

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Opinion No: 5419 (S. C. Ct. App. filed June 29, 2016)
(791 S.E.2d 305)

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S.C. SUPREME COURT

Arkay, LLC and Robert R. Knoth, its member Petitioners,

v.

City of Charleston, City of Charleston Board of Zoning
Appeals, Andrew Pinckney Inn and Michael A. Molony Respondents.

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STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT OF APPEALS PROPERLY INTERPRET THE TERM “STABLE” IN SECTION 54-206(p)(1) OF THE CITY’S ZONING ORDINANCE TO MEAN THE BUILDING, INSTEAD OF JUST THE AREA IN WHICH THE STALLS ARE LOCATED?

II. IS THE BOARD’S FACTUAL FINDING THAT THE USES AND ACTIVITIES ASSOCIATED WITH THE PROPOSED STABLE EXTENDED TO THE FRONT OF THE BUILDING, SUCH THAT THE ENTIRE BUILDING FUNCTIONS AS A STABLE, SUPPORTED BY THE RECORD EVIDENCE, AS RECOGNIZED BY THE COURT OF APPEALS?

III. DOES THE INTERPRETATION ADOPTED BY THE BOARD AND COURT OF APPEALS THAT THE TERM “STABLE” IN SECTION 54-206(p)(1) MEANS A STRUCTURE OR BUILDING RENDER THE WORD “BUILDINGS” IN SECTION 54-206(p)(7) MEANINGLESS?

IV. DID THE COURT OF APPEALS PROPERLY RECOGNIZE THAT THE LOCATION OF OTHER ACTIVITIES WITHIN THE STABLE BUILDING, SUCH AS OFFICES TO SUPPORT THE CARRIAGE BUSINESS, WOULD NOT CHANGE THE PRINCIPAL NATURE OR PURPOSE OF THE BUILDING AS A STABLE?

V. DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT THE DEFINITIONS IN THE TOURISM ORDINANCE SUPPORT THE BOARD’S INTERPRETATION OF A STABLE TO INCLUDE THE ENTIRE BUILDING, NOT JUST THE COLLECTION OF STALLS WITHIN THE BUILDING?

STATEMENT OF THE CASE

This matter arises from an appeal of a decision of the City of Charleston Board of Zoning Appeals–Zoning (the “Board”) denying Petitioner Arkay, LLC (“Arkay”) a special exception to use Arkay’s property at 45 Pinckney Street (the “Property”), in the City of Charleston, as a stable. (App., Vol. 1, pp. 260-63). In denying Arkay’s application, the Board held that the proposed stable would be located 93.5 feet from a residentially-zoned district, in contravention of section 54-206(p)(1) of the City’s Zoning Ordinance (the “CZO” or the “Ordinance”), which permits a stable as a special exception only if the Board finds, among other things, that the “stable is not located within 100 feet of any residential zone district.” (App., Vol. 1, p. 263).

Pursuant to section 6-29-820(A) of the South Carolina Code, on July 1, 2013, Arkay and its member, Robert R. Knoth (collectively, “Petitioners”), appealed the Board’s decision to the circuit court. (App., Vol 1, pp. 25-32). Petitioners named the City of Charleston, the Board, and nearby property owners, Andrew Pinckney Inn and Michael A. Molony, personally and as Personal Representative of the Estate of Robert E. Molony and Trustee for Sadie Molony, now deceased, as respondents (collectively, “Respondents”). (App., Vol. 1, p. 25).

The circuit court heard the appeal on April 11, 2014. (App., Vol. 1, p. 155). On May 30, 2014, the circuit court entered an order overturning the Board’s decision (the “Original Order”). (App., Vol. 1, p. 4, p. 17). Respondents received written notice of entry of the Original Order on June 6, 2014. (App., Vol. 1, p. 17). On June 16, 2014, Respondents served a motion to alter, amend, or reconsider the Original Order. (App., Vol. 1, pp. 17-24).

On June 25, 2014, the circuit court entered a “Corrected Order on Appeal” (the “Corrected Order”), which, by its terms, “supersedes” the Original Order, but also reverses the Board’s decision. (App., Vol. 1, pp. 4-16). The circuit court found that only the portion of the Property

where horses are “kept,” i.e. the stalls, was subject to the 100-foot separation requirement in section 54-206(p)(1). (App., Vol. 1, pp. 4-16). As a result, the circuit court remanded the matter to the Board, ordering the Board to issue the special exception, subject to conditions consistent with the Corrected Order, including without limitation the specific requirement that Petitioners form and file a proposed horizontal property regime (“HPR”), turning the portion of the Property containing stalls into a separate “unit.” (App., Vol. 1, p. 16).

On June 26, 2014, the circuit court entered an order denying Respondents’ motion to alter, amend, or reconsider the Original Order. (App., Vol. 2, p. 502). Respondents received written notice of entry of the Corrected Order on July 1, 2014, and Respondents served and filed their notice of appeal of the Corrected Order on July 3, 2014. (App., Vol. 2, p. 502).

On June 29, 2016, the Court of Appeals reversed the circuit court, concluding that “Council intended to apply the 100-foot separation requirement in subsection 54-206(p)(1) to a physical structure operating as a stable—such as the building at 45 Pinckney Street—and not merely to stalls that house the horses.” See Arkay, LLC v. City of Charleston, 418 S.C. 86, 88, 791 S.E.2d 305, 306 (Ct. App. 2016) (App., Vol. 2, p. 565). On July 13, 2016, Petitioners petitioned for rehearing. (App., Vol. 2, pp. 570-78). On October 27, 2016, the Court of Appeals denied the petition. (App., Vol. 2, p. 587). On November 11, 2016, Petitioners petitioned this Court for a writ of certiorari, which this Court granted on April 19, 2018.

FACTS

The Property, located at 45 Pinckney Street near the City’s “Market Area,” contains one building, covering the entire site, such that all walls of the building are flush with the property lines. (App., Vol. 1, p. 27, ¶ 9; p. 68). The building’s only access is from Pinckney Street. (App., Vol. 1, p. 68). The Property is zoned General Business (“GB”). (App., Vol. 1, p. 269, lines 11-13;

p. 388). The portion of the building fronting Pinckney Street lies within 100 feet of a residential zoning district. (App., Vol. 1, p. 27, ¶ 11; p. 374).

The Andrew Pinckney Inn lies to the east of the Property. (App., Vol. 1, p. 274, line 24-p. 275, line 7). A parking garage lies to the west of the Property, and Nos. 14 and 16 Hayne Street adjoin the Property to the south. (App., Vol. 1, p. 381). To the north of the Property, across Pinckney Street, are single family homes. (App., Vol. 1, p. 374).

In the GB district, stables are not allowed as a matter of right. (App., Vol. 1, p. 395). Pursuant to section 54-206(p) of the CZO, stables are permitted in the GB district only when the Board grants an exception after making specific findings set forth therein:

Stables shall be permitted within 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 zone district.
2. The City of Charleston Tourism Commission has issued a Certificate of Appropriateness for the stable.
3. The stable complies with all city, county, and state regulations for stables.
4. A site plan is provided showing that the cleaning/loading/tacking area shall not impede traffic flow in the public right-of-way.
5. A written explanation is submitted detailing how refuse will be handled in accordance with city, county, state, and federal regulations. This shall be reviewed by the Department of Public Service.
6. A plan is submitted showing how drainage on the property is to be collected in accordance with city, county, state, and federal regulations. This shall be reviewed by the Commissioners of Public Works and the Department of Public Service.
7. Buildings are designed utilizing appropriate ventilation to prevent objectionable odors from being emitted.

(App., Vol. 1, p. 395).

In March, 2013, Arkay applied to the Board for a special exception “to use a portion of the Property as a stable for the operation of a horse drawn carriage touring business known as Carolina Polo and Carriage Company, Inc.”¹ (App., Vol. 1, pp. 365-79). To meet the special exception criterion mandating that the stable be located more than 100 feet from any residential zoning district, Arkay proposed to subject the Property to a horizontal property regime (“HPR”). (App., Vol. 1, p. 290, lines 5-19; p. 420, ¶ 8). The rear approximately 44 linear feet of the building would become “Unit A” in the HPR. (App., Vol. 1, p. 290, lines 5-12; p. 381). Unit A would contain 1,639 square feet and have 6 stalls, where the horses would be fed, groomed, and stored overnight. (App., Vol. 1, p. 290, lines 5-12; p. 381; pp. 452-453).

The front 11.5 linear feet of the building, measured from the property line along Pinckney Street, would become “Unit B” in the HPR. (App., Vol. 1, p. 381; p. 420, ¶ 8). Unit B would contain 435 square feet, with 37.89’ fronting on Pinckney Street. (App., Vol. 1, p. 381). Approximately one-third (1/3) of the frontage (12.2’) would be used as an “Ingress-Egress Easement for Unit A to Cross Unit B,” to access Pinckney Street. (App., Vol. 1 p. 292, lines 6-16; p. 381). As a practical matter, the location of the access easement is dictated by the current entrance to the building from Pinckney Street. (App., Vol. 1, p. 381, p. 383, pp. 452-53). The remainder of Unit B would contain two offices—one on the northwest corner to be used for the horse carriage business, and the other on the northeast corner for a business that sanitizes streets where carriage tours are conducted. (App., Vol. 1, p. 291, line 15-p. 292, line 5; pp. 452-53).

¹ From 1990 to 2009, the Property was used as a horse carriage business, including by an affiliate of Arkay. (App., Vol. 1, pp. 368-69). An amendment to the zoning ordinance pertaining to stables was enacted so that, at times relevant to this appeal, to establish a stable at this location, a special exception was required. (App., Vol. 1, p. 368). There is no issue of legal nonconforming use in this appeal, as the parties acknowledge that the Property had not been used for a horse carriage business for more than 3 years prior to Arkay’s application in 2013, and, thus, any prior nonconforming use had lapsed. (App., Vol. 1, p. 368).

Units A and B would be separated by 14 linear feet (running north to south) of General Common Area and Limited Common Area. (App., Vol. 1, p. 381; p. 420, ¶ 8). The General Common Area, containing 137 square feet, would include a portion of a tack room and restroom facilities. (App., Vol. 1, p. 302, lines 1-7; pp. 452-53). According to Arkay, the Limited Common Area, measuring 350 square feet, would be used solely in conjunction with Unit A, as a tack room and waiting area for carriage business patrons.² (App., Vol. 1, p. 289, lines 13-25; p. 371; p. 420, ¶ 8). The only access from the horse stalls in Unit A to Pinckney Street is through this Limited Common Area and across Unit B, by way of the access easement. (App., Vol. 1, p. 381; pp. 452-53). Per Arkay's proposal, animals would be housed in over sixty percent (60%) of the building, exclusive of Limited and General Common Areas. (App., Vol. 1, p. 381).³

On April 16, 2013, the Board held a hearing on Arkay's special exception request. (App., Vol. 1, p. 266). During the hearing, testimony proffered by Arkay's own witnesses emphasized that the negative impacts of a stable are not limited to the stalls or Unit A; instead, the evidence indicated that the entire building will be used as a stable and activities relating to a stable.

For example, Sandy Logan, Arkay's architect, explained that "there are two main concerns with any kind of a stable use." (App., Vol. 1, p. 300, lines 11-19). "One is manure and its disposal." (App., Vol. 1, p. 300, lines 16-17). The other is ventilation. (App., Vol. 1, p. 300, line 17). Logan further explained that six horses would be expected to produce over 300 pounds of manure a day.

² The circuit court defined "tacking" to include "the process of attaching horses to bridles, reins and carriages. (App., Vol. 1, p.11). The circuit court also found that the term "stable" was a use associated with "keeping and maintaining horses," or where horses would be "preserved and maintained." (App., Vol. 1, p. 14). As a result, even under the reasoning employed by the circuit court, a tacking area would be part of a stable. See also § 54-206(p)(4) (requiring the applicant for a stable to provide a site plan "showing that the cleaning/loading/tacking area shall not impede traffic flow in the public right-of-way) (App., Vol. 1, p. 41).

³ The building is 2,616 square feet, of which 1,639 square feet is the proposed Unit A. (App., Vol. 1, p. 381).

(App., Vol. 1, p. 301, lines 1-8). While the manure will be stored in the back of the building, “collection will be where they’re rolled out to the front of the building and still within the building.” (App., Vol. 1, p. 301, lines 15-23).

Likewise, Logan explained the drainage plan for the stable, which includes “a double issue of having to not only get the wet material out as fast as possible but also to get it and into the drains and carry it to the sanitary sewer but also to collect it before it gets spread out” (App., Vol. 1, p. 302, lines 12-18). Logan testified that, at some point between where the waste is collected and where it exits the building, there will be a device called a separator which “separates [particulate matter] from the water before it goes back into the—the City sanitary sewer.” (App., Vol. 1, p. 302, line 19-p. 303, line 14). “And that will, then, trap all that, get cleaned out probably twice a day and allowing just liquids to—to—which include water, which—which the horses are washed down with to go out to the sanitary sewer.” (App., Vol. 1, p. 303, lines 6-14). An email from Charleston Water System (“CWS”) included in the record shows that “the floor drains contained within the horse stalls do indeed drain into the gravity sewer line owned, operated and maintained by CWS.” (App., Vol. 1, p. 486). The drainage plan shows the drainage system from the stalls running through the building out to Pinckney Street. (App., Vol. 1, pp. 110-111).

Kneth also submitted an affidavit to the BZA, emphasizing that, despite Arkay’s attempt to separate out stabling activities and despite Arkay’s argument that such activities are limited to Unit A, the entire building functions as a stable, with stabling activities throughout: “As shown on Mr. Logan’s drawings, that [sic] the corridor area between the stalls of the stables, *as well as the ‘public area,’ where customers will be waiting, will be used for the purposes of cleaning, and tacking of horses and carriages,* and for on-loading and off-loading customers, thus avoiding that activity in any public right of way.” (App., Vol. 1, pp. 433-34, ¶ 19) (emphasis added).

Owners of property to the west of the site (Andrew Pinckney Inn) and to the north of the site (owner and/or personal representative of owner of single family homes) appeared at the hearing in opposition to the application. (App., Vol. 1, p. 316, line 20-p. 339, line 10). These property owners, who had first-hand experience with the operation of prior stables at this location, voiced concern about the noise, rodents and odor attendant to a stable. (App., Vol. 1, p. 323, line 25-p. 325, line 16; p. 331, line 11-p.332, line 16; p. 333, line 22-p. 334, line 6). There was a particular concern raised by the owner of the Andrew Pinckney Inn regarding the potential for odor wafting through its porous cinder block wall, the only wall separating it from the table, with the odors being drawn “right up in to the rooms in the Andrew Pinckney Inn.” (App., Vol. 1, p. 323, line 25-p. 325, line 16). Property owners also raised regarding the legality of the proposed HPR. (App., Vol. 1, p.319, line 10-p. 322, line 21).

The neighbors further contended the stable was within 100 feet of a residentially zoned district, and, therefore, could not, as a matter of law, meet the requirements for a special exception. (App., Vol. 1, p. 322, line 22-p. 323, line 15). Significant to this issue was a survey prepared and introduced by Arkay that demonstrated that the building at 45 Pinckney Street was within 100 feet of a residentially zoned district. (App., Vol. 1, p. 374).

Arkay argued the separation requirement of section 54-206(p)(1) was to be measured from Unit A, which Arkay argued was the only place within the building where the horses would be “kept,” and that this area was over 100 feet from a residential district. (App., Vol. 1, pp. 367-69).

The Board rejected this argument, concluding, in pertinent part:

Forty-five Pinckney Street is occupied by one building. The HPR does not alter this circumstance. There is no dispute as to the fact that the building is within 100 feet of a residentially zoned district. While Unit A within the building is where the animals will be stored, to access that area, it is necessary to pass through Unit B, an area within 100 feet of a residentially zoned district. This Board cannot

discern intent to separate the use from its access when there is but one access to the building, and the law requires an apartment in a HPR to have either direct access to a public street or a common area leading to a public street. The common area or easement to Pinckney Street from Unit A is appurtenant to, or a part of, the Unit, rendering it within the 100 foot limitation. Thus, 45 Pinckney Street does not qualify as the site of a stable because it is located within 100 feet of a residential zone district.

(App., Vol. 1, p. 263).

On appeal to the circuit court, Petitioners argued that the Board erred in the following particulars: (1) by measuring the 100-foot separation requirement in section 54-206(p)(1) from the façade of the building, rather than from Unit A, as purportedly the only place in the building where animals are to be kept; (2) by including the access easement as part of the stable because, according to Arkay, the access easement is not a place where animals are kept; (3) by refusing to limit the definition of “stable” to the area in which the horse stalls are located; and (4) by overruling the Zoning Administrator’s previous conclusion that the 100 foot separation requirement would only apply to the area in which the stalls are located. (App., Vol. 1, pp. 25-32).

Additionally, Petitioners asserted that the City’s Tourism Ordinance, related to animal-drawn vehicles for the purpose of touring, codified at sections 29-201 to -223 of the City’s Code of Ordinances (the “Tourism Ordinance”), required section 54-206(p)(1) to be construed in the context of the densely-developed Market Area, because, the argument goes, the Tourism Ordinance required stables to be within “walking distance” of the Market Area. (App., Vol. 1, p. 30, ¶ 21(a)(2)). From this premise, Petitioners conclude that, due to the lack of buildings in the Market Area meeting the 100-foot separation requirement, City Council must have intended for the measurement to be taken from the place where the “stabling activity” occurs, that being the place within a building where the animals are stored, not from the walls of the building. (App., Vol. 1, pp. 25-32).

Notably, the Tourism Ordinance relied upon by Arkay defines the term “stable” and the term “stall.” (App., Vol. 1, p. 53). A “stable” is “the barn where the animals are kept.” § 29-212(b)(12) (App., Vol. 1, p.53). A “stall” is “the individual space within the barn where each animal is kept.” § 29-212(b)(13) (App., Vol. 1, p.53).

The circuit court reversed the Board. (App., Vol. 1, pp. 4-16). The circuit court characterized the dispositive issue as “whether the one hundred foot measurement is to be taken from the building within which the stable is contained; or . . . from the ‘use’ as a stable where, as here, that use is within a building containing other uses?” (App., Vol. 1, p. 8) (emphasis in original). After analyzing the various provisions of section 54-206(p), the circuit court emphasized: “It is the ‘use’ as a stable, and the attendant, potentially obnoxious characteristics of keeping and maintaining animals, that City Council intended to be at least one hundred feet distant from a residential zone district.” (App., Vol. 1, p. 12). The circuit court concluded:

The area of 45 Pinckney Street where stalls will be constructed, and where horses will be ‘kept’ is Unit ‘A’ of the horizontal property regime depicted on the plot plan in this record. That area, and the ‘use’ of that area, is 119 feet distant from the residential zone district.

I find and conclude that the Board of Zoning Appeals committed an error of law in construing Section 54-206.p.1 otherwise. The one hundred foot measurement to the residential zone district should be made from the ‘use’ as a stable and not from the façade of the building where no such ‘use’ will be conducted; and where, to the contrary, offices will be placed in an area that by deed covenant may not be used as a stable.

(App., Vol. 1, p. 15).

The circuit court rejected the Board’s finding that the access easement should be included as a point of measurement, holding, in pertinent part:

First, and in addition to my conclusion that the measurement must be taken from the ‘use’ as a stable, the easement is to be titled with

Unit 'B' of the horizontal property regime and it is not exclusive to Unit 'A.' Secondly, however, the horses will no more be 'kept' on the access easement than they would be 'kept' on the streets of Charleston through which they come and go every day, and from which they enter 45 Pinckney Street.

(App., Vol. 1, p. 15).

Respondents appealed, contending that the circuit court (1) misconstrued section 54-206(p) by confusing the activities associated with a stable with a use of land, buildings or structures; (2) misapplied the laws relating to horizontal property regimes by confusing ownership with use; (3) failed to consider the use of the access easement and common areas as part of the stable; and (4) ignored the definition of a "stable" in the Tourism Ordinance to constitute a barn, while utilizing other provisions in the Tourism Ordinance to suggest that a stable constitutes a use or activity. (App., Vol. 2, pp. 508-511).

In a 2-1 decision, the Court of Appeals reversed the circuit court. (App., Vol. 2, pp. 558-569). The majority opinion recognized that the 100-foot separation requirement must be applied to a physical location, and focused on whether City Council "intended such physical location to mean a structure or the exact place where horses are kept." (App., Vol. 2, p. 564). The Court of Appeals initially read section 54-206(p) *in pari materia* with the Tourism Ordinance, concluding that, based on the definitions of "stable" and "stall" in section 29-212(b)(12) and (13), "stalls are a smaller component of the larger entity that is the stable." (App., Vol. 2, p. 564).

The Court of Appeals explained:

In the case of 45 Pinckney Street, because the building that would keep the horses encompasses the entire lot, we find it is a barn for purposes of the ordinance. Even though the horses would be kept in the rear of the building . . . this does not change the building's status as a barn. Moreover, we find these areas and rooms in the front of 45 Pinckney Street are commonly associated with horse stables. The obnoxious elements—no matter how minimal in scope Arkay claims they will be—are still likely to accumulate in these areas and escape

through the front gate abutting Pinckney Street, the building's only point of access.

(Emphasis added) (App., Vol. 2, pp. 564-65). The Court of Appeals also recognized that Arkay's interpretation of section 54-206(p) as including only an area of the building containing stalls would lead to the absurd results that fire protection measures and inspection requirements, would only apply to a portion of the building. (App., Vol. 2, p. 565).⁴

Finally, the Court of Appeals emphasized that, under the laws applicable to horizontal property regimes, the filing of a master deed does not subdivide the land itself, but simply changes the ownership interests in the areas within the regime. (App., Vol. 2, p. 566). As a result, "Arkay's proposed HPR for 45 Pinckney Street does not change the status of the building as a stable because it does not vertically subdivide the building itself." (App., Vol. 2, p. 566).

Petitioners requested certiorari review, and this Court granted the petition.

STANDARD OF REVIEW

This case involves the interpretation of a zoning ordinance. The central question involved in this appeal is whether, in regulating stables, City Council intended for the provisions in section 54-206(p) to regulate the stable as a structure or to separate out the individual activities within the structure by limiting the Board's consideration to only the area containing stalls.

"Issues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." Eagle Container Co., LLC v. Cty. of Newberry, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008). "Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances,

⁴ In this respect, Petitioners ignore the obvious and serious hazard arising from permitting smoking in areas adjacent to horse stalls simply because the Property has been turned into a horizontal property regime.

a broader and more independent review is permitted when the issue concerns the construction of an ordinance.” Id. (citations and internal quotation marks omitted). “The determination of legislative intent is a matter of law.” Id. (citation and internal quotation marks omitted).

This case also involves the issue of whether the “uses” or “activities” associated with the stable on the Property are located within 100 feet of a residential zone district, i.e., whether the entire building operates as a stable because it includes stabling activities through, as the Board found, or whether the stable, and its associated activities, are limited to Unit A, as Arkay contends. This issue is one of fact, and the Board should be affirmed unless no evidence supports its decision in this regard.

“A determination by a zoning board that a particular purpose or activity does or does not constitute a ‘use’ is a finding of fact.” Heilker v. Zoning Bd. of Appeals, 346 S.C. 401, 412, 552 S.E.2d 42, 48 (Ct. App. 2001). On appeal from the decision of a board of zoning appeals, “[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.” S.C. Code Ann. § 6-29-840(A). “The factual findings of the Board must be affirmed by the circuit court if there is *any* evidence to support them and they are not influenced by an error of law.” Fairfield Ocean Ridge, Inc. v. Edisto Beach, 294 S.C. 475, 479-80, 366 S.E.2d 15, 18 (Ct. App. 1988) (emphasis in original).

ARGUMENTS

I. THE COURT OF APPEALS PROPERLY INTERPRETED THE TERM “STABLE” IN SECTION 54-206(p)(1) OF THE CITY’S ZONING ORDINANCE TO MEAN THE BUILDING, INSTEAD OF JUST THE AREA IN WHICH THE STALLS ARE LOCATED.

The first issue presented to this Court is whether, in requiring that a stable be more than 100 feet from a residential zone district, City Council intended the term “stable” to mean a building or, instead, only the specific area within a building where the activity of storing horses, i.e., the

stalls, occurs. The Board, as the agency charged with the administration of the City's Zoning Ordinance, held that City Council intended the former. The Court of Appeals agreed. The reasoning of the Board and the Court of Appeals fully comports with rules of statutory interpretation.

A careful reading of section 57-206(p) of the CZO clearly demonstrates that the City Council intended the 100-foot separation requirement to apply to a stable, as a structure, not just the portion of a structure containing the stalls. Section 54-206(p) provides as follows:

Stables shall be permitted within 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 zone district.
2. The City of Charleston Tourism Commission has issued a Certificate of Appropriateness for the stable.
3. The stable complies with all city, county, and state regulations for stables.
4. A site plan is provided showing that the cleaning/loading/tacking area shall not impede traffic flow in the public right-of-way.
5. A written explanation is submitted detailing how refuse will be handled in accordance with city, county, state, and federal regulations. This shall be reviewed by the Department of Public Service.
6. A plan is submitted showing how drainage on the property is to be collected in accordance with city, county, state, and federal regulations. This shall be reviewed by the Commissioners of Public Works and the Department of Public Service.
7. Buildings are designed utilizing appropriate ventilation to prevent objectionable odors from being emitted.

(App., Vol. 1, p. 395) (emphasis in original)

“The cardinal rule of statutory construction is that courts will ascertain and effectuate the intent of the lawmaking body.” Historic Charleston Found. v. Krawcheck, 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994). “The primary rule of statutory construction requires that

legislative intent prevail if it can reasonably be discovered in language used construed in light of intended purpose.” Stephen v. Avins Constr. Co., 324 S.C. 334, 338, 478 S.E.2d 74, 76 (Ct. App. 1996).

In this respect, the Court of Appeals and circuit court appear to agree upon the legislative intent behind section 54-206(p), despite coming to contrary conclusions in applying this intent. The circuit court recognized: “It is the ‘use’ as a stable, and the attendant, potentially obnoxious characteristics of keeping and maintaining animals, that City Council intended to be at least one hundred feet distant from a residential zone district.” (App., Vol. 1, pp.11-12). The Court of Appeals concluded: “The purpose of the various requirements of section 54-206(p) is to protect the health and safety of city patrons and carriage horses, while distancing the unwelcome elements of a barn, including the noise, odors, waste, drainage, and pests from residential areas.” (App., Vol. 2, p. 565).

This underlying purpose—separating the obnoxious, unwelcome characteristics of a stable from residential areas—supports the application of section 54-206(p)(1) adopted by the Board, requiring *all uses and activities* associated with the stable to comply with the 100-foot separation requirement, not just the stalls. The circuit court improperly construed section 54-206(p)(1) to tilt in favor of stables, when its purpose is to protect residential areas.

As the Board and the Court of Appeals aptly noted, the criteria listed in section 54-206(p) of the CZO that must be satisfied to be eligible for a special exception do *not* impose regulations on specific areas within a stable in which only particular activities, such as lodging horses, occur. Instead, the conditions apply to the use of the land or building as a stable. See Heilker v. Zoning Bd. of Appeals, 346 S.C. 401, 407, 552 S.E.2d 42, 45 (Ct. App. 2001) (interpreting “use” as “the purpose or activity for which land or buildings are designed, arranged, or intended, or for which

land or buildings are occupied or maintained.”). Simply put, Arkay did not seek a special exception for stalls—it sought a special exception for a stable, and all that comes with it.

The Court of Appeals’ interpretation is also supported by the remaining provisions in section 54-206(p), which apply to the entire structure, not just stalls. Section 54-206(p) does not address the care or type or number of animals to be housed. Rather, the criteria impose regulations that clearly relate to the principal use of the building as a stable, be it the 100-foot separation requirement; the design requirements for drainage and ventilation; compliance with the Tourism Ordinance, and state and local law; or the operational requirements with respect to traffic and collection and handling of refuse. (App., Vol. 1, p. 41).

For instance, Petitioners contend that the common areas are separate from Unit A, and Unit A is the only portion of the building “used” as a “stable.” However, section 54-206(p)(4) requires a special exception application for a stable to include a site plan showing cleaning, loading, and tacking areas, such that these areas will not impede traffic flow in the public right-of-way. (App., Vol. 1, p. 41). The site plan submitted by Arkay shows the cleaning, loading, and tacking areas being within the common areas, and, therefore, clearly part of the “stable.” (App., Vol. 1, p. 381, pp. 452-453). Although these areas are beyond the 100-foot separation requirement, they clearly support the Court of Appeals’ conclusion that the stable is the entire building—not just the stalls.

Section 54-206(p)(5) requires an application for a special exception for a stable to include a written explanation as to how refuse will be handled. Arkay addressed this criterion by explaining that the more than 300 pounds of manure would be stored in the back of the building, but moved to the front, where it would be collected—daily. (App., Vol. 1, p. 301, lines 15-23). This circumstance renders the front of the building part of the “stable,” and again supports the Court of Appeals’ conclusion that the entire building is a stable, not just Unit A.

Section 54-206(p)(6) requires a drainage plan to be submitted for the “property,” with such plan to be reviewed by the Commissioners of Public Works (also known as Charleston Water System or “CPW”) and the Department of Public Services. (App., Vol. 1, p. 41). Arkay submitted a drainage plan emphasizing how liquid waste would be drained from the back of the “property” and separated from particulate matter, such as straw and manure, before continuing to the public drainage system. (App., Vol. 1, p. 302, line 12-p. 303, line 14). CPW confirmed that the floor drains within the stall would drain into the gravity sewer line operated by CPW, and the conceptual drainage plan shows these drains running through the common areas and Unit B out to Pinckney Street. (App., Vol. 1, pp. 110-11; p. 486). Clearly, the drainage system is also part of the stable, and the “stabling activities” occur through the building.

According to the words of section 54-206(p) their plain and ordinary meaning, in light of the purpose of the ordinance to separate the obnoxious, unwarranted negative components of a stable from residential areas, it is evident that the term “stable” in section 54-206(p) is the building used for that purpose, not a collection of stalls within the building, as Petitioners assert. See Adkins v. Varn, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993) (“A basic rule of statutory construction is that the words must be given their plain and ordinary meaning without resort to a subtle or forced construction which limits or expands the statute’s operation.”). As applied here, there is no question but that the building proposed to be used as a stable on the Property is within 100 feet of a residentially zoned district and is thus not eligible to be used as a stable. The Court of Appeals’ decision should therefore be affirmed.

II. AS THE COURT OF APPEALS RECOGNIZED, THE BOARD’S FACTUAL FINDING THAT THE USES AND ACTIVITIES ASSOCIATED WITH THE PROPOSED STABLE EXTENDED TO THE FRONT OF THE BUILDING, SUCH THAT THE ENTIRE BUILDING FUNCTIONS AS A STABLE, IS SUPPORTED BY THE RECORD EVIDENCE.

In applying the separation requirement in section 54-206(p)(1) of the CZO, the Board found:

While Unit A within the building is where the animals will be stored, to access that area, it is necessary to pass through Unit B, an area within 100 feet of a residentially zoned district. This Board cannot discern intent to separate the use from its access where there is but one access to the building, and the law requires an apartment in a HPR to have either direct access to a public street or a common area leading to a public street. The common area or easement to Pinckney Street from Unit A is appurtenant to, or a part of, the Unit, rendering it within the 100 foot limitation.

(App., Vol 1, p. 36).

“A determination by a zoning board that a particular purpose or activity does or does not constitute a ‘use’ is a finding of fact.” Heilker v. Zoning Bd. of Appeals, 346 S.C. 401, 412, 552 S.E.2d 42, 48 (Ct. App. 2001). Moreover, the application of the facts of the case to a statute is a question of fact. See Boggero v. S.C. Dep’t of Revenue, 414 S.C. 277, 280-81, 777 S.E.2d 842, 843-44 (Ct. App. 2015) (whether the facts of a case were correctly applied to a statute is a question of fact). A board’s factual findings will not be disturbed unless there is no evidence to support such findings. See Charleston Cty. Parks & Rec. Comm’n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (“This Court will not reverse the Circuit Court’s affirmance of the Board unless Board’s findings of fact have no evidentiary support or Board commits an error of law.”).

Here, the Board’s finding that the uses and activities associated with a stable extend through the entire building to the front of the building abutting Pinckney Street is supported by the evidence. One need go no further than to consider the following evidence as supportive of the Board’s finding in this regard: Arkay’s site plan shows cleaning, loading and tacking areas within the common area of the building (App., Vol. 1, p. 381, pp. 452-453); Arkay explained to the Board that the manure would be stored in the back of the building and removed from the only entrance—

located at the front of the building (App., Vol. 1, p. 301, lines 15-23); the drainage plan submitted by Arkay shows floor drains from the stalls draining toward the gravity sewer line in the public right-of-way, with the explanation that the particulate material would be separated and removed between the drains and the outlet onto Pinckney Street (App., Vol. 1, p. 302, line 12-p. 303, line 14; pp. 110-11); and the only way for the horses—or anyone else—to access the building is from Pinckney Street. As the Court of Appeals’ recognized: “The obnoxious elements . . . are likely to . . . escape through the front gate abutting Pinckney Street, the building’s only point of access.” (App., Vol. 2, pp.564-65).

Ignoring this evidence supporting the Board’s factual determination, Petitioners seemingly suggest that an access easement over Unit B is beyond the reach of the zoning ordinance, as a matter of law, or that the creation of an HPR automatically negates the negative impacts of a stable, even when the only access to the stalls runs through the entire building. Such is not the case.

It is well-settled that an easement is a right of use, and that a zoning ordinance applies to the use of an easement. See Steele v. Williams, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944) (“An easement is a right which one person has to use the land of another for a specific purpose.”); San Francisco v. Safeway Stores, Inc., 310 P.2d 68, 71 (Cal. App. 2nd 1957) (“Defendant seems to contend that the use of a traffic easement in connection with its store business and parking facilities cannot be a commercial use, thereby implying that the right to pass over the easement is superior to the right to zone that easement. In effect, defendant is contending that property held in fee may be zoned for a particular use but that a lesser interest, such as an easement, cannot be zoned. The fallacy of this argument is that it is the property itself which is zoned and not any particular interest in it as such.”).

Relying in part on Safeway Stores, supra, this Court explained, in Rush v. Greenville, 246 S.C. 268, 279, 143 S.E.2d 527, 532 (1965): “It has been generally held that private lands within an area zoned for residential purposes cannot be used as a regular means of vehicular passage to and from commercial or business premises without being a violation of the zoning laws.” The same analysis controls here.

With respect to an HPR, the Court of Appeals has previously recognized that the conversion of a building into an HPR does not subdivide the land itself, but merely divides ownership. See Penny Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC, 375 S.C. 267, 651 S.E.2d 617 (Ct. App. 2007) (“In other words, while an owner of an apartment complex grants sole ownership of individual units to purchasers after converting the building to a condominium, the property and common areas remain intact and the owner merely grants a share of his ownership interest in these areas to purchasers.”). The HPR does not change the use of the Property, especially when, as in the present case, the activities and negative impacts from the stable run from the stalls in Unit A across the common area to the front of the building, as the Board recognized.

Here, the Board’s finding that the use or activities associated with a stable extended to the front of the Property, notwithstanding the easement or the HPR, is supported by the evidence. The decision of the Court of Appeals should therefore be affirmed.

III. THE INTERPRETATION ADOPTED BY THE BOARD AND COURT OF APPEALS THAT THE TERM “STABLE” IN SECTION 54-206(p)(1) MEANS A STRUCTURE OR BUILDING DOES NOT RENDER THE WORD “BUILDINGS” IN SECTION 54-206(p)(7) MEANINGLESS.

There is no support for Petitioners’ theory that the use of the word “buildings” in section 54-206(p)(7) of the CZO is indicative of legislative intent to distinguish a “stable” from a building, especially in the present case, in which the entire building functions as a stable. The Court of Appeals’ construction of section 54-206(p)(1) does not render the word “buildings” in subpart (7)

meaningless. To the contrary, the Court of Appeals' construction of section 54-206(p) recognizes and gives efficacy to the very definition of that term adopted by City Council.

Section 54-120 of the CZO defines the term "building" as "[a]ny structure built for the support, shelter, housing or enclosure of persons, animals or property of any kind" (App., Vol I, p. 217). Thus, the CZO itself evinces clear legislative intent that a structure used for housing animals is a building, not a portion of a building.

Additionally, there is simply no support for Petitioners' contention that the use of the term "buildings" in section 54-206(p)(7) is indicative of Council's intent to disregard the very definition it attributed to that term.⁵ This becomes especially clear when considering that the purpose of section 54-206(p) is to regulate the ill effects of stables. A court is required to construe an ordinance consonant with its purpose. See Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."); Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) ("A statutory provision should be given a reasonable construction consistent with the purpose and policy expressed in the statute."). As applied here, since a building includes a structure for housing animals, the use of that term in section 54-206(p)(7) is wholly consistent with the purpose and design of the ordinance, that being to regulate stables. The Court should not look to impose another meaning.

IV. THE COURT OF APPEALS PROPERLY RECOGNIZED THAT THE LOCATION OF OTHER ACTIVITIES WITHIN THE STABLE BUILDING, SUCH AS OFFICES TO SUPPORT THE CARRIAGE BUSINESS, WOULD NOT CHANGE THE PRINCIPAL NATURE OR PURPOSE OF THE BUILDING AS A STABLE.

⁵ Petitioners' reference to the portion of the definition of "building" that excludes from the term certain aspects of a structure for purposes of measuring setbacks is curious, but in any event, irrelevant. The building at 45 Pinckney Street has no "assistive technology for accessibility," such as ramps or platform lifts. Moreover, the 100-foot separation requirement in section 54-206(p)(1) is not a "setback" from the *lot line*, as required for the exception in section 54-120 to apply.

The circumstance of a structure used to house animals having other uses within it does not change the nature or purpose of the building to something other than a stable. The facts of this case bring that point home. The portion of the building at 45 Pinckney Street containing the stalls will comprise at least 60% of the square footage of the building. If the Limited Common Area attached to Unit A is considered, the percentage rises to over 75%. It not credible to contend that this building is something other than what it is—a structure that houses animals. And notwithstanding Petitioners’ protestations to the contrary, the Court of Appeals did not overreach in noting that the alternate uses proposed for the building at 45 Pinckney Street were consistent with uses attendant to a stable. Common knowledge—not to mention the plain language of section 54-206(p)(4) requiring a site plan to show tacking and loading area for stables—tells us that tacking areas, loading areas, waiting rooms, and restrooms are not foreign to stables.

Nor is it beyond the pale for a stable to incorporate office space for record keeping and storage. Notably, the circuit court concluded: “The special exception requirements for a stable as set forth in Section 54-206.p are uniquely focused on stables in the carriage tour business.” (App., Vol. 1, p. 10). Section 29-212(j) of the Tourism Ordinance, relied upon by the circuit court and Petitioners to support their interpretation of section 54-206(p)(1), expressly imposes certain record-keeping requirements, with such records being made available for inspection by the City. (App., Vol. 1, p. 252). Moreover, Petitioners concede that the offices will function as part of the carriage tour business, supporting the Board’s conclusion that activities associated with the stable extend to the front of the building. (App., Vol. 1, p. 106).

V. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DEFINITIONS IN THE TOURISM ORDINANCE SUPPORT THE BOARD’S INTERPRETATION OF A STABLE TO INCLUDE THE ENTIRE BUILDING, NOT JUST THE COLLECTION OF STALLS WITHIN THE BUILDING.

Section 54-206(p)(2) expressly states that, for a stable to be permitted as a special exception, the Board, after review, must find that “(2) The City of Charleston Tourism Commission has issued a Certificate of Appropriateness for the stable.” (App., Vol. 1, p. 240). “It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.” Joiner v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

In the Tourism Ordinance, the term “stable” and “stall” are specifically defined. (App., Vol. 1, p. 248). Pursuant to section 29-212(b)(12), a stable is “the barn where the animals are kept.” (App., Vol. 1, p. 248). A “stall” is the place within the barn where the animals are kept. (App. Vol. 1, p. 248). A barn is a “building for storing hay, grain, etc., and often for housing livestock.” Webster’s Encyclopedic Unabridged Dictionary, Ninth Ed. p. 121. Applying these definitions to the Property, the stable is the barn, or building, on the site where the animals are kept. The stalls are the places within the barn where the animals are individually separated.

These very definitions undermine Petitioners’ theory that City Council was mindful of the limited opportunities for stables within walking distance of the Market Area, and thus intended for stables to be an “activity” within a building, as opposed to the building itself. If this was the intent of Council, the question is begged as to why Council defined the term “stable” as it did for this dense area of the City.

And, inexplicably, Petitioners contend that the operative words of the definition of stable in the Tourism Ordinance is “where the animals are kept,” totally ignoring the word “barn” which precedes this phrase. The outright disregard of the word “barn” from the definition is improper and results in a forced construction of the definition that limits its operation. Such is prohibited by longstanding rules of statutory construction. See Abraham v. Palmetto Unified Sch. Dist. No. 1,

343 S.C. 36, 48, 538 S.E.2d 656, 662 (Ct. App. 2000) (“It is well settled, however, that statutes ‘should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.’” (citations and internal quotation marks omitted)); Richland Cty. Sch. Dist. Two v. S.C. Dep’t of Educ., 335 S.C. 491, 496, 517 S.E.2d 444, 447 (Ct. App. 1999) (“Words used in a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the operation of the statute.”).

Petitioners attempt to evade the definitions of stable and stall in the Tourism Ordinance, arguing the “context” of these definitions do not require their application to the CZO. But Petitioners cannot have it both ways. They cannot cherry pick from the provisions of the Tourism Ordinance to suit their purposes. If the Tourism Ordinance is the framework for the stable regulations of the CZO, as Petitioners have urged throughout this case, the consideration of the definitions in those ordinances and other provisions relating to stables is wholly proper, if not required. See Fid. & Cas. Ins. Co. v. Nationwide Ins. Co., 278 S.C. 332, 335, 295 S.E.2d 783, 785 (1982) (“In construing a statute, it is proper to consider legislation dealing with the same subject matter.”); Howell v. United States Fid. & Guar. Ins. Co., 370 S.C. 505, 509, 636 S.E.2d 626, 628 (2006) (“Statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.”).

Nor does the opinion of the Court of Appeals lead to absurd results, as Petitioners suggest. The Court of Appeals aptly made note that, if the definition of stable is limited to the stalls, as Petitioners suggest, then the remainder of the structure that contains those stalls would escape oversight imposed by the Tourism Ordinance, meaning the portions of the building at 45 Pinckney Street outside the stalls would not have to be kept clean, in good repair, free of excreta and

nuisances, or inspected. (App., Vol. 1, p. 252; § 29-212 (1) (a), (e), (i) and (3)). Such could hardly have been the intent of Council in light of its defining stable to be a barn.

The Court of Appeals should therefore be affirmed.

CONCLUSION

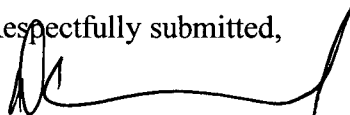
Whether construed under section 54-206(p) of the CZO, or under the Tourism Ordinance, or under both, the result is the same. A stable is a structure. Because the structure at 45 Pinckney Street is within 100 feet of a residentially zoned district, it is not eligible to be used as a stable.

The Board's factual determination that the uses and activities associated with the stable as a structure extend to the front of the building, notwithstanding the HPR or the imposition of an easement, is supported by evidence.

The Board also evaluated the issue of the location from which to measure the separation requirement in a logical manner, giving effect to the purposes of the CZO and provisions of the Tourism Ordinance applicable to the same subject matter. Its decision wholly comports with the rules of statutory construction, and there is no reason for this Court to hold otherwise. Cf. Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000) ("The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason.").

For the reasons set forth herein, Respondents respectfully submit that the opinion of the Court of Appeals in upholding the Board's decision should be affirmed.

Respectfully submitted,



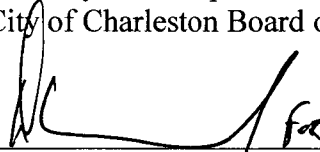
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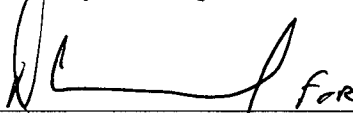
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July 30, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

AUG 02 2018

J.C. Nicholson, Jr., Circuit Court Judge

S.C. SUPREME COURT

Opinion No: 5419 (S. C. Ct. App. filed June 29, 2016)
(791 S.E.2d 305)

Arkay, LLC and Robert R. Knoth, its member Petitioners,

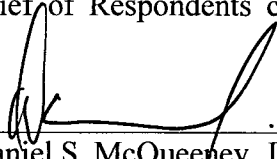
v.

City of Charleston, City of Charleston Board of Zoning
Appeals, Andrew Pinckney Inn and Michael A. Molony Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondents complies with Rule 211(b),
SCACR.

July 30, 2018


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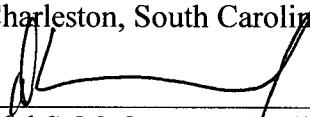
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PROOF OF SERVICE

I certify that I have served the Brief of Respondents upon Petitioners by depositing a copy of it in the United States Mail, postage prepaid, on July 30, 2018, addressed to Petitioners' attorney of record, Capers G. Barr, III, 11 Broad Street, Charleston, South Carolina, 29201.

July 30, 2018


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