

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JUL 25 2016

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

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.

Return to Petition for Rehearing
And
Suggestion for Rehearing *En Banc*

The City of Charleston, City of Charleston Board of Zoning Appeals – Zoning, Andrew Pinckney Inn and Michael Molony (the “Respondents”) submit this Return to Petitioners’ Petition for rehearing and suggestion for rehearing *en banc*. Respondents oppose the petition.

INTRODUCTION

This case poses a question of statutory construction. The specific question posed is the intent of the Charleston City Council in enacting an ordinance requiring that a stable be at least 100 feet from a residential zoning district.

Petitioners operate a horse carriage tour business in downtown Charleston. They seek to locate a stable at 45 Pinckney Street. No. 45 Pinckney Street is in the Market Area of downtown and is zoned General Business (GB).

The City’s Zoning Ordinance allows stables in a GB zone if the Board of Zoning Appeals grants a special exception, after determining the stable meets certain criteria. One criterion is that the stable cannot be located within 100 feet of a residentially zoned district.

No 45 Pinckney Street is occupied by one building, the walls of which are flush with all lot lines. The building has one means of ingress and egress to Pinckney Street. A survey commissioned by Petitioners demonstrated that the front façade of the building was within 100 feet of a residentially zoned district.

When the Petitioners appeared before the Board, they sought to satisfy the 100 foot separation requirement by proposing to house their horses in the rear of the building, arguing that, for purposes of determining the separation requirement, the measurement was to be taken from the location within the building where the animals were stored, not from the building itself. Petitioners further proposed subjecting 45 Pinckney Street to a horizontal property regime,

allocating 79% of the square footage of the building to Unit A, where horses would be stored, and 21% of the building to Unit B, where carriage offices, customer waiting areas and restrooms would be located. The statutorily prescribed access from Unit A to Pinckney Street was by way of easement and/or common area through Unit B.

The Board of Zoning Appeals denied the special exception on the basis of the stable being located within 100 feet of a residentially zoned district. The Board rejected Petitioners' argument that a stable was only the area in a building in which the animals were stored, and it was from that area that the separation measurement was to be made. The circuit court reversed the Board's decision, holding that the use of the term "buildings" instead of "stable" in one of the special exception criteria was evidence of an intent by Council that buildings used as stables would have multiple uses, and thus the separation requirement was to be measured from the place within the building where the stabling "use" occurred. This Court reversed the decision of the circuit court in Opinion 5419, filed June 29, 2016.

STANDARD OF REVIEW

This petition is governed by Rule 221 (a), SCACR, which requires Petitioners to identify points that were overlooked or misapprehended by the Court.

DISCUSSION

The issue in this case boils down to discerning the intent of City Council in requiring that a stable in a GB zone be at least 100 feet from a residentially zoned district. The Opinion of this Court addressed this issue head-on and thoroughly. The foundation of Petitioners' case rests on whether, in the use of the term "buildings" in one of the seven special exception criteria, Council

intended to create a distinction that a stable was not a building, but a place within a building. The Board and this Court held otherwise. This holding is correct, not just from common experience which tells us a stable is a building, but also from the City's zoning ordinance itself. As noted in this Court's Opinion, while the zoning ordinance does not define the term "stable", it does define the term "building". A building, per the zoning ordinance, is "any structure built for the support, shelter, housing or enclosure of persons, animals or property of any kind". (R. Vol. I, p. 217) Thus, per the zoning ordinance, the term "building" encompasses a stable. The very definition of "building" undermines the Petitioners' contention that Council's use of the term when addressing stables was intended to draw a distinction between a building and a stable. As applied here, there is but one building on 45 Pinckney Street. That building is proposed to be used as a stable, and that building is within the proscribed distance of a residentially zoned neighborhood.

Nor can issue be taken with this Court considering how Council defined stable in its tourism management ordinance. Petitioners themselves contend that the purpose of the zoning regulations pertaining to stables were designed to address stables used in the horse carriage business. (Pet., p.4, ¶ 2) If that is the case, then how Council defined "stable" in the tourism ordinance is cogently relevant. Council's intent could not have been clearer in this regard: per the tourism ordinance, a stable is the "barn where the animals are kept"; a stall is the "individual place within the barn where the animals are kept". (R. Vol. I, p. 245) It is illogical to contend that a stable means one thing per the tourism ordinance, and another per the zoning ordinance if Petitioners' contention that the zoning regulations were designed for stables used in the carriage tour business is to be taken as true. As applied here, the building at 45 Pinckney Street is the barn

where animals are kept. Unit A of the proposed horizontal property regime is a stall, that being the place within the barn where the animals are kept.

Petitioners' challenge to this Court's observation that areas and rooms in the front portion of 45 Pinckney Street is an effort to create an issue where there is none. Common experience supports this finding. Stables house animals. They also commonly include areas for storage, caretaker quarters, running water, restroom facilities and work space. Moreover, this finding by the Court is in lockstep with the facts of this case. Petitioners were proposing to establish a stable for use in a horse carriage business. In light of this circumstance, it is gainsaid but that restrooms, waiting areas and an office would be associated with a stable used for that purpose. And sight must not be lost of the fact that Petitioners were proposing to dedicate 1639 square feet of the 2074 square foot building, or 79% of the building, to what it contends is the "stable", with the remaining 435 square feet being dedicated to what it contends are non-stable uses. (R. Vol. I, p. 106) To accept Petitioners' proffered construction of the term "stable" would mean the inclusion of any use in a stable that does not include space where animals are kept would transform the nature of the building to something other than a stable, no matter what. As applied here, the 21% of the building that Petitioners contend is not used for stable purposes would require ignoring that the overwhelming area of the building is used for that purpose, presenting a classic case of the tail wagging the dog.

That City Council requires stables used in the horse carriage business to be located in the Market Area of the City has no bearing on its intent of what constitutes a stable. This becomes abundantly clear that when enacting that very requirement, it also enacted provisions that defined a stable as the barn where the animals are kept, and defined stall as a place within the barn where the animals are kept. Moreover, the requirement for horse carriage stables being in the Market

Area is wholly logical. Carriage tours start and end in the Market. Requiring stables used in that business to be located nearby is a legitimate means of organizing the operation of that business and mitigating the impact that slow moving carriages have on the flow of traffic.

Petitioners' protests to the contrary notwithstanding, this Court's noting that the obnoxious elements associated with the operation of a stable would accumulate in the front of the building and escape through its only entrance out onto Pinckney Street are spot on and supported by the Record. The site plan of the stable demonstrates as much. (R. Vol. I, pp. 106, 107) The door to the building would have to be open to accommodate the comings and goings of the carriages and their patrons. And the fact that the front offices have doors is of no moment. Enclosing a room within a building does not result in a new or separate building.

That the building at 45 Pinckney is 6.5 feet short of the required separation, while unfortunate, nonetheless renders the building ineligible for use as a stable. As held in Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, 171, 72 S.E.2d 66, 70 (1952), zoning lines have to be drawn somewhere, and that determination rests with the governing body.

Petitioners' argument regarding the use by Council of the term "buildings" in the zoning ordinance when enacting stable regulations has been addressed. Suffice it to say, these terms, per the zoning ordinance, are interchangeable, as the definition of building includes a stable. Indeed, Petitioners do not argue otherwise. Nor does their being used interchangeably render either meaningless. This is so because a stable is a building. The effort to attribute great significance to the use of a term that has the same meaning as stable should not be countenanced.

CONCLUSION

Rule 221(a), SCACR requires a showing that this Court overlooked or misapprehended a point of law or fact. While the petition before the Court embodies argument disagreeing with the Opinion of this Court, there has been no showing that a fact or point of law was overlooked or misapprehended. There is no need for this Court to take a second look at its Opinion or to reconsider this matter *en banc*. This petition should be denied.

Respectfully submitted,

Charleston, South Carolina

July 22, 2016

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CERTIFICATE OF SERVICE

I certify that I have served the Return to the Petition for Rehearing and Suggestion for Rehearing *En Banc* on Arkay, LLC and Robert R Knoth, its member, on July 22, 2016, addressed to his attorney of record, Capers G. Barr, III, Post Office Box 1037, Charleston, South Carolina 29401

July 22, 2016



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