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S.C. SUPREME COURT

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. 2018-001240

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

v.

Paul Boehm, ...Respondent.

BRIEF OF PETITIONERS

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November 13, 2018
Charleston, South Carolina

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STATEMENT OF THE CASE

Respondent Paul Boehm ("Boehm") initiated an appeal from a final order of the Town of Sullivan's Island's (the "Town") Board of Zoning Appeals ("BZA") dated April 10, 2014. **(App. pp. 143-169).** 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).**[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 Town Zoning Ordinance but determined that Boehm should be allowed to make structural expansions to the building, despite the nonconforming status. **(App. pp. 6-12).**

On May 11, 2015, Petitioners received written notice of entry of the order filed on May 4, 2015. On June 4, 2015, Petitioners timely served their notice of appeal of the Circuit Court's order

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

filed on May 4, 2105. The Court of Appeals heard oral argument on April 11, 2017, and published an opinion affirming the Circuit Court on March 28, 2018. **(App. pp. 690-709).** Petitioners filed a Petition for Rehearing, which was denied by order dated June 5, 2018. **(App. pp. 710-719).** Petitioners filed a Petition for Writ of Certiorari, which was granted by this Court by order dated September 21, 2018. **(App. pp. 720-731).**

FACTS

Respondent owns two structures at 2720 Goldbug Avenue, Sullivan's Island, South Carolina. One of the structures, a 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 the nonconforming second principal building. See e.g., **(App. p. 143)**. Also, on the same lot is a conforming principal residential building, which is not subject to this appeal.

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 Zoning Administrator 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

[2] The Court of Appeals affirmed the lower court's decision that this structure was a nonconforming second principal building, and not an accessory structure as previously determined by the Town 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).** Petitioner did not seek review of that portion of the Court of Appeals decision and it is now undisputed that the structure is a nonconforming second principal building.

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]

Boehm appealed the Zoning Administrator's decisions to the BZA, which affirmed. See **(App. pp. 143-169)**. The BZA's April 10, 2014 order included three rulings affirming the three decisions of the Zoning Administrator. See **(App. pp. 143-169)**. Specifically, the BZA (1) affirmed the denial of a request to increase the roof height of the nonconforming second principal building by two feet; (2) affirmed the issuance of a stop work order for construction work beyond the scope of work illustrated on the 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 residential use. **(App. p. 143).** Boehm appealed to the Circuit Court and 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 June 4, 2015, Petitioners timely served their notice of intent to appeal the Circuit Court's order filed on May 4, 2105. The Court of Appeals heard oral argument on April 11, 2017

[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).**

and published an opinion affirming the circuit court on March 28, 2018. Petitioners filed a Petition for Rehearing, which was denied by Order dated June 5, 2018. **(App. p. 719).** Petitioners filed a Petition for Writ of Certiorari, which was granted by this Court by Order dated September 21, 2018. **(App. pp. 720-731)**

STANDARD OF REVIEW

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, ... [i]n 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 reducing or eliminating the nonconforming use. In other words, this case concerns whether the Town's Zoning Ordinances' prohibition on any expansion of a nonconforming use is enforceable, or whether a test created in this case by the Court of Appeals, allowing expansions of nonconforming uses, overrides the plain language of the duly enacted zoning laws of the Town.

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 when the municipal zoning ordinance prohibits the expansion of a nonconforming use which does not have the effect of reducing or eliminating the nonconforming use.

i. The Town's Zoning Ordinances clearly prohibit the expansion of a nonconforming use which does not have the effect of reducing or eliminating the nonconforming use and express a policy of reducing and eliminating all nonconformities.

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 larger 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.").

Additionally, by ordinance, the Town has adopted an ordinance codifying a policy of reducing nonconformities. See TOSI Ordinance § 21-149 (B) **(App. p. 604)**. (". . . [I]t 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.").

A governing body's "intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.'" Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 466, 602 S.E.2d 76, 79 (Ct. App. 2004) (quoting Charleston Cty. Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)). "An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Somers, 319 S.C. at 68, 459 S.E.2d at 843.

Here, the Town's intent is clear from the language of the applicable ordinances—nonconforming uses cannot be expanded except to eliminate or reduce the nonconforming aspects, and the Court of Appeals should be reversed because the proposed expansions did not have the effect of eliminating or reducing the nonconforming residential use of the structure. 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 expansions 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).

There is no ordinance of record suggesting that nonconforming uses can be expanded if there is no change in use or the expansion is only minimal. However, the Court of Appeals found the expansion of the nonconforming residence in this case should be allowed because "the purpose or use of Unit B would not change if Boehm is allowed to make any of the alterations he requested;" that "Boehm's requested changes do not even change Unit B from a one-family to a multiple-family residence;" and "the proposed changes do not add bedrooms or increase the square footage/floor space and does not occupy any more space on the lot." **(App. p. 708)**. Whether the use would change or whether bedrooms/square footage would be added are not the proper inquiries under the Town's Zoning Ordinance. The proper question is whether the proposed alterations would have the effect of "eliminat[ing] or reduc[ing] the nonconforming aspects" of the nonconforming residential use. Here, there was no finding that the proposed alterations would do that. Instead the Court of Appeals adopted a flexible test to evaluate whether proposed expansions were significant enough to be prohibited. As explained in detail below, there was no basis for the creation of such a test and the Court of Appeals decision should be reversed and the BZA's decision reinstated.

ii. <u>The Court of Appeals, like the Circuit Court, committed error of law in allowing the proposed alterations of a structure housing a nonconforming use when the proposed expansion would not have the effect of reducing or eliminating the nonconforming use.</u>

In direct contrast to the plain language of the Town Zoning Ordinances prohibiting expansions of this nature, the Circuit Court ruled, and the Court of Appeals affirmed, that Boehm should be allowed to expand and enlarge the nonconforming second principal building and concomitantly intensify the nonconforming residential use. **(App. pp. 6-12); (App. pp. 690-709).** Specifically, the Circuit Court overturned the BZA decision prohibiting raising the roof height (expanding the interior volume of the nonconforming unit); connecting the slat house to the

nonconforming second principal building and adding seating to the roof of the slat house; and extending the roof of the nonconforming second principal building over the staircase, outside of the permitted area. **(App. pp. 6-12); (App. pp. 690-709).**

The Court of Appeals went further than the Circuit Court and blessed wholesale expansion of structures housing nonconforming uses. Contrary to both the applicable municipal ordinances and this Court's prior cases, the Court of Appeals decision allows 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 this new 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 Court of Appeals' decision rendered the Town's Zoning Ordinance provision strictly prohibiting the expansion of nonconforming uses—and any other similar local zoning ordinances in South Carolina—meaningless. The proposed expansions in this case did nothing to reduce or eliminate the nonconformity but were nevertheless 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. See **(App. p. 143).** As explained

above, the Town's Zoning Ordinance only allows the reduction or elimination of nonconforming uses.

The Court of Appeals' pro-expansion approach to nonconformities ignores the plain language of the Town Zoning Ordinance and substitutes the Town's legislative authority with a pro-expansion policy conjured up by a court. The extent to which nonconforming uses should be expanded *vel non* is a legislative decision reserved for a legislative body such as the town council, and a court should not disregard the plain language of the ordinance and substitute its own policy judgment. See generally, Olds v. City of Goose Creek, 424 S.C. 240, 818 S.E.2d 5, 10, 2018 WL 3749764 (2018) ("When interpreting an ordinance, the legislative intent must prevail if it can be reasonably discovered in the language used" (citing Mikell v. County of Charleston, 386 S.C. 153, 160, 687 S.E.2d 326, 330 (2009)).

In crafting a new rule out of whole cloth, the Court of Appeals suggested 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 Court of Appeals would require that instead of prohibiting any expansion of nonconformities, a municipality desirous of curtailing nonconforming uses would have to predict the ways a property owner may seek to expand a nonconforming use or structure and list them in its ordinance.

As referenced above, the Court of Appeals' 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 Town Zoning Ordinance specifically provides a policy of reducing

nonconformities. See 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 Court of Appeals' approach to nonconformities is also a sharp departure for our state's well-established law and policy with regard to nonconformities. 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.").

Therefore, the Court of Appeals should be reversed.

iii. The Court of Appeals improperly relied on out of state cases interpreting significantly different zoning ordinances to establish a new "three-part test" that is contrary to the ordinances at issue in this case and South Carolina's prior jurisprudence concerning nonconformities.

The Court of Appeals gutted the Town Zoning Ordinance, and established 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. 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).

In addition to the above cited case, the Court of Appeals relied heavily on 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 area, are an expansion of the residential living space. See **(App. p. 143).** The purpose of his improvements is to create more space for people to use the nonconforming second principal building as a residence, which is expressly prohibited by the zoning ordinance.

Therefore, the new test crafted by the Court of Appeals should be rejected and the Court of Appeals reversed.

CONCLUSION

Therefore, the Court of Appeals' decision should be **REVERSED** and the BZA's denial of Boehm's appeal from the Town Zoning Administrator **REINSTATED.**

Respectfully Submitted,

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Paul Boehm, ... Respondent,

PROOF OF SERVICE

I hereby certify that I have served a true and accurate copy of the **BRIEF OF PETITIONER** by U.S. Mail on November 13, 2018 to counsel of record for Respondent as shown below:

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