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IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

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

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Case No. 2015-001230  
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**RECEIVED**  
APR 12 2018  
SC Court of Appeals  
Appellants,

Town of Sullivan’s Island Board of Zoning Appeals  
And Town of Sullivan’s Island,

v.

Paul Boehm,

Respondent.

\_\_\_\_\_  
PETITION FOR REHEARING BY APPELLANTS TOWN OF SULLIVAN’S ISLAND  
BOARD OF ZONING APPEALS AND TOWN OF SULLIVAN’S ISLAND  
\_\_\_\_\_

Pursuant to Rule 221(a), SCACR, Appellants the Town of Sullivan’s Island Board of Zoning Appeals (“BZA”) and the Town of Sullivan’s Island (“the Town”) (collectively, “Appellants”) hereby petition for rehearing of the Court's published decision affirming an order reversing the BZA’s decision. See Boehm v. Town of Sullivan’s Island Board of Zoning Appeals et. al., Op. No. 5546 (Ct. App. filed March 28, 2018) (the “Opinion”).

Rehearing is appropriate because the Opinion overlooks, misapprehends, or fails to address Appellants’ argument that any expansion of a second principal building, a structure housing a nonconforming use, which does not have the effect of reducing or eliminating the nonconforming use is prohibited under the Town’s zoning ordinance.

## FACTS

Paul Boehm owns two structures at 2720 Goldbug Ave. One of the structures, Unit B, has a garage on the ground level, with an apartment located above the garage. See e.g., (R. p. 176) (Certificate of Occupancy issued November 20, 1989 for “Apartment Above Garage”); **(R. p. 141)**.<sup>1</sup> The other structure is a “slat house,” immediately adjacent to Unit B. See e.g., (R. p. 141). Also on the property, which is not subject to this appeal, is the principal residential building.

Boehm sought to expand Unit B by raising the roof approximately two feet and the Town’s Zoning Administrator (the “Zoning Administrator”) denied his permit application. **(R. pp. 214-218)**. The Town approved proposed renovations that did not expand the residential use of Unit B. **(R. pp. 137-140)**. After construction began, the Zoning Administrator issued a stop work order for work being performed that differed from the approved plans. Additionally, the Zoning Administrator issued violations for work for which Boehm never applied for a permit. Specifically, the Zoning Administrator issued violations for (1) connecting the slat house to Unit B; (2) removing a portion of the handrail on the second story rear walkway of Unit B, which allowed this connection; (3) constructing anchored, wooden benches on the roof of the slat house; (4) installing anchored planters on the roof of the slat house; and (5) installing additional slats/planks on the roof of the slat house. **(R. pp. 201-211)**.<sup>2</sup>

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<sup>1</sup> The Opinion affirmed the lower court’s decision that Unit B was a second principal building and not an accessory structure. **(Opinion)**. As a second principal building, Unit B is a structure designated as nonconforming. See (Opinion) and TOSI Ordinance § 21-150(F) **(R. pp. 600-601)**. This Petition for Rehearing does not seek rehearing with respect to the ruling that Unit B is a nonconforming second principal building.

<sup>2</sup> All five of the violations for unpermitted construction work relate to Boehm’s unpermitted work in connecting the slat house to Unit B to expand and outfit Unit B’s second story-deck area. See (R. pp. 201-211).

Boehm appealed the decisions to the BZA, which affirmed. See (R. pp. 141-167). The BZA's April 10, 2014, order included three rulings affirming three decisions of the Zoning Administrator. See (R. pp. 141-167). Specifically, the BZA's April 10, 2014 order: (1) affirmed the denial of a request to increase the roof height of Unit B by two feet; (2) affirmed the issuance of a stop work order for construction work beyond the scope of the work illustrated on a building permit; and (3) affirmed the issuance of violations related to the alteration of the slat house. (R. pp. 141-167). Among other things, the BZA found all the work planned for Unit B impermissibly expanded a nonconforming use. (R. pp. 141). Boehm appealed.<sup>3</sup>

By order filed on May 4, 2015, the Circuit Court ruled that Unit B is a nonconforming second principal building and concluded that Boehm should be allowed to complete the expansion of Unit B, even though it was nonconforming. (R. pp. 4-10). This appeal followed.

### ANALYSIS

The Court's decision misapprehends, overlooks or fails to address Appellants' argument that under the Town's zoning ordinance, a structure housing a nonconforming use cannot be expanded except to reduce or eliminate the nonconformity. "In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322,322 (2001).

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<sup>3</sup> Boehm appealed the BZA's decision to the Circuit Court, which remanded the matter to the BZA with instructions to make additional findings of fact to support its decision that the structure at issue was an accessory structure with a nonconforming residential use on the second floor. See (R. pp. 2-3). In accordance with the Circuit Court's order, the BZA held a public meeting on January 8, 2015 and unanimously adopted six additional specific findings of fact. See (R. pp. 11-12). In an order issued February 12, 2015, the BZA memorialized its additional specific findings of fact. (R. pp. 11-12). After the BZA issued its additional findings of fact, Boehm renewed his appeal of the BZA's decision. On April 7, 2015, the Circuit Court held a hearing on Boehm's appeal from the BZA's February 17, 2015 order. (R. pp. 4-10).

In the Opinion, this Court ruled that Unit B is a nonconforming second principal building. **(Opinion)**. The Opinion quoted Sec. 21-150(F) of the Town’s zoning ordinance, which provides that when two or more principal buildings occupy a single lot, said occupancy constitutes a nonconforming use and that the large structure is conforming and the smaller nonconforming. **(Opinion)**; See also, TOSI Ordinance § 21-150(F) **(R. pp. 600-601)**. Having concluded that Unit B was a second principal building with a nonconforming residential use, rendering Unit B a nonconforming structure under the zoning ordinance, the Court should have reversed the circuit court and reinstated the BZA’s decision that Boehm could not expand Unit B by raising the roof height (expanding the interior volume of the nonconforming apartment); connecting the slat house to Unit B and adding seating to the roof of the slat house for use by the residents of Unit B; and extending the roof of Unit B over the staircase, outside of the permitted area. As found by the BZA, these structural alterations increased the extent of the nonconformity, which is prohibited.

By ordinance, nonconforming structures cannot be expanded except to decrease 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) **(R. pp. 600-601)** (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) **(R. pp. 600-601)** (stating that (“[a] Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspects.”). Here, the ordinance designates a second principal building as nonconforming and the residential use as a nonconforming use. Therefore, under the plain language of the ordinance, the proposed additions and expansion of Unit B should have been precluded, because the proposed additions and expansion did not have the effect of reducing or eliminating the nonconforming use.

The Opinion cited out-of-jurisdiction opinions and adopted “a three-part test to determine what constitutes a change or substantial expansion of a prior nonconforming use.” (**Opinion**). These cases did not involve a zoning ordinance that provided for *no expansion* of nonconforming uses except to reduce or eliminate the nonconformity. In fact, some even included specific references to zoning ordinances or state laws with lenient language concerning the expansion of a nonconforming use. See Bio Energy, LLC v. Town of Hopkinton, 153 N.H. 145, 155, 891 A.2d 509, 519 (2005) (considering whether a change in the type of fuel used by a co-generation facility constituted a change in use previously approved by a variance and determining “that the use of woodchips from C & D materials does not substantially change the nature and purpose of the original use permitted by the 1983 variance.”); Raymond v. Zoning Bd. of Appeals of City of Norwalk, 76 Conn. App. 222, 259, 820 A.2d 275, 298 (Conn. App. 2003) (citing no ordinance precluding the expansion of a nonconforming use, except to eliminate or reduce the nonconforming aspects, but finding that an “increase from the parallel parking to the diagonal parking was an intensification of the use that was impermissible”); Oakham Sand & Gravel Corp. v. Town of Oakham, 54 Mass. App. Ct. 80, 86, 763 N.E.2d 529, 535 (Mass. App. 2002) (noting a court established test for what constitutes a change or substantial extension of a prior nonconforming use and citing to a *state statute* providing that any subsequent use of the property must not constitute a *change or substantial extension* of the nonconforming use.); City of New Orleans v. JEB Properties, Inc., 609 So. 2d 986, 989 (La. App. 4th Cir. 1992) (“Article 12, Section 5, does not expressly prohibit an increase in the amount of use within the same non-conforming area.”); McKemy v. Baltimore County, 39 Md. App. 257, 260, 385 A.2d 96, 98 (Md. Spec. App. 1978) (citing a zoning ordinance provision that specially provided for some expansion of nonconforming uses).

The Opinion also cites to Town of Seabrook v. D'Agata, 362 A2d 182 (N.H. 1976) which allowed an owner of a nonconforming dwelling to add storage space underneath the existing structure. The court in that case noted that “[t]he enclosed area, which contains no heat, electricity, water, or other amenities usually associated with a living area, is suitable only for the use to which it is put, i.e.: the storage of various household items” at 473, 362 A.2d at 183. The use of the newly enclosed space as storage was a permitted use in the zoning district, not a nonconforming use. Id. The D'Agata case is inapposite to this case because Boehm’s improvements, such as enlarging the inside of the living quarters by raising the roof and creating space for outdoor living on the expanded deck/slat house roof area, are an expansion of the residential use. The purpose of his improvements is to create more space for people to enjoy Unit B a residence, which is expressly prohibited by the zoning ordinance.

As explained above, the Opinion overlooked the language of the Town’s zoning ordinances, which is tailored to prevent any nonconforming use from being expanded unless the expansion reduces or eliminates the use. Here, the proposed expansions did nothing to reduce or eliminate the nonconformity and were properly prohibited by the Zoning Administrator and the BZA. The Opinion takes a pro-expansion approach to nonconformities, suggesting that “. . . if the town had intended “[u]se shall not be expanded” to mean the volume of a nonconforming building cannot be increased, it should have used that exact terminology, as some other places have done” (**Opinion**) (citations omitted). This suggestion ignores that the existing ordinance broadly condemns any expansion of a nonconforming use unless it reduces or eliminates the extent of the nonconformity. The Opinion suggests that instead of prohibiting any expansion of nonconformities, municipalities must predict all the ways a property owner may seek to expand a nonconforming use or structure and list those out in its ordinance.

The Opinion's pro-expansion approach to nonconformities is a sharp departure for our state's well-established law and policy. See Christy v. Harleston, 266 S.C. 439, 223 S.E.2d 861 (1976); see also generally, 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."). Additionally, the Town zoning ordinance also specifically provides a policy of reducing nonconformities. TOSI Ordinance § 21-149 (B) (**R. p. 599**). ("... 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.").

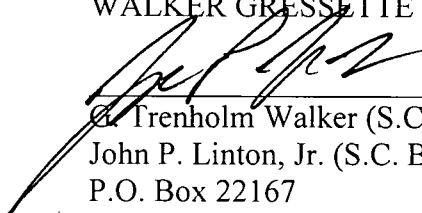
Unit B is a residence. Boehm's proposed renovations will not reduce or eliminate the residential use, but instead will increase the size of the residential unit by raising the roof and expanding the outdoor living space. The Opinion overlooks the plain language of the Town zoning ordinance, rewrites the zoning ordinance, and establishes a new test based on cases where the ordinance or statute at issue was much less strict. Therefore, rehearing should be granted.

### **CONCLUSION**

For the reasons stated above, the Court should **GRANT** rehearing.

Respectfully Submitted,

WALKER GRESSETTE FREEMAN LINTON, LLC



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April 12, 2018

Charleston, South Carolina

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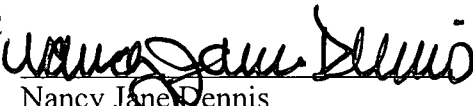
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PROOF OF SERVICE  
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I hereby certify that I have served a true and accurate copy of the **PETITION FOR REHEARING BY APPELLANTS TOWN OF SULLIVAN'S ISLAND BOARD OF ZONING APPEALS AND TOWN OF SULLIVAN'S ISLAND** by U.S. Mail on April 12, 2018 to counsel of record as shown below:

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Charleston, South Carolina