line on following page

Capers G. Barr, III
SC Bar No: 00542
Barr, Unger and McIntosh
11 Broad Street (29401)
P.O. Box 1037
Charleston, SC 29402
Telephone: 843-577-5083
Facsimile: 843-723-9039
Attorney for Respondents Arkay, LLC and Robert R. Knoth, its member

Charleston, South Carolina
July 13, 2016