THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2013-CP-10- 3864

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

v.

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

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II. Did the Circuit Court rely upon the creation of a horizontal property regime in making his findings and conclusions?

III. If the Circuit Court relied upon the creation of a horizontal property regime in applying the ordinance, was there error in his conclusion that the separation requirement of Section 54-206p of the Zoning Ordinance was met?

IV. Did the Circuit Court err in harmonizing the provisions of the Zoning Ordinance with the provisions of the Tourism Ordinance, in his conclusion that the 100 foot separation required by Section 54-206p of the Zoning Ordinance was met?

STATEMENT OF THE CASE

Arkay, LLC is a single member limited liability company that holds title to 45 Pinckney Street in the City of Charleston. Robert R. Knoth is its single member. Mr Knoth seeks to relocate his horse tour carriage stable to 45 Pinckney.

To operate in the City of Charleston a stable must obtain special exception approval from the City Board of Zoning Appeals. On March 18, 2013 Mr. Knoth applied for a special exception use. The application was heard before the Board of Zoning Appeals on April 16, 2013, and was denied.

Because the only issue in the Special Exception application dealt with a 100 foot distance requirement between the stable and the nearest Residential Zone District, Arkay made application on April 22, 2013 to the City Board of Zoning Appeals for a variance,

arguing that the distance differential was *de minimis.* (6.5 feet short of a 100 foot requirement, or 6.5%) The Board of Zoning Appeals denied the variance.

The Board of Zoning Appeals issued its formal orders on both the special exception application and the variance application on June 4, 2013.

Arkay filed its Petition and Appeal from the Special Exception Order with the Court of Common Pleas on July 1, 2013. It filed its Petition and Appeal from the Variance Order on July 3, 2013.

Both appeals came to be heard before the Honorable J. C. Nicholson, Jr., Circuit Judge, on April 11, 2014. On June 25, 2014, Judge Nicholson filed his corrected Order on Appeal finding, *inter alia,* that because the Order of the Board of Zoning Appeals denying the special exception use must be reversed, it was not necessary that he rule on the variance appeal.

Appellants filed their Notice of Appeal to this Court by letter dated July 3, 2013.

STATEMENT OF FACTS

Robert R. Knoth has been in the horse carriage tour business in Charleston for 24 years, operating under the name "Carolina Polo and Carriage Company". It is his family's only livelihood. When he lost his lease at 19 Hayne Street, which immediately adjoins the property here at issue to the rear, he found the opportunity to buy 45 Pinckney Street for the purpose of relocating his stable. Coincidentally, Mr. Knoth had begun his carriage business at 45 Pinckney Street 24 years previously. In the intervening years, however, the City of Charleston had adopted zoning and tourism ordinances that are implicated in this case. (R.pp.74-77, paragraphs 2, 5, 10, 16, and 17.)

More precisely, the provision of the zoning ordinance at issue in this case deals with the required distance from the use of property as a stable, measured to the nearest residential zone district.

Section 54-206 of the City Code of Ordinances provides for "special exception uses" under the city zoning code. A "special exception" is "a departure from a general provision of this chapter which, by the expressed terms of such provision, may be permitted by the Board of Zoning Appeals upon application only after the board finds the existence of facts and circumstances detailed in such provision."

The special exception criteria for stables are set out in Code Section 54-206p, in seven subparagraphs. It is not disputed that Respondent has complied with six of seven criteria (R.p. 254, 256). The sole criteria at issue relates to whether Respondents meet the required distance separation between a stable and a residential zone district. Section 54-206p provides in substance as follows:

> "Section 54-206. Special Exception Uses: Uses designated in the Table of Permitted Uses and listed below, may be permitted in certain districts where the Board of Zoning Appeals-Zoning after review, finds that requirements listed below for such uses have been met...
>
> p. 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.
>
> 2-7. (not repeated here).
>
> (R.p. 36, 38)

Respondent engaged a surveyor to calculate and to depict on a plat the closest distance from the building at 45 Pinckney Street to the residential zone district across the street. The plat appears in the Record at page 368. In order to further assure the 100 foot separation between the space where animals were to be kept, and the residential district, Respondent had the surveyor to plat the property so that it could be subdivided according to uses. See the HPR plot plan at page 375 of the Record. Respondent proposed in his application for special exception use that the first 25.5 feet of the building be restricted against use as a stable. The device to accomplish the use subdivision of the property is a Horizontal Property Regime ("HPR"), so that only Unit "A" of the HPR, set 25.5 feet back from the front of the building, and 119 feet distant from the nearest residential zone district, will be used as a stable to house the horses. Unit "B", at the front of the building, will be used for office use only, and the middle space will consist of restrooms and a customer lounge area. Unit B and the common area are to be restricted against use as a stable. The point to be made is that humans will occupy the first 25.5 feet of the building; and the animals will occupy the rearmost 69.51 feet, 119 feet away from the residential zone district. (R.pp. 384-386)

Contrary to arguments made by Appellants to the BZA and to the Court, the HPR concept is not proposed by Mr. Knoth as a fiction, or as a "dodge". To the contrary, the Horizontal Property Regime will record binding covenants running with the land, that will restrict all but the rearmost 69 feet of 45 Pinckney Street against use as a stable. Restrictive covenants are real, and hardly a "fiction". The intent in forming an HPR is to give to the City and to the public the assurance that no stabling activity will occur, except in Unit A, 25.5 feet deep into the building and 119 feet away from the residential district.

The Horizontal Property Regime was not perfected before filing the Special Exception application, to enable the City to impose such other and further conditions as it may deem appropriate, to be included with the special exception use approval, and to be included in the terms of the master deed of the HPR, to be recorded with the RMC Office.

On March 18, 2013 Respondent made formal application to the City of Charleston Board of Zoning Appeals-Zoning for a special exception use to locate his horse carriage tour stable at 45 Pinckney Street. (R.pp.359-368), and including the condominium subdivision of uses as discussed above. The single issue in dispute was the distance requirement to a residential zone district. After staff investigation of the circumstances of the application, a hearing was held before the City Board of Zoning Appeals on April 16, 2014.

At hearing, the City of Charleston Zoning Administrator recommended approval of the special exception use application, concluding that all statutory criteria, including the distance requirement, were met. (R.pp.262-271). As for the 100 foot distance requirement, the Administrator testified to the Board of Zoning Appeals:

> MR. BATCHELDER: "So the closest residentially zoned properties are these properties that I've highlighted in my presentation, and the zoning boundary is the – the line, the property line, the property line of those properties as shown on that plat. So you can see that from 45 Pinckney Street, the closest residential zoning district boundary is 93.5 feet to the north, and it is the zoning boundary dashed property line of 57 Hasell Street.
>
> Now, the – wording of the ordinance in this particular instance refers to a use, a special exception use. On the table of permitted uses, a stable use is listed as a special exception use within the General Business zoning district.

And under this provision in the Special Exceptions Section 54-206 of the zoning ordinance, the wording refers to the stable, which I interpret to mean the use; and that means the use, the stable use, cannot be located within 100 feet of any residential zoned district.

Now the front of the building is within 100 feet of the residential zoned district; but as you'll see, the actual use that they are proposing to place in this building at the back of the building is the stable use and that that use would be some 25 feet from the front of the property to the south of Pinckney Street so that would thereby increase the distance between the actual use and the residential zoned district boundary and – and that distance would, then, exceed 100 feet."

(R.p.264, line 12 to p.265, line 14)

AND

"MR. ALTMAN: Mr. Batchelder, how do you – how do you get over number 1 on your list? What's the requirements?

MR. BATCHELDER: Well, again, if you look at the context of the – the requirement in this Section 54-206, it states that the stable is not located within 100 feet from any residential zoned district. And when I – when I read this, I read that to mean the "use", the stable "use," is not located within 100 feet of any residential zoned district.

There are other types of land uses that are identified in the same section of the zoning ordinance where the wording is such that it specifies that you measure from the building or from the property line. In this case there's no mention of a building or property line that – that is where you should take the measurement from.

So I think it's appropriate to measure it from the use; and if that use is not at the front of the building, then you don't have to measure from the front of the building.

> Could be that, for instance, if the – if the First Baptist gymnasium located a half a block away was renovated and turned into multiple commercial tenant spaces, which it could be because that is a commercially zoned property, and you place a stable in one of those spaces but then had offices and restaurants and shops and other tenant spaces, that you would measure from the space that was actually occupied by the stable use and not from the building.
>
> So I think it's appropriate to do that in this case, and you'll hear from the applicants more information about that as well.
>
> MR. ALTMAN: So the City is recommending approval?
>
> MR. BATCHELDER: Right."
>
> (R.p.269, line 14 to p.270, line 24)

Of the seven members of the Board of Zoning Appeals present, the minimum quorum of four was met at the April 16th hearing to consider Respondent's application. By a vote of three to one, the Zoning Administrator's recommendation was overruled; Respondent's application was denied. (R.p.347).

Thereafter, Respondent applied on April 22, 2013, again to the Board of Zoning Appeals-Zoning, for a variance. In that application and at hearing, Respondent contended that the distance deviation separating 45 Pinckney Street from the nearest residential zone district, was *de minimis:* The closest measured distance from the façade of 45 Pinckney Street to the nearest residential zone district was 93.5 feet. A deviation of 6.5 feet from the required 100 foot distance, or 6.5%.

On further expounding to the BZA about the physical circumstances, Respondent showed that, because the northern boundary line of 45 Pinckney Street and the southern boundary line of the nearby residential district are not parallel, the closest distance between

them is 93.5 feet. However, because the residential district line diverges away from parallel to the northern line of 45 Pinckney Street, approximately one-half of the façade of 45 Pinckney Street is, in fact, 100 feet or farther from the residential district line. (See Exhibit at R.p.151). On this occasion a BZA quorum of five were present; the variance application was denied by a vote of three to two.

SCOPE OF REVIEW

This appeal presents a question of statutory construction. That is to say, what is the construction and the legislative intent of Section 54-206.p.1. of the City of Charleston Zoning Ordinance in its requirement that "The stable is not located within one hundred feet of any residential zone district"? The more specific question is whether the one hundred foot measurement is to be taken from the building within which the stable is contained; or is it to be measured from the "use" as a stable where, as here, that use is within a building containing other uses?

Issues involving the construction of an ordinance are reviewed under a broader standard of review than is applied to reviewing issues of fact. *Mikell vs. County of Charleston, 386 S.C. 153, 687 S.E.2d 326 (S.Ct. 2009).* Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, "a broader and more independent review is permitted when the issue concerns the construction of an ordinance. The determination of legislative intent is a matter of law." *Mikell, supra,* citing *Charleston County Parks and Recreation Commission vs. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995); Eagle Container Co., LLC vs. County of Newberry, 379 S C. 564, 666 S.E.2d 892 (S.Ct. 2008).*

The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose.. *Charleston County PRC vs. Somers, supra; City of Columbia vs. Niagara Insurance Co , 249 S C. 388, 154 S.E.2d 674 (1967).*

The determination of legislative intent is a matter of law. 73 Am.Jur.2d Statutes § 142 (1974); *Charleston County PRC vs Somers, supra.*

It is well settled that when interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used. *Fairfield Ocean Ridge, Inc. vs. Town of Edisto Beach, 294 S.C. 475, 366 S.E.2d 15 (Ct.App. 1988).* An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Spartanburg Co. D.S.S. v. Little,* 309 *S.C. 122, 420 S.E.2d 499 (1992).* In construing ordinances, the terms used must be taken in their ordinary and popular meaning. *Citizens for Lee County v. Lee County, 308 S C. 23, 416 S.E.2d 641 (1992).*

ARGUMENT

Introduction.

Before engaging in a detailed and grammatical analysis of the statutory language in this case, Respondents invite the Court to consider a broader perspective.

The City of Charleston drafted its zoning ordinance with respect to stables to accommodate and to regulate the housing of animals-primarily horses and mules – within a densely built, mixed-use and vibrant section of the City; an area referred to in the ordinances as the "Market District." Within the densely built Market District there is little space for single purpose structures. (R.p.443, colored zoning map). Former large warehouses have

been subdivided and partitioned into multiple store front uses: restaurants, ice cream shops, hat shops, t-shirt shops, and jewelry and apparel shops. The old City Market itself is an open stall, three blocks in length, at which vendors sell their wares, ranging from foods to jewelry to clothing and accessories. Within this principally pedestrian activity, horse tour carriages are constantly circulating.

In the heart of this dense and vibrant activity, is the horse tour carriage "Gate", at the northeast corner of North Market Street and Church Street. (R.p.443, colored zoning map). The Gate is the place at which horse tour carriages queue up to load passengers and to receive from city tourism employees their assignments to tour specific sections of the city. With few exceptions all horse carriage tours depart from the Gate.

Building space is at a premium in the Market District. That a horse tour carriage stable would occupy a structure that included other business activities would certainly have been within the knowledge and the contemplation of City Council when it enacted the legislation that is relevant to this case. As for horse tour carriage operations, City Council specifically identified discrete activities that must be addressed in order to accommodate the balance between animal activity and human activity. For example, the tacking of horses and carriages must not interfere with automobile traffic (See City Code Section 54-206p.4). Refuse must be handled in accordance with sanitary practices (54-206p.5). Drainage must be collected properly (54-206p.6). And odors must be controlled (54-206p.7). Notably not all of the activities relate to the "keeping" of horses. (See R.p.38)

Because of the dense urban environment in which a stable would be located within the Market District, the Court further concluded that City Council "...envisioned a physical

circumstance such as is presented in this case, where the use of the property as a 'stable' is but one of several uses contained in a larger 'building'". (R.p.008).

A measurement of 100 feet can only be taken from one physical point to a second physical point. Therefore, it is obvious that what the Circuit Court held is that the measurement must be taken from the physical space of the building in which the stables use occurs and not from the building itself.

In their Brief, Appellants make a grammatical argument that, respectfully, makes no difference in this case. It has never been the contention of Respondents, and the Court Order does not find, that the 100 feet must be measured from anything other than a physical point. The question is simply whether, where the use of property as a stable is but one of several uses in a larger building, must the 100 foot measurement be taken from the building's exterior wall, or must it be taken from the physical space in the building used as a stable?

ARGUMENT I

THE CIRCUIT COURT DID NOT ERR BY CONSTRUING THE WORD "STABLE" IN SECTION 54-206p.1. OF THE CHARLESTON CITY CODE TO MEAN THE PHYSICAL SPACE CONTAINING THE "USE" OR "ACTIVITY" OF STABLING, RATHER THAN TO MEAN THE LARGER "BUILDING" WITHIN WHICH THE USE OR ACTIVITY OCCURS, WHERE THE BUILDING CONTAINS MULTIPLE USES.

The essence of the Circuit Court's holding is that the legislative intent in enacting Section 54-206p.1. was to ensure a 100 foot separation between a residential district, and the specific and potentially obnoxious aspects of keeping horses in a stable. (R.p.11). Accordingly, where the use of property as a stable is but one of several uses contained in a larger building, it is appropriate to measure from the physical space in the building

where the use occurs, to the residential district, rather than measure from the outside of the building. (R.pp. 8-9).

The Court's conclusions were reached by first analyzing the plain language of the statute, and secondly by considering the larger statutory complex involving the Tourism Code.

a. The Plain Language Analysis. Section 54-206p consists of seven subparagraphs and uses the word "stable" in four places: First in its title, "Stables shall be permitted..."; secondly in subparagraph 1, "the stable is not located within 100 feet..."; third in subparagraph 2, "the...Tourism Commission has issued a Certificate of Appropriateness for the stable."; and fourth in subparagraph 3, "the stable complies with all city (etc.) regulations...".(R.p.38)

Appellants' principal argument to this Court, at length, is that, as used in 54-206p "stable" is a noun, and not a verb. Respondents do not disagree that "stable" is used as a noun. Particularly with respect to the issue in this case, the 100 foot measurement must be made from a physical point; a thing or a place, which must necessarily be described as a noun. However, the noun/verb argument does not begin to resolve the issue.

When the zoning administrator testified that he would measure the distance from the "use" as a stable in a building of multiple uses, he was simply defining the area of the use as the point of measurement. A stable consists of individual stalls where animals are kept, and it is from that space where the measurement is taken, but not necessarily from the building edge or the property line. To include other uses of the building not involved with the "keeping" of animals as a part of the "stable", would not be supported by any

grammatical analysis; nor by any construction of Section 54-206p, nor of any other provision of the City Code.

In this case Mr. Knoth's business office will be housed in one of the office spaces of Unit "B". (R.p.375). No animals will be "kept" there. There is no statutory, or dictionary device that could be used to define Mr. Knoth's office as a "stable". The reasoning is likewise for the second office space of Unit "B"; and the reasoning is likewise for the restrooms in the middle apace, and for the customer waiting space comprising the general and limited common areas shown in the center of the building. No animals will be "kept" in any of these areas.

Only by a contorted, tunnel vision construction of "stable" could the offices, restrooms and customer waiting areas be deemed to be a "stable", or a part of a stable, in which any obnoxious activity would occur.

Moreover, Appellant's grammatical analysis cannot change the plain fact that "stable" is used in Section 54-206p to mean different things:

1. Section 54-206p.1., here at issue, can only mean a physical location because a measurement must be taken from it.

2. However, Section 54-206p.2. ("the...Tourism Commission has issued a Certificate of Appropriateness for the stable.") cannot refer to a physical stable, because the Certificate of Appropriateness to which it refers applies to horse tour carriages. See Code Section 29-208(c). (R.p.48; See, also, Sections 29-219 to 29-223, R.pp. 56-57). To have any meaning, which it must in accord with precedent, subsection's 2's reference to the "stable" must mean the activity of operating horse tour carriages. This construction is consistent with provisions of the Tourism Code where, for example, it is provided that

"the individual company's stable (must have) a current written statement by a veterinarian on file that the animal is fit for such work notwithstanding such condition..." (See Section 29-212(e)(1)a); (R.p.51). The reference to "stable" can only mean the business activity, and it would be meaningless if it were intended to refer to the physical stalls where animals are kept.

3. 54-206p.3. provides that the stable must comply with all city, county and state regulations for stables. This provision could and probably does apply to both the physical space, as well as to the business activity. For example, the business activity must obtain a city business license.

The remaining parts of Section 54-206, in subparagraphs 4, 5, and 6, do not use the word "stable", but are descriptive of stable "uses". In subparagraph 4, requiring a site plan to ensure that tacking of horses to carriages does not impede the public right of way, this obviously requires compliance by the business entity, and does not apply to the physical location where the horses are kept. In subparagraph 5, it is required that a written description be made how refuse is to be handled. Obviously this must be provided by the business entity responsible for the stable. In subparagraph 6, a plan must be submitted to show that drainage is properly provided. Again, a requirement imposed upon the business entity of the stable.

b. City Council used the term "Building" advisedly. The remaining subparagraph, subparagraph 7, is significant to the statutory construction question before the Court. (R.p.38). It uses different terminology, providing that "Buildings are (*i.e.*,"must be") designed utilizing appropriate ventilation to prevent objectionable odors from being emitted." In the first place, Appellants acknowledge that Respondent

complies with the ventilation requirements of subparagraph 7. But from a statutory construction perspective City Council's use of the word "Building" in subsection 7 is important to the question whether the 100 foot separation between stable and residential district should be measured from the space used as stable, or whether it should be measured from the building in which that space is contained. The Trial Court held in his Order:

> "Finally, from a "plain language" analysis of Section 54-206.p, it is noteworthy that the seventh special exception requirement for a stable use, expressed in Section 54-206.p.7 states: "Buildings are designed utilizing appropriate ventilation to prevent objectionable odors from being emitted." (Emphasis added.) In discerning legislative intent, the Court must assume that City Council used the word "buildings" in subsection 7 advisedly. If it were the legislative intent that "stable" as used in 54-206.p referred to a physical structure, rather than a "use" associated with a property, City Council would have stated in subsection 7 that "stables are designed utilizing appropriate ventilation...etc.". However, by using the word "buildings", I conclude that City Council intended a differentiation, and envisioned a physical circumstance such as is presented in this case, where the use of the property as a "stable" is but one of several uses contained in a larger "building". It is noteworthy that the subsection at issue in this case, 54-206.p.1, does not provide that the "building" be not located within one hundred feet of any residential zoned district, but that the "stable" be so located. 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."
> (R.pp. 8-9).

The Trial Court's reasoning is based upon well-established principles of statutory construction. Courts presume that the legislature understood the meaning of the words that it used, and that it intended to use them. *82 CJS Statutes, Section 385*; in accord, *Hadden vs. South Carolina Tax Commission, 183 S.C. 38, 190 S.E. 249 (1937),* ("...it is clear that the legislature used the word 'individual' in the Act of 1933 advisedly, intending thereby to expressly eliminate from the terms thereof fiduciaries, partnerships, and corporations..."); *Davenport vs. City of Rock Hill, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993),* ("...it is never supposed that a single word was inserted in the laws of this state without the intention of thereby conveying some meaning."); *State vs. Hercheck, 403 S.C. 597, 743 SE2d 798 (S.Ct. 2013); Ravenel vs. Dekle, 265 S.C. 364, 218 S.E.2d 521 (S.Ct. 1975),*("...it is never to be supposed that a single word was inserted in the organic law of the state without the intention of conveying thereby some meaning.").

It is also a settled principle of statutory construction that a statute must be read so that no word, clause, sentence, provision or part shall be rendered surplusage or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law. *CFRE, LLC vs. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (S.Ct. 2011); Hembree vs. One Thousand Eight Hundred Forty-Seven Dollars, 404 S.C. 241, 743 S.E.2d 864 (Ct.App. 2013)*

In this case, Charleston City Council used the word "Buildings" in subparagraph 7, rather than the word "Stable" as was used in subparagraphs 1, 2 and 3. Consistent with the authorities cited, it must be presumed that City Council used the word "Building" advisedly. As concluded by the Trial Court, if City Council had intended that "Stable"

meant the "Building" within which it was contained, for the purposes of establishing the distance to the nearest residential district, Council would have required that Stables "are designed utilizing appropriate ventilation to prevent objectionable odors", in subparagraph 7. Likewise, in subparagraph 1, if Council had intended the measurement be taken from the building within which the stable is located, it would have so provided. To conclude that "Building" and "Stable" are synonymous in the ordinance would be to render one word or the other meaningless, thus ignoring the distinction made by City Council. This, a Court cannot do.

Moreover, an ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. *Charleston County Parks and Recreation Commission vs. Somers, 319 S.C. 65, 459 S.E.2d 841 (S.Ct. 1995).* The practical, reasonable and fair interpretation of Charleston City Code Section 54-206p.1. is probably best expressed by the City Zoning Administrator in this case: "There are other types of land uses that are identified in the same section of the Zoning Ordinance where the wording is such that it specifies that you measure from the building or from the property line. In this case there is no mention of a building or property line...where you should take the measurement from...so I think it's appropriate to measure it from the use; and if that use is not at the front of the building, then you don't have to measure it from the front of the building...could be that, for instance...if the First Baptist Gymnasium located a half block away was renovated and turned into multiple commercial tenant spaces...and you place a stable in one of those spaces but then had offices and restaurants and shops in other tenant spaces, that you would measure from the space that was actually occupied by the stable use and not from

the building...so I think it's appropriate to do that in this case...". (R.p.269, line 24 to p.270, line 20).

Finally, and with respect to City Council's advised use of the term "Building" in Section 54-206p.7, the City Zoning Code in its definitions section, Section 54-120, defines "Building" as follows:

> **Building.** Any structure build for the support, shelter, housing or enclosure of persons, animals or property of any kind, including appurtenances to buildings such as chimneys, stairs, and elevated stoops, porches, terraces and decks; except that assistive technology for accessibility including ramps and platform lifts shall not be defined as part of the building for the purpose of measuring setbacks and the lot occupancy of a building. (emphasis added.)

Therefore, the Zoning Code's definition of building as including a "structure for the housing of animals" further supports the conclusion that "stable" as used in 54-206p.1. means something different. The terms are not synonymous. Rather, "Building" encompasses a larger structure within which stable and other uses may be housed.

Council deliberately did not require that "Buildings" be 100 feet distant from a residential district, but only that the stable maintain such distance. The decision of the Circuit Court is manifestly correct.

ARGUMENT II

THE CIRCUIT COURT DID NOT RELY UPON THE HORIZONTAL PROPERTY REGIME CONSTRUCT. THERE WAS NO ERROR.

Appellants summarize their argument as to this issue by suggesting that there should have been no need to even propose a Horizontal Property Regime. Respondents

do not disagree with this argument. There was no necessity to create a Horizontal Property Regime. However, Appellants miss the point of Respondent's position.

Even though the filing of a declaration and master deed of a horizontal property regime does not create a subdivision of land, the creation of a horizontal property regime does enable the creation of enforceable and binding covenants and declarations, thereby subdividing land uses.

South Carolina Code Section 27-31-100 provides that "The master deed or lease creating and establishing the horizontal property regime shall be executed by the owner...of the real property making up the regime and shall be recorded with the register of mesne conveyances...The master deed or lease shall express the following particulars:". Of the particulars to be included in the master deed, subsection (f) provides: "(The master deed shall express) a description of the full legal rights and obligations, both currently existing and which may occur, of the apartment owner, the co-owners and the person establishing the regime..."

Accordingly, Respondents' application for special exception use in this case provides that Unit "B" of the HPR (See Plot Plan, R.p.375) will be restricted against use as a stable, by provision in the master deed. The master deed and its associated covenants will be recorded in the RMC Office and will be binding upon all subsequent owners of Units "A" and "B" of the 45 Pinckney Street Horizontal Property Regime. The recording shall likewise provide public notice of the restrictions and covenants imposed on the horizontal property regime.

In fact, the Circuit Court placed no reliance in his Order on the HPR construct, and Appellants have pointed to none. The point of the HPR is for Respondents to give

assurance to the City and to the public that the space where the animals are kept- the stable in Unit "A" of the HPR-will remain at a distance greater than 100 feet from the residential district.

The Appurtenant Easement. Within this same exception, Appellants also argue that the 100 foot separation from the residential district is not maintained because the ingress/egress easement to Unit "B" falls within 100 feet of the residential district.

It should be clear from the record that the access easement is not exclusive to Unit "A". (See Plot Plan, R.p.375). The area of the easement will be titled with Unit "B", and will serve as access for the two offices of Unit "B", as well as access for customers to the limited common area and to the restrooms, and as access for horses and carriages to enter and leave Unit "A".

An easement is the right of one person to use the land of another for a specific purpose. *Smith vs. CPW, 312 S.C. 460, 441 S.E.2d 331(Ct.App. 1994).* An easement is a non-possessory interest in the land of another. An easement holder may only use the land burdened by the easement; the holder may not occupy and possess it as does an estate owner. *The Law of Easements and Licenses in Land, Bruce and Ely 1995 (Warren, Gorham and Lamont Publishers).*

In this case, the easement is no more than that: the means of access from the public street to Unit "A", containing the stable. Here, it is a leap of logic to characterize the easement as the "Stable" which must be 100 feet distant from the residential district.

As for the condominium structure, Appellants further argue that, because the roof and walls of the building at 45 Pinckney Street are common areas within the HPR, "this unit (Unit "A") ...is part of a building that is undeniably within 100 feet of the

residentially zoned area. To adopt the Circuit Court's construction of the effect an HPR would require that the front part of the building at 45 Pinckney be ignored...".

Appellant's argument-that Unit "A" is a part of the common elements-is not legally correct. The common areas of an HPR are not a part of each unit. Rather, in addition to holding title to a unit, the owners of the units also share an undivided ownership interest in the common elements. Thus, it cannot be said that the façade of the building is a part of Unit "A". Rather, the ownership of the façade, as a common element, is proportionately owned by the owners of Units "A" and "B". See Code Section 27-31-60. ("An apartment owner shall have the exclusive ownership of his apartment and shall have a common right to a share, with the other co-owners, in the common elements of the property..."). Thus, existence of the common elements is separate from existence of the individual apartment units. The owner of an apartment owns a proportionate share in the common elements, but it cannot be said that the unit and the common elements are a part of the same property.

ARGUMENT III

THE CIRCUIT COURT CONSTRUED THE ZONING CODE AND THE TOURISM CODE PROPERLY AND CONSISTENTLY

The question before this Court is a zoning question. City Code Section 54-206p is a Zoning Ordinance. The Circuit Court held, from a plain language analysis, that the separation between stable and residential district required by Section 54-206p.1. must be measured from the space "used" as a stable, where a building contains multiple uses. See Argument I, above.

In their final argument to this Court, Appellants contend that the Circuit Court's plain language analysis must yield to the Tourism Code's definition of "stable" as being the "barn" i.e., building, where the animals are kept. Appellants do not yet suggest how to reconcile the Zoning Code's "stable/building" distinction, except to argue that it is a "leap" requiring a "tortured" construction of a common word. Appellants further do not yet suggest how or whether the Zoning Code's use of "Building" and the Tourism Code's use of "barn" can be or should be reconciled.

The flaw in Appellant's argument is this: The question before the Court is a zoning question with which Section 54-206p deals squarely and specifically. The definition of stable in the Tourism Ordinance, not dealing at all with zoning, is expressed in the context of "General health care and management requirements" of the Tourism Ordinance, Section 29-212. Section 54-206p deals specifically with zoning. Sections 29-201, *et. seq.,* the Tourism Code, do not deal with zoning at all. If there is any conflict, the general rule of statutory construction holds that a specific statute prevails over a more general one. *Mikell vs. County of Charleston, 386 S.C. 153, 607 S.E.2d 326 (S.Ct. 2009).* The Court's construction of the zoning ordinance must prevail.

Appellants argue that under the Tourism Ordinance a stable is a structure that includes stalls where animals are kept. (Appellant's Brief, pp. 13-14). There is no disagreement about this point. The disagreement applies to Appellant's argument that the entire building at 45 Pinckney is, therefore, the stable.

In support of their argument, Appellant's point to the other provisions of the Tourism Code to make the point that the stable is a "structure": It must be lighted, ventilated, protected from weather, free from leaks, kept clean. Respondents agree that all

of the enumerated provisions of 29-212 support the premise that a stable is a structure. However, Appellant's argument does not address the question whether the structure may be part of another, greater structure, containing other uses that are not considered to be a part of the stable.

According to Appellant's argument, Mr. Knoth's office in Unit "B" is a part of the "Stable". According to Appellants, Section 29-212(i) "defines and addresses what a stable is." Section 29-212(i)(1)j provides, "There shall be no smoking at any time in stables." Question: Therefore, there shall be no smoking at any time in Mr. Knoth's office? Mr. Knoth's office should be kept free of an unreasonable accumulation of excreta? Section 29-212(i)(1)i. Surely City Council did not intend these constructions. (See R.p.54).

The Circuit Court does not hold in its Order that a stable is not a "structure". The Court does hold that where, as here, the space within a structure used as a stable is identifiable, and where the structure also includes other uses not involving the "keeping of animals", then the non-stable use area need not maintain a 100 foot distance.

There is no disharmony with the Circuit Court's conclusions in this respect.

CONCLUSION

The operative activity of a stable is the "keeping" and "housing" of animals.

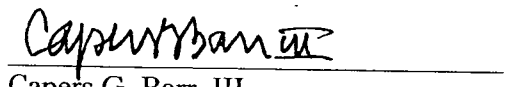
Every aspect of the stabling of horses at 45 Pinckney Street will occur at a distance of 119 feet or greater from the residential district. It would defy logic and common sense to conclude that the office uses of 45 Pinckney Street in this case constitute a stable that must be greater than 100 feet away. No animals will be "kept" in the offices.

Likewise, that the animals merely pass within 100 feet of a residential zone to gain access to a stable is no different from their daily tour routes, on which they regularly travel the streets of Charleston, deep within residential districts. The horses will be no more "housed" or "kept" on the access easement to Unit "A" of 45 Pinckney Street, than they would be "kept" in the residential districts through which they pass daily, during their tours. In both instances they are merely passing by.

The Circuit Court did not err in his construction of the zoning ordinance. His order should be affirmed.

Respectfully Submitted,

BARR UNGER & McINTOSH



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February 24, 2015, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2013-CP-10- 3864

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

v.

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

PROOF OF SERVICE

I certify that I have served a copy of the following Final Brief of Respondents on counsel for Appellants by depositing a copy of same in the United States Mail, postage prepaid, on February 25, 2015, addressed as follows:

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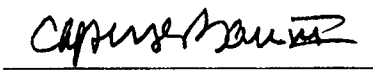

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CERTIFICATE OF COUNSEL

I certify the within Final Brief of Respondents complies with Rule 211(a), SCACR.

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