THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5546 (S.C. Ct. App. filed March 28, 2018)
Appellate Case No. 2015-001230

Paul Boehm,..... Respondent,

v.

Town of Sullivan's Island Board of Zoning Appeals
and Town of Sullivan's Island,..... Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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July 3, 2018

Charleston, South Carolina

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled upon by the Court of Appeals on June 5, 2018

QUESTION PRESENTED FOR REVIEW

I. Did the Court of Appeals, like the circuit court, commit an error of law in finding a structure housing a nonconforming use could be expanded even though the nonconforming use would be intensified and expanded and the municipal zoning ordinance prohibits the expansion of a nonconforming use which does not have the effect of reducing or eliminating the nonconformity.

STATEMENT OF THE CASE

Respondent Paul Boehm ("Boehm") initiated an appeal from a final order of the Town of Sullivan's Island's Board of Zoning Appeals ("BZA") dated April 10, 2014 (the "April 10, 2014 order") **(App. pp. 143-169).**[1] On April 7, 2015, the Circuit Court held a hearing on Boehm's appeal from the BZA's February 12, 2015 order. See **(App. pp. 6-12).** By order filed on May 4, 2015, the Circuit Court ruled that the building at issue was a nonconforming principal building under the zoning ordinance, but determined that Boehm should be allowed to make structural expansions to the building, despite the nonconforming status (the "Order"). **(App. pp. 6-12).**

On May 11, 2015, Appellants received written notice of entry of the order filed on May 4, 2015. **(Notice of Appeal).** On June 4, 2015, Appellants timely served their notice of appeal of the circuit court's order filed on May 4, 2105. **(Notice of Appeal).** The Court of Appeals heard Oral argument on April 11, 2017 and published an opinion affirming the circuit court on March 28, 2018 (the "Opinion"). Petitioner filed a Petition for Rehearing, which was denied by Order dated June 5, 2018. This Petition for Writ of Certiorari followed.

[1] Boehm's appeal of the BZA's April 10, 2014 order proceeded under case number 2014-CP-10-2623, the appeal was remanded to the BZA, the BZA made additional factual findings and Boehm renewed the appeal. The renewed appeal was assigned case number 2015-CP-10-1103.

STANDARD OF REVIEW

I. Standard for Granting Petition for Writ of Certiorari

Petitioners, the Town of Sullivan's Island Board of Zoning Appeals ("BZA") and the Town of Sullivan's Island ("the Town") (collectively, "Appellants"), seek a writ of certiorari. South Carolina Rule of Appellate Procedure 242(b) provides the applicable considerations for the granting of a petition for writ of certiorari:

> (b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> (1) Where there are novel questions of law.
>
> (2) Where there is a dissent in the decision of the Court of Appeals.
>
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> (4) Where substantial constitutional issues are directly involved.
>
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

S.C.R. App. P. 242(b). As explained in detail in the arguments section below, this for Writ of Certiorari be granted based upon subsections (1) and (3) above—the decision of the Court of Appeals involves a novel question of law and the decision is in conflict with prior decisions of this Court.

II. Standard on Appeal from a Municipal Board of Zoning Appeals

This Court has summarized the standard of review in zoning appeals as follows:

> It is a well settled proposition of zoning law that ***a court will not substitute its judgment for the judgment of the board.*** The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the

> board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

Rest. Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (quotation marks and citation omitted) (double emphasis added). See also, 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."). The governing statute imposes the same limited standard of review: "...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." S.C. Code §6-29-840(A).

This standard of review recognizes that the decisions of those charged with interpreting and applying zoning ordinances "should be given some consideration and not overruled without cogent reason therefore." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 236, 642 S.E.2d 565, 568 (2007).

This case involves the question of whether a structure housing a nonconforming use can be expanded such that the nonconforming use is intensified and expanded when the municipal zoning ordinance prohibits the expansion of a nonconforming use which does not have the effect of the reducing or eliminating the nonconforming use.

FACTS

Respondent Paul Boehm owns two structures at 2720 Goldbug Ave. One of the structures, the nonconforming second principal building, has a garage on the ground level, with an apartment located above the garage. See e.g., **(App. p. 178)** (Certificate of Occupancy issued November 20,

1989 for "Apartment Above Garage"); **(App. p. 143).**[2] The other structure is a "slat house," immediately adjacent to Unit B. See e.g., **(App. p. 143)**. Also on the property, which is not subject to this appeal, is the first (conforming) principal residential building.

Boehm sought to expand the nonconforming second principal building by raising the roof approximately two feet and the Town's Zoning Administrator (the "Zoning Administrator") denied his permit application. **(App. pp. 216-220).** The Town approved other proposed renovations that did not expand the residential use of the nonconforming second principal building. **(App. pp. 139-142).** 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 the nonconforming second principal building; (2) removing a portion of the handrail on the second story rear walkway of the nonconforming second principal building, 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/plats on the roof of the slat house. **(App. pp. 203-213).**[3]

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[2] The Opinion affirmed the lower court's decision that the structure referred to in this Petition as the nonconforming second principal building was a nonconforming second principal building, and not an accessory structure as previously determined by the Zoning Administrator and BZA. **(App. pp. 690-709).** As a second principal building, the structure is designated by ordinance as nonconforming. See **(App. pp. 690-709)** and TOSI Ordinance § 21-150(F) **(App. pp. 605-606).** This Petition does not seek review with respect to the ruling that the structure at issue is a nonconforming second principal building.

[3] All five of the violations for unpermitted construction work relate to Boehm's unpermitted work in connecting the slat house to the nonconforming second principal building to expand and outfit the nonconforming second principal building's second story deck area. See **(App. pp. 203-213).**

Boehm appealed the decisions to the BZA, which affirmed. See **(App. pp. 143-169)**. The BZA's April 10, 2014 order included three rulings of the BZA affirming three decisions of the Zoning Administrator. See **(App. pp. 143-169)**. 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. **(App. pp. 143-169).** Among other things, the BZA found all the work planned for the nonconforming second principal building impermissibly expanded a nonconforming use. **(App. p. 143).** Boehm appealed to the circuit court.[4] By order filed on May 4, 2015, the Circuit Court ruled that the nonconforming second principal building could be expanded, even though it was nonconforming. **(App. pp. 6-12).**

On May 11, 2015, Appellants received written notice of entry of the order filed on May 4, 2015. **(Notice of Appeal).** On June 4, 2015, Appellants timely served their notice of intent to appeal the circuit court's order filed on May 4, 2105. **(Notice of Appeal).** The Court of Appeals heard Oral argument on April 11, 2017 and published an opinion affirming the circuit court on March 28, 2018. Petitioner filed a Petition for Rehearing, which was denied by Order dated June 5, 2018. This Petition for Writ of Certiorari followed.

[4] 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. See **(App. pp. 4-5).** 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 **(App. pp. 13-14)**. In an order issued February 12, 2015, the BZA memorialized its additional specific findings of fact. **(App. pp. 13-14).** 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. **(App. pp. 6-12).**

ARGUMENT

I. The Court of Appeals, like the circuit court, committed an error of law in finding a structure housing a nonconforming use can be expanded such that the nonconforming use is intensified and expanded even though the municipal zoning ordinance prohibits the expansion of a nonconforming use which does not have the effect of the reducing or eliminating the nonconforming use.

Section 21-150(F) of the Town's zoning ordinance, 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. See TOSI Ordinance § 21-150(F) **(App. pp. 605-606).** By ordinance, nonconforming structures cannot be expanded except to decrease the extent of the nonconformity and nonconforming uses cannot be expanded except to eliminate or reduce the nonconforming aspects. See TOSI Ordinance § 21-151(B)(1) **(App. pp. 605-606)** (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) **(App. pp. 605-605)** (stating that ("[a] Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspects.").

It is undisputed that the structure at issue is a nonconforming second principal building with a nonconforming (residential) use. Therefore, under the plain language of the ordinance, the BZA decision precluding the proposed additions and expansion of the nonconforming second principal building should have been affirmed, because the proposed additions and expansions did not have the effect of reducing or eliminating the nonconforming use. **(App. p. 143)**; **(App. pp. 168-169)** (BZA finding these structural alterations increased the extent of the nonconformity and were prohibited).

However, in direct contrast with the plain language of the ordinance prohibiting expansions of this nature, the circuit court ruled, and the Court of Appeals affirmed, that Respondent should

be allowed to expand and enlarge the nonconforming second principal building by raising the roof height (expanding the interior volume of the non-conforming apartment); connecting the slat house to the nonconforming second principal building and adding seating to the roof of the slat house for use by the residents of the nonconforming second principal building; and extending the roof of the nonconforming second principal building over the staircase, outside of the permitted area. **(App. pp. 690-709)**; **(App. pp. 6-12).**

The Opinion, as issued, would allow a nonconfining use to be expanded in almost any situation, provided that a new nonconforming use is not established and square footage not expanded:

> Unit B was and still will be a residence. A change in use would be ***if a residence were to become a business, an industrial site, or a farm.*** Boehm's requested changes do not even change Unit B from a one-family to a multiple-family residence. As explained in Section I, Unit B is nonconforming because it is the second residence on the lot. With Boehm's proposed changes, ***the lot will still have just two residences. Further, the proposed changes do not add bedrooms or increase the square footage/floor space and does not occupy any more space on the lot.*** Therefore, Boehm's changes would not increase Unit B's nonconformance.

(App. p. 708) (double emphasis added). Under the rule crafted by the Court of Appeals, a nonconforming use can now be expanded provided the use is not changed to another nonconforming use, the use doesn't take up more space on the lot, and square footage/floor space is not added.

The Opinion renders the language of the Town's Zoning Ordinance, which is tailored to prevent any nonconformity from being expanded unless the expansion reduces or eliminates the use, meaningless. For example, the proposed expansions in this case did nothing to reduce or eliminate the nonconformity, but were endorsed by the Court of Appeals. The nonconforming second principal building is a residence. The proposed expansions and renovations would 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. As explained above, the Town's Zoning Ordinance only allows the reduction or elimination of nonconforming uses.

The Opinion's pro-expansion approach to nonconformities ignores the plain language of the Town Zoning Ordinance in favor of a pro-expansion policy decision—the type of policy decision normally reserved for a legislative body such as Town Council. In crafting the new rule out of whole cloth, the Opinion suggest that ". . . if the town had intended that a '[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" **(App. pp. 690-709)** (citations omitted). The Opinion would require that instead of prohibiting any expansion of nonconformities, a municipality desirous of curtailing nonconforming uses would have to predict all the ways a property owner may seek to expand a nonconforming use or structure and list them in its ordinance.

As referenced above, the Opinion's pro-expansion approach ignores that the existing ordinance broadly condemns any expansion of a nonconforming use unless it reduces or eliminates the extent of the nonconformity. See TOSI Ordinance § 21-150(B) **(App. pp. 605-606)** (stating that ("[a] Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspects."). Additionally, the Opinion ignores that the Town Zoning Ordinance specifically provides a policy of reducing nonconformities. TOSI Ordinance § 21-149 (B) **(App. p. 604).** (". . . 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.").

The Opinion's pro-expansion approach to nonconformities is also 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.").

The Opinion guts the Town Zoning Ordinance, and establishes a new test based on cases where the ordinance or statute at issue was much less strict. The Court of Appeals cited several out of jurisdiction opinions and adopted "a three-part test to determine what constitutes a change or substantial expansion of a prior nonconforming use." **(App. p. 706).** 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 non-conforming 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 living space. The purpose of his improvements is to create more space for people to enjoy the nonconforming second principal building as a residence, which is expressly prohibited by the zoning ordinance.

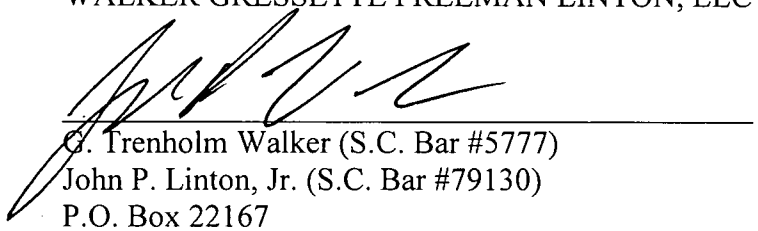
Therefore, as explained above, the Court of Appeals Opinion conflicts with prior decisions of this Court and involves novel questions of law. Specifically, the Court of Appeals has created a new pro-expansion approach to nonconformities, which conflicts with prior decisions of this Court and the provisions of the Town Zoning Ordinance.

CONCLUSION

Therefore, because the Court of Appeals Opinion conflicts with prior decisions of this Court and involves novel questions of law, Certiorari should be granted the Court of Appeals decision, **REVERSED**.

Respectfully Submitted,

WALKER GRESSETTE FREEMAN LINTON, LLC



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PROOF OF SERVICE

I hereby certify that I have served a true and accurate copy of the **PETITION FOR WRIT OF CERTIORARI BY PETITIONERS TOWN OF SULLIVAN'S ISLAND BOARD OF ZONING APPEALS AND TOWN OF SULLIVAN'S ISLAND** by U.S. Mail on July 3, 2018 to counsel of record for Respondent as shown below:

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